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Franchise Law

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FRANCHISE LAW

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Texas law continues to navigate through various litigation-related franchising issues. Although this Survey period did not have any single "blockbuster" development for franchise and distribution case law in Texas, a number of cases were decided on frequently litigated issues in Texas, including the scope and applicability of contractual arbitration provisions, the interpretation of discretionary contract obligations, misappropriation of trade secrets as defined by the Texas Uniform Trade Secrets Act, and the application of the economic loss rule to fraud and misrepresentation claims. This Survey period produced many Texas cases that continue to define and shape the franchise environment. These cases highlight important considerations for contract drafters and litigators, including procedural hurdles, early-dispute resolution, common law and statutory claims, and intellectual property issues that are unique to the franchising model.

I. PROCEDURE

A. PERSONAL JURISDICTION

> *The mere fortuity that a party to a contract happens to be a Texas resident, coupled with that party's unilateral performance in the forum state, is not enough to confer jurisdiction.*[1]

That is what the U.S. District Court for the Eastern District of Texas made clear in *United States v. Sims*.[2] In that case, the district court addressed both general and specific personal jurisdiction and, ultimately, granted a franchisor's special appearance and motion to dismiss.[3] Defen-

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1. United States v. Sims, No. 4:17-CV-00495, 2017 WL 5441834, at *6 (E.D. Tex. Nov. 14, 2017) (mem. op.).
2. *Id.* at *1.
3. *Id.*

dant and former football player Billy Sims (Sims) inspired the Billy Sims BBQ franchised restaurants owned and operated by Legendary Q Brands, LLC (Legendary).[4] The franchised restaurants were located in Oklahoma, Kansas, Iowa, Missouri, and Colorado; there was one franchised restaurant located in Texas for a period of time.[5] As the face of the franchise, Sims received various compensation for the use of his name, image, and likeness.[6] In 2017, the government filed suit to recover outstanding tax assessments and to enforce federal tax liens on Sims' property, his rights to payments from Legendary, and any rights Legendary obtained from Sims to use his assets.[7] The government also named Legendary in the lawsuit due to Legendary's interest in Sims' personal assets.[8]

Legendary moved to dismiss on the ground that the court did not have personal jurisdiction over it.[9] First, the district court analyzed whether it could exercise general jurisdiction over Legendary, which requires "continuous and systematic" general contacts with Texas.[10] The district court found the facts did not establish sufficient ties to Texas for general personal jurisdiction to attach. Legendary had no office or any employee in Texas, was not organized in Texas, and did not do business in Texas.[11] The district court acknowledged that the facts established that Legendary conducted business in Texas through a franchise agreement with an Oklahoma company for approximately a year, which the court found to be insufficient minimum contacts to establish general jurisdiction.[12]

Next, the district court analyzed whether it could exercise specific personal jurisdiction over Legendary and likewise held that the facts did not support specific jurisdiction. Legendary's licensing agreement to use Sims' publicity rights for marketing the Billy Sims BBQ restaurants was executed in Oklahoma and governed by Oklahoma law.[13] "Merely contracting with a resident of the forum state does not establish minimum contacts," and the choice-of-law provision in the licensing agreement indicated that "Legendary did not intend to avail itself of the privileges of doing business in Texas and believed that any dispute over the contract would be resolved [in] Oklahoma."[14] "[T]he License Agreement did not require Legendary to perform any of its obligations in Texas."[15] Finding that Sims' Texas location and Legendary's payments to Sims (deposited in Texas) were not enough to confer jurisdiction, the court granted Leg-

4. *Id.*
5. *Id.* at *1–2.
6. *Id.* at *1.
7. *Id.* at *2.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at *5
12. *Id.* at *4.
13. *Id.*
14. *Id.* at *5 (citing Moncrief Oil Int'l Inc. v. Oao Gazprom, 481 F.3d 309, 311 (5th Cir. 2007)).
15. *Id.* at *6.

endary's special appearance and motion to dismiss pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure and dismissed Legendary from the case without prejudice.[16]

Sims serves as a useful reminder that general jurisdiction is very limited and most likely only available over a corporate defendant in its place of incorporation and principal place of business. As to specific jurisdiction, the second avenue to personal jurisdiction, a contract with a Texas resident is not enough to establish minimum contacts. Nor is payment in Texas.

B. Forum Selection

Forum-selection clauses come in all shapes and sizes, and franchise cases often involve prolonged discussion of where the litigation should occur. The Dallas Court of Appeals recently considered the scope of a broad forum-selection clause in *In re Bambu Franchising, LLC*.[17] The franchise relationship between the parties in that case was consummated, in part, through a business agreement that contained the following forum selection clause: "Any lawsuit relating to any *matter* arising under this agreement shall be initiated in a State or Federal Court located in San Jose, California."[18] The franchisee sued the franchisor for violations of the Texas Deceptive Trade Practices Act, and the franchisor moved to dismiss based on the forum selection clause.[19] The trial court denied the motion and the franchisor sought mandamus relief.[20] While the franchisee argued that its tort claims were not covered by the forum-selection clause, the court of appeals disagreed after discussing the importance of the language used in the forum selection clause: the use of the term "shall" made the clause mandatory, and the use of the term "matter" as opposed to "claim" signaled an agreement that the forum-selection clause applied to matters beyond just breach of contract claims.[21] Because the franchisee's extra-contractual claims emanated from the business agreement, the court ordered the trial court to vacate its previous order and grant the franchisor's motion to dismiss.[22] The court's order demonstrated that even an artful pleading cannot escape a broad mandatory forum selection clause when the claims would not exist but for the existence of the agreement containing the clause.[23]

16. *Id.*
17. No. 05-17-00690-CV, 2017 WL 4003428 (Tex. App.—Dallas Sept. 12, 2017, no pet.) (mem. op.).
18. *Id.* at *1 (emphasis added).
19. *Id.*
20. *Id.*
21. *Id.* at *3.
22. *Id.* at *3–4.
23. *Id.* at *3.

C. Arbitration

The importance of the interpretation and application of arbitration provisions by Texas courts continues to grow in light of the increasing number of franchise disputes settled through alternative dispute resolution. Nonetheless, Texas courts consistently enforce arbitration provisions and apply the plain language of their terms.

In *Charging Bison, LLC v. Interstate Battery Franchising & Dev., Inc.*, the U.S. District Court for the Northern District of Texas addressed the scope and applicability of a contractual arbitration provision. The parties' franchise agreement required arbitration of "any claim or controversy arising out of or relating to" the franchise agreement *except* "any claim or dispute involving the propriety of any termination of [the franchise agreement]."[24] After several years of franchise operations, the franchisee notified the franchisor that it intended to terminate the franchise agreement due, in part, to alleged misrepresentations in the Franchise Disclosure Document.[25] The franchisor then filed a demand for arbitration and sought a declaration that the franchisee had "no basis to terminate the franchise agreement."[26] The franchisee objected to arbitration and argued the franchise agreement specifically excluded the franchisor's claim from arbitration, but the arbitrator refused to stay the proceedings.[27]

The franchisee subsequently filed suit in state court to stay the arbitration under Section 171.023(c) of the Texas General Arbitration Act, and argued that the anticipatory termination of the franchise agreement fell under the exception to arbitration.[28] The franchisor responded that the arbitration exception only applied to the validity of an actual termination and, since no termination had occurred, the exception did not apply.[29] Further, the franchisor argued that the allegation of fraudulent inducement clearly fell under the general arbitration provision, which applied to all claims and disputes arising out of or relating to the franchise agreement or the parties' relationship.[30] Focusing on the plain meaning of the contract terms, the district court held that the arbitration exception did not include an anticipatory termination of the franchise agreement.[31] The district court emphasized the policy reasons favoring arbitration and reiterated the general principle that all doubts concerning the scope of the arbitration clause should be resolved in favor of arbitration.[32] This case illustrates that Texas courts continue to favor arbitration, particularly

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24. Charging Bison, LLC v. Interstate Battery Franchising & Dev., Inc., No. 3:16-CV-3476-G, 2017 WL 1296454, at *1 (N.D. Tex. Apr. 7, 2017) (mem. op.).
25. *Id.*
26. *Id.* at *2.
27. *Id.*
28. *Id.*
29. *Id.* at *3.
30. *Id.*
31. *Id.* at *4.
32. *Id.*

when the agreement between the parties includes a mandate (or explicit exception).

In another case addressing a carve-out to an arbitration agreement, the U.S. District Court for the Western District of Texas denied a franchisee's motion to compel arbitration after the franchisor sought preliminary and permanent injunctive relief.[33] The franchisor had terminated the franchise agreement and sought to enjoin the franchisee from using and infringing on its trademarks. While the franchise agreement's arbitration provision covered all claims and disputes arising out of or related to the agreement, it specifically excluded "temporary or preliminary injunctive relief . . . that may be necessary to protect [franchisor's] Proprietary Marks or other rights or property."[34]

The district court first had to address who must determine the arbitrability of the franchisor's claim.[35] The franchisee argued it was the arbitrator; the franchisor argued it was the court.[36] Even though the agreement did not expressly delegate the question to the arbitrator, it adopted the American Arbitration Association's (AAA) Commercial Rules of Arbitration to govern any arbitration proceedings, which expressly granted the arbitrator power to rule on his or her jurisdiction or the arbitrability of any claim.[37] The district court acknowledged the Fifth Circuit's prior holding that "the adoption of the AAA rules to govern arbitration proceedings 'presents clear and unmistakable evidence that the parties agreed to arbitrate arbitratbility,'" but it concluded the general rule did not apply "when the agreement contains an express exclusion to the arbitration clause."[38] As a result, the district court examined whether the injunctive relief sought related to the franchisor's trademarks and non-compete agreement fell within the exclusion clause of the arbitration provision.[39] The district court held that it did and pointed to the broad language of the exclusion, which provided for injunctive relief related to the protection of franchisor's marks or "other rights or property."[40]

In *Prescription Health Network, LLC v. Adams*, the Fort Worth Court of Appeals refused a franchisor's request to vacate, modify, or correct an arbitration judgment under the Federal Arbitration Act.[41] After the franchisees filed suit in Texas state court asserting various tort and contract claims, the franchisor successfully moved to compel arbitration based on

33. Stockade Cos., LLC v. Kelly Rest. Grp., LLC, No. A-17-CV-143 RP, 2017 WL 1968328 (W.D. Tex. May 11, 2017).
34. *Id.* at *2.
35. *Id.* at *2–3.
36. *Id.*
37. *Id.* at *3.
38. *Id.* (citing Cooper v. WestEnd Capital Mgmt., L.L.C., 832 F.3d 534, 546 (5th Cir. 2016)).
39. *Id.* at *4.
40. *Id.* at *4–5.
41. Prescription Health Network, LLC v. Adams, No. 02-15-00279-CV, 2017 WL 1416875 (Tex. App.—Fort Worth Apr. 20, 2017, pet. denied) (mem. op.).

the franchise agreement's arbitration clause. A three-member arbitration panel heard the dispute and found that the franchisees owed damages, but the panel offset the franchisor's recovery due to its violation of the Florida Deceptive and Unfair Trade Practices Act and breach of a related agreement between the parties.[42] The panel also awarded the franchisees their attorneys' fees and costs.[43]

In its motion to modify or vacate the award, the franchisor argued that the panel "acted with 'manifest disregard of the law,' 'exceeded their powers,' or awarded damages on a matter not presented to them."[44] Specifically, the franchisor complained of the panel's decision to apply Texas law to the tort claims yet nevertheless found the franchisor violated a Florida statute. It also complained of the panel's decision to award attorneys' fees and costs to the franchisees even though the panel awarded actual damages to the franchisor.[45] The state trial court confirmed the judgment, and the franchisor appealed.[46] The Fort Worth Court of Appeals confirmed the trial court's judgment and held the arbitration panel did not exceed its powers (i.e. deciding a matter not before them) to warrant disturbing the award.[47] In reaching its decision, the court noted that (1) the franchise agreement expressly allowed the parties to submit deceptive trade practices claims under both Texas and Florida law; and (2) the franchisee was entitled to attorneys' fees and costs despite the fact the franchisor prevailed on eight of its ten claims.[48] This result not only reflects Texas courts' continuing deference to arbitration awards, but it also highlights that a "manifest disregard of the law" does not justify vacating an award under the Federal Arbitration Act.[49]

II. THE FRANCHISE RELATIONSHIP, TERMINATION, AND NONRENEWAL

Courts in Texas continue to afford great deference to agency decisions in the franchise context. In *Sweeten Truck Center, L.C. v. Volvo Trucks North America*, a franchisor sought to modify a franchise agreement shrinking the franchisee's geographic area of responsibility (AOR) from twenty-four to thirteen counties.[50] After Volvo notified the dealer of its intention to modify the dealer's AOR, the dealer filed a protest with the Board of the Texas Department of Motor Vehicles (Board).[51] The administrative law judge (ALJ) issued a proposal for decision with findings of fact and conclusions of law after a six-day contested hearing and recom-

42. *Id.* at *1.
43. *Id.* at *2.
44. *Id.*
45. *Id.*
46. *Id.* at *1.
47. *Id.* at *3–7.
48. *Id.* at *4, *6–7.
49. *Id.* at *3–4.
50. Sweeten Truck Ctr., L.C. v. Volvo Trucks N. Am., No. 1:15-CV-0085, 2016 WL 4979826, at *1 (Tex. App.—Austin Sept. 13, 2016, no pet.) (mem. op.).
51. *Id.*

mended that Volvo's modification of the franchise agreement be granted. The franchisee filed a protest with the Texas Department of Motor Vehicles pursuant to the Texas Occupations Code and ultimately the ALJ approved the franchisor's modification of the franchise agreement and the Board approved.[52] On appeal to the Austin Court of Appeals, the franchisee argued that the Board improperly concentrated on past data instead of the current circumstances, but the court noted the relevant Texas Occupations Code statute required the consideration of historical data.[53] In addition, the court held that the Board did not improperly consider past data and properly considered other factors such as recent data and the impact of new dealerships.[54] The court's decision demonstrates the difficulty that parties face in attempting to change an administrative decision in the franchise context.

III. INTELLECTUAL PROPERTY

In the wake of the enactment of the Texas Uniform Trade Secrets Act and its preemption provision, Texas courts have increasingly focused on misappropriation of trade secrets claims.[55] In *TeamLogic, Inc. v. Meredith Group IT, LLC*, the U.S. District Court for the Northern District of Texas held that the franchisor successfully stated a claim against its franchisees for misappropriation of trade secrets and denied franchisees' motion to dismiss under Rule 12(b)(6).[56] Franchisees claimed the franchisor failed to demonstrate any of its property qualified as a trade secret or the use or disclosure of any trade secrets without consent.[57] The franchisor alleged that franchisees had improperly used or disclosed its "operating systems, compilations of information, customer names and contract information, business strategies, product structure, customer utilization data, pricing, marketing materials, tradenames, trade secrets, and trademarks."[58] The franchisor also alleged that the franchisees did not stop a subsequent IT business owned by one of the franchisees' employees (the principal's son) "from using [the franchise's] proprietary information and trade secrets."[59] Finally, the franchisor alleged that one franchisee's principal strung along the franchise by acting like she was going to renew the franchise so that they could avoid transitioning clients to another franchise and funnel those clients to her son's business.[60] The district

52. *Id.*
53. *Id.* at *2.
54. *Id.* at *3–4.
55. *See* 360 Mortg. Grp., LLC v. Homebridge Fin. Servs., Inc., No. A-14-CA-00847-SS, 2016 WL 900577, at *8 (W.D. Tex. Mar. 2, 2016) (holding that some traditional tort claims related to trade secrets may be preempted by the Texas Uniform Trade Secrets Act when the facts of the claim are the same as the claim for misappropriation of trade secrets); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 134A.007(a) (West 2017).
56. TeamLogic, Inc. v. Meredith Grp. IT, LLC, No. 3:16-CV-2542-BH, 2017 WL 1837114, at *7 (N.D. Tex. May 8, 2017) (mem. op.).
57. *Id.* at *6.
58. *Id.* at *7.
59. *Id.*
60. *Id.*

court held these allegations were sufficient to survive a motion to dismiss under Rule 12(b)(6) for misappropriation of trade secrets.[61]

In *Stockade Companies, LLC v. Kelly Restaurant Group, LLC*, the franchisor asked the U.S. District Court for the Western District of Texas to enjoin a former franchisee from: (1) "using [its] confidential information in violation of the parties' [f]ranchise [a]greement" with respect to the buffet system setup of the newly rebranded restaurants; (2) "misappropriating [its] trade secrets in violation of the Texas Uniform Trade Secrets Act"; and (3) "infringing on [its] trade dress in violation of the Lanham Act."[62] The district court had previously ordered the franchisee to de-brand three franchise restaurants—Sirloin Stockade, Coyote Canyon, and Montana Mike's—and the franchisee rebranded the restaurants as Kansas Buffets.[63]

First, as to the buffet system,[64] the district court held that given the generally-known information of a buffet restaurant system and the plaintiff's failure to demonstrate any direct evidence about the use of confidential information, the plaintiff did not meet the burden to establish a preliminary injunction.[65] Second, with respect to the misappropriation of trade secrets, the district court held that plaintiff failed to show the discovery of any facts through an improper means and concluded that the franchisor's broad definition of "trade secret" was not sufficient to establish a preliminary injunction.[66] Finally, because the franchise did not use distinctive designs, decor, "color palette, furniture, exterior décor, or the ratio of hot bars to cold bars," the district court found that the trade dress was not inherently distinctive.[67]

TeamLogic and *Stockade* underscore the importance of ensuring that no intellectual property is disclosed or used after the termination of a franchise. While the party claiming that a trade secret was misappropriated bears the burden—usually the franchisor—the franchisee also has clear obligations to protect the franchise's intellectual property when winding up the franchise. Franchisors and franchisees should take particular care when the franchisee intends to start operating a similar business.

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61. *Id.*

62. Stockade Cos., LLC v. Kelly Rest. Grp., LLC, No. 1:17-CV-143-RP, 2017 WL 4640443, at *1 (W.D. Tex. Oct. 16, 2017).

63. *Id.*

64. The franchisor's claim was based on a breach of the franchise agreement, because the franchisee was allegedly using the same "buffet system" including food, recipes, layout design, décor, and specialty nights that the franchise used. *Id.* at *1–3.

65. *Id.* at *4–5.

66. *Id.* Evidence in the case reflected that defendant-franchisee no longer had access to franchisor-plaintiff's resource library and returned or otherwise disposed of other materials that might constitute trade secrets. The party seeking an injunction for misappropriation of a trade secret must show that the trade secret was discovered through improper means. *Id.* at *5.

67. *Id.* at *6.

IV. COMMON LAW CLAIMS

A. Contract Issues—Contract Interpretation and Formation

In every franchise agreement, the franchisor and franchisee both promise to fulfill certain contractual obligations, but the satisfaction or failure of those promises is not always clear. While the payment of royalties by a specified date is a straight-forward question, other obligations such as the franchisor's "support" can be less clear and become a factual question for the jury. In *Armstrong v. Curves International, Inc.* (*Armstrong I*), franchisees operating eighty-three locations sued Curves International, Inc. (Curves), the franchisor of thirty-minute fitness centers marketed towards women, alleging that Curves' misrepresentations induced them into entering into franchise agreements and that Curves later breached the franchise agreements.[68] After dismissing many of the franchisees' claims, the district court addressed the remaining claims for breach of contract based on Curves' alleged failure to provide franchisees the support promised in the franchise agreements.[69] In its motion for summary judgment, Curves argued the language of the franchise agreement demonstrated it had complete discretion in how to perform the listed services.[70] The U.S. District Court for the Western District of Texas rejected Curves' arguments and denied Curves' motion for summary judgment.

First, Curves argued it had sole discretion to determine what services to perform and how to perform them because the franchise agreement did "not require Curves to provide the 'expected' services."[71] Curves pointed to a section in the franchise agreement that stated it "may" provide certain listed services and items.[72] Curves added that it only agreed to "use reasonable efforts to provide such services in a manner reasonably designed for the Curves System, the content of and manner by which any and all services are to be delivered by Curves are within Curves' sole reasonable discretion and right."[73]

The district court rejected Curves' first argument that there were other bases for franchisees' breach of contract claims and the argument would render parts of the agreement illusory.[74] Curves' mandatory obligation to "provide training classes" and "assist in developing all advertising materials," alone, precluded summary judgment.[75] The district court determined that the plain language of the franchise agreement requiring Curves "to make available certain services to Franchisee and use reasonable efforts to provide such services in a manner reasonably designed for the Curves System" created an affirmative and non-discretionary obligation on

68. Armstrong v. Curves Int'l, Inc., No. 6:15-CV-294-RP, 2017 WL 894437 (W.D. Tex. Mar. 6, 2017).
69. *Id.* at *2.
70. *Id.* at *3–4.
71. *Id.* at *3.
72. *Id.* at *4.
73. *Id.* at *3.
74. *Id.* at *4.
75. *Id.*

Curves "to make available certain services."[76] As such, the district court examined whether this section of the franchise agreement was capable of an alternative interpretation by "look[ing] at the [f]ranchise [f]greement as a whole and attempt[ing] to harmonize its interpretation" with the rest of the agreement.[77] While another section of the franchise agreement provided that the content and manner of the services were within Curves' *reasonable* discretion, "simply because Curves has reasonable discretion in the content and manner of the services it has agreed to provide does not mean it can avoid providing a particular service altogether where it would be unreasonable to do so."[78]

The district court also rejected Curves' second argument alleging the franchise agreement entitled it to "Reasonable Business Judgment" in deciding the manner in which it provided services and support to the franchisees. First, the "Reasonable Business Judgment" provision only applied to circumstances "involving or requiring Curves' approval or consent" and was thus inapplicable to the mandatory obligations alleged by franchisees, such as those related to training and advertising.[79] Second, this provision did not preclude a breach of contract claim based on decisions made pursuant to the business judgment rule.[80] In the context of corporate governance, the district court noted that the business judgment rule does not protect officers and directors from all liability or breaches of their fiduciary duty, such as bad faith breaches or self-dealing transactions.[81] The district court applied this rationale to the franchise relationship and determined that the franchisees "must prove that actions taken by Curves were unreasonable or not intended to benefit the Curves system."[82] The district court denied Curves' motion for summary judgment on the basis of the reasonable business judgment provision in the franchise agreement.

Under *Armstrong*, erroneous judgment could result in a potential breach of contract claim, even though, as discussed below, Texas law does not recognize a contractual duty of good faith and fair dealing. Pursuant to *Armstrong*, when a franchisor is granted "discretion" to provide certain services, a franchisor cannot avoid providing a service altogether when it would be unreasonable to do so. And a jury will likely decide the issue of reasonableness. It will be interesting to see if franchisors alter their franchise agreements to explicitly state that there is no obligation to provide certain services and whether such changes will affect the outcome of *Armstrong*.

Another interpretation of contractual terms was at issue in

76. *Id.* at *5.
77. *Id.* at *4.
78. *Id.* at *5.
79. *Id.* at *6.
80. *Id.*
81. *Id.*; *see* Ritchie v. Rupe, 443 S.W.3d 856, 876 n.47 (Tex. 2014).
82. *Armstrong*, 2017 WL 894437, at *6.

Whataburger, Inc. v. Whataburger of Alice, Ltd.,[83] where a dispute arose over the interpretation of a 1993 Settlement Agreement reached when franchisor Whataburger, Inc. (Whataburger) bought twenty-eight of its franchisee's locations in exchange for future development rights. Under the settlement agreement at issue, Whataburger agreed to buy franchisee's twenty-eight franchises in Bexar County, Texas in exchange for giving franchisee "the exclusive right to construct, operate or develop Whataburger restaurants in Bee, Jim Wells, and Webb Counties."[84] For each new location, franchisee and Whataburger "shall enter in [Whataburger]'s standard form of franchise agreement."[85] In addition, the settlement agreement provided that franchisee would pay 2% of gross sales as a royalty/advertising fee for each new restaurant in each of the three designated counties.[86]

The current dispute began when, in 2013, franchisee, who had twelve locations at the time, wanted to develop a Whataburger in Laredo, Texas, and the parties argued about whether franchisee needed Whataburger's consent to the selected site.[87] Whataburger argued that it had the right to approve the new site locations "in its sole discretion for any reason."[88] Whataburger stated that it would not approve the new Laredo location until the franchisee renegotiated franchise agreements for the current twelve locations, with the twelve renegotiated franchise agreements having a 5% royalty/advertising fee and providing that franchisee formally agreed that Whataburger had site approval rights.[89] The district court granted franchisee's summary judgment motion, declaring that franchisee had the sole right to select site locations in Webb and Jim Wells Counties pursuant to the express terms of the 1993 Settlement Agreement.[90] In addition, the district court determined that the franchise agreements for the new locations had a royalty/advertising fee of 2% and that the franchisee had the right to renew the terms of the 1993 Settlement Agreement after the franchise agreements for existing locations expired.[91] Finally, the district court determined that, as a result of "best efforts" and "further assurances" clauses in the 1993 Settlement Agreement, Whataburger owed franchisee duties of candor, loyalty, and good faith.[92]

On appeal, both parties agreed that the 1993 Settlement Agreement was unambiguous and therefore the San Antonio Court of Appeals interpreted the settlement agreement to "determine the true intent of the par-

83. No. 04-16-00085-CV, 2017 WL 2664437 (Tex. App.—San Antonio June 21, 2017, pet. filed) (mem. op.).
84. *Id.* at *1.
85. *Id.*
86. *Id.*
87. *Id.* at *2.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*

ties as expressed by the plain language of the agreement."[93] Based on the plain language of the settlement agreement, the court of appeals agreed with franchisee on the new locations issue and that franchisee had the right to select sites for new locations within the designated exclusivity counties and rejected Whataburger's argument for the court to consider the industry practice relating to site selection.[94] The court of appeals stated that:

> [w]hile we understand the industry practice may be for a franchisor to select site locations of new restaurant locations, parties can agree to terms different than the industry practice [and that] the unambiguous language of the 1993 Settlement Agreement grants the right to designate site locations of *new* restaurants to the franchisee, not the franchisor.[95]

As to the terms of expiring franchise agreements, Whataburger contended on appeal that the "parties did not agree in 1993 to have franchise agreements running into perpetuity."[96] The court of appeals agreed with Whataburger on this issue and determined that once a franchise agreement expires by its terms, negotiations must begin anew as to that location since Whataburger and franchisee no longer have a contractual relationship with respect to that location.[97] Finally, the court of appeals agreed with Whataburger that the "best efforts" and "reasonable efforts" clauses did not create a heightened duty. First, the court of appeals recognized that there is no "implied covenant of good faith and fair dealing in Texas contracts."[98] "The franchisor-franchisee relationship does not amount to a 'special relationship' giving rise to heightened duties,"[99] and the " 'best efforts' clause . . . and the 'further assurances' clause [did] not give rise to heightened dut[ies]."[100]

"Best efforts" and "reasonable assurances" clauses are rarely defined by the parties and are often ignored as boilerplate. Further, no bright-line test can determined when a violation of a "best efforts" clause occurs. According to *Whataburger*, "best efforts" does not mean "good faith." There is a lack of guidance by Texas courts as to what these clauses really mean. It will be interesting to see if summary judgment is granted where the evidence establishes that one party used "no efforts."

To form a contract, the parties must have a "meeting of the minds" on the essential terms of the contract.[101] In the franchise-context, litigation involving "meeting of the minds" of essential terms is rare since the

93. *Id.* at *4 (citing N. Shore Energy, LLC v. Harkins, 501 S.W.3d 598, 602 (Tex. 2016)).
94. *Id.* at *6–7.
95. *Id.* at *9.
96. *Id.*
97. *Id.* at *11.
98. *Id.* (citing English v. Fischer, 660 S.W.2d 521, 522 (Tex. 1983)).
99. *Id.*; *see* Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp., 823 S.W.2d 591, 595–96 (Tex. 1992).
100. *Whataburger*, 2017 WL 2664437, at *11.
101. David J. Sacks, P.C. v. Haden, 266 S.W.3d 447, 450 (Tex. 2008).

franchise agreement is a signed agreement where mutual assent is expressly stated. However, in *Stelutti Kerr, L.L.C. v. Mapei Corporation*,[102] the issues of contract formation and the essential terms of the contract were front and center.

In this case, the U.S. Court of Appeals for the Fifth Circuit reviewed the district court's order granting a judgment as a matter of law for defendant Mapei Corporation (Mapei) after the jury awarded plaintiff Stelluti Kerr, L.L.C. (SK) about $1.5 million for breach of contract and roughly $6.1 million for tortious interference.[103] In 2006, SK, a machinery distributor, entered into an agreement with Arodo BVBA (Arodo), a Belgian corporation, to be Arodo's non-exclusive, North American distributor of Arodo's machine called an Arovac.[104] At this time, the Arovac, which would be used to package cement-based powders used in tile installation, was only a prototype.[105] Later in 2006, "Mapei, a Florida-based manufacturer of . . . cement-based tile adhesives, saw the [Arovac] at [a trade] show and was immediately interested" in purchasing Arovacs.[106] A series of negotiations ensued between Mapei and SK; both parties agreed that a contract was formed between Mapei and SK in which Mapei agreed to purchase a certain number of Arovacs from SK, with SK agreeing to sell the machines to Mapei on an exclusive basis.[107] However, the terms of the contract were at issue, including whether the contract was for the sale of one Arovac or fourteen Arovacs.[108] Mapei accepted delivery of its first Arovac from SK, but thereafter turned to Arodo directly to supply it with Arovacs.[109] Mapei refused to deal with SK due to a disagreement regarding the number of Arovacs that Mapei had committed to purchase from SK.[110]

Thereafter, SK sued both Arodo and Mapei for breach of contract and tortious interference with existing contract.[111] SK's claims against Arodo were arbitrated and the claims against Mapei were stayed pending arbitration.[112] After the stay was lifted, the case proceeded to trial as to SK's claims against Mapei, where the jury found that Mapei had breached a contract with SK to purchase a total of fourteen Arovacs and had tortiously interfered with its contractual relationship with Arodoa.[113] After the district court granted Mapei's judgment as a matter of law (JMOL), SK appealed to the Fifth Circuit, where Mapei filed a renewed motion for JMOL on SK's breach of contract claims.

102. No. 16-10430, 2017 WL 2842149 (5th Cir. June 30, 2017).
103. *Id.* at *6.
104. *Id.* at *1.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at *4–5.
110. *Id.* at *5.
111. *Id.*
112. *Id.* at *6.
113. *Id.*

The Fifth Circuit rejected each of the three bases asserted in Mapei's renewed motion for JMOL on SK's breach of contract claim. First, the Fifth Circuit determined that sufficient evidence supported the jury's determination that there was a meeting of the minds—that is an offer and acceptance—for Mapei to purchase a total of fourteen Arovacs from SK.[114] The jury could have found that a price quotation, which contained the exclusivity provision and requirement for Mapei to purchase fourteen total Arovacs, was an offer resulting in formation of a contract upon acceptance, although the price quotation contained a home office approval clause.[115] Despite the general rule that a price quotation is not considered an offer, the price quotation at issue supported the jury's implied finding that the price quotation was an offer, given the "quotation's level of detail, the extent of prior inquiry, and the number of persons to whom the quotation was sent."[116] And while the home office approval clause in the price quotation undermined the jury's implied finding that the quotation was an offer, "in light of the extensive dealings and preparations between these two parties, the jury could conclude this [home office approval] clause at most created a condition precedent on [SK]'s obligation to perform and did not prevent the formation of a contract."[117] As to the acceptance requirement for a "meeting of the minds," the fact that the acceptance "contain[ed] materially different terms than the offer [did] not mean that it [would] be considered a rejection or counter-offer."[118] In this case, the Fifth Circuit determined that the jury could have concluded that the purchase order "did manifest acceptance of the Price Quotation, even though the terms of the two materially differed."[119]

Second, the Fifth Circuit rejected Mapei's argument that the exclusivity provision was a dependent promise contingent on Mapei first fulfilling its promise to purchase thirteen additional machines.[120] The price quotation's exclusivity provision provided that: "'[i]f the first machine operates as specified in this order, Mapei agrees and is committed to purchase [13] subsequent machines' and 'SK will grant Mapei exclusivity to the Arovac [. . .] for its industry.'"[121] Given "that the only conditional language in the . . . exclusivity provision relates to the first Arovac operating as specified," the Fifth Circuit determined that the promises were independent.[122]

Third, the Fifth Circuit determined that there was some evidence, although "thin," that Mapei's board of directors authorized the purchase of

114. *Id.* at *8–9.
115. *Id.* at *8.
116. *Id.*
117. *Id.* (quoting Crest Ridge Constr. Grp., Inc. v. Newcourt, Inc. 78 F.3d 146, 150 (5th Cir. 1996)).
118. *Id.* at *9.
119. *Id.*
120. *Id.* at *9–10.
121. *Id.* at *10.
122. *Id.*

fourteen Arovacs, rather than just one.[123] Because the issue of authority was not raised in the initial JMOL and SK objected to the lack-of-authority issue not being raised for the first time in the renewed JMOL, the Fifth Circuit's review was under the plain error standard, which required affirmation of "the jury's implied finding of authority if there is any evidence that supports it."[124]

In reversing the JMOL on liability for breach of contract, the Fifth Circuit determined that "[t]he jury was presented with two alternative, but plausible, accounts of the formation and authorization of a contract. The jury reasonably selected one of those alternatives."[125] Therefore, there was "no basis for setting aside the jury's verdict on [the] breach of contract claim."[126]

To prove an enforceable contract, a party must establish an offer and acceptance. While an acceptance must generally be clear, indefinite, and identical to the offer to form a contract, *Stelluti Kerr* demonstrates that extensive dealings between two parties can establish a meeting of the minds, at least in situations where both parties agree that a contract was formed. And given the parties agreement that some contract was formed, the Fifth Circuit did not consider whether an enforceable contract really existed between the parties. The result may have been different if the existence of a contract was considered.

As to Mapei's JMOL on the tortious interference claim, the Fifth Circuit agreed with Mapei that SK had failed to prove that it suffered damages resulting from Mapei's alleged interference with SK's distribution agreement with Arodo.[127] Mapei argued that there was no evidence beyond unsupported speculation that SK would have sold more Arovacs as part of its agreement with Arodo beyond the fourteen machines it had contracted with Mapei to resell.[128] The Fifth Circuit agreed that SK's experts had offered no reliable evidence that SK would have made additional sales.[129] As such, the Fifth Circuit affirmed the district court's decision to grant JMOL on SK's tortious interference with existing contract claim.[130]

B. Contract Issues—The Duty of Good Faith and Fair Dealing

Texas law does not recognize contractual duties of good faith and fair dealing; rather, courts will impose such a duty only when a special rela-

123. *Id.* at *11.
124. *Id.* at *10.
125. *Id.* at *12.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at *13.
130. *Id.* at *14.

tionship exists between the parties.[131] And as discussed above in *Whataburger*, Texas courts have found no special relationship between parties to a franchise agreement.[132] Texas has enacted statutes, however, specific to special industries, including automobiles and heavy equipment, to regulate the contracting parties' relationship. For example, under the Texas Occupations Code, manufacturers and dealers of motor vehicles that enter into a franchise agreement each owe a duty of good faith and fair dealing to the other party.[133] In addition, certain requirements must be met before a manufacturer may terminate or modify the franchise agreement, including "good cause" for termination or modification.[134] In *Sweeten Truck Center, L.C. v. Volvo Trucks North America*,[135] discussed above for its franchise relationship issues, the Austin Court of Appeals examined whether the Board had considered the appropriate enumerated statutory factors when it determined that there was good cause for modification of a franchise agreement that significantly reduced a Volvo franchisee's AOR.[136]

In *Sweeten*, the Board issued a final order adopting the ALJ's findings of fact and conclusions of law and added an additional conclusion that good cause for modification had been established based on three of the statutory factors listed in Texas Occupations Code § 2301.455(a).[137] Specifically, the Board found that "good cause" had been established based on: (1) "the dealer's sales in relation to the sales in the market"; (2) "the dealer's investment and obligations"; and (3) "the adequacy of the dealer's service facilities, equipment, parts, and personnel in relation to those of other dealers of new motor vehicles of the same line-make."[138]

Under Texas Occupations Code §§ 2301.454(d) and 2301.455(a), the Board "*shall* determine whether the manufacturer, distributor, or representative has established by a preponderance of the evidence that there *is* good cause for the proposed modification" and in making this determination, the Board "*shall* consider all *existing circumstances*."[139] The dealer argued that this emphasized language required the Board to only focus on the present situation and that consideration of historical data was therefore not appropriate.[140]

The court of appeals rejected the dealer's interpretation because the Texas Occupations Code required the Board to consider many factors in

131. City of Midland v. O'Bryant, 18 S.W.3d 209, 215 (Tex. 2000); Subaru of Am., Inc. v. David McDavid Nissan, Inc., 84 S.W.3d 212, 225 (Tex. 2002).

132. *Subaru of Am.*, 84 S.W.3d at 225; *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 596 (Tex. 1992).

133. Tex. Occ. Code Ann. § 2301.478(6) (West 2017) ("Each party to a franchise owes to the other party a duty of good faith and fair dealing that is actionable in tort.").

134. *Id.* § 2301.454(d).

135. No. 03-16-00068-CV, 2016 WL 4979826 (Tex. App.—Austin Sept. 13, 2016, no pet.) (mem. op.).

136. *Id.* at *1.

137. *Id.* at *2.

138. *Id.*

139. *Id.* (citing Tex. Occ. Code §§ 2301.454(d), 2301.455(a) (West 2017)).

140. *Id.*

making a good cause determination, including several factors that required the Board to compile and examine historical data.[141] The court of appeals determined that accepting the dealer's interpretation would mean that "a dealership could nearly always avoid a franchise modification by making improvements only after receiving notice of a proposed modification," which was "not mandated by the statute's plain language."[142] The court of appeals also found that the weight to be given to historical data in making the good cause determination was within the discretion of the Board, and in any event there was no evidence that the Board did not consider the dealer's recent improvements.[143] Finally, the court of appeals rejected the dealer's argument that the possibility of a future dealership, which the franchisee alleged that Volvo intended to establish after modifying the franchisee's AOR, materially diminished the present value of the franchisee's investment, because it was mere speculation.

Dalwadi v. Holiday Hosp. Franchising[144] presents a useful reminder that only breach of contract claims that cite a specific provision that is breached will survive a motion to dismiss and that fraud claims in federal court must meet heightened pleading requirements. In this case, a licensee sued Holiday Hospitality for breach of contract and fraud, among other claims, arising from Holiday Inn's non-renewal of its license to operate a Houston hotel under the Holiday Inn name.[145] Plaintiffs "alleg[ed] that they spent millions of dollars developing . . . the hotel" even though "they knew they would be unable to recoup this investment during the initial ten-year term" based on the fact that Holiday Hospitality told them that franchisees get renewed "almost automatically."[146] When their license was not renewed and Holiday Hospitality licensed a new hotel in the area, the licensee sued. Holiday Hospitality moved to dismiss the breach of contract and implied covenant of good faith and fair dealing claims for failure to state a claim based on the express language of the license agreement, which provided that "this License [was] not renewable" and that only a non-exclusive license was granted.[147] The U.S. District Court for the Southern District of Texas agreed that licensee could not state a claim for breach of contract or breach of an implied duty of good faith and fair dealing under Georgia law, which governed the dispute.[148] These claims failed because plaintiffs had "not cited to any specific contract term entitling [p]laintiffs to renewal or to the issuance of a new license as the basis for their claim" and "the License Agreement

141. *Id.*
142. *Id.* at *3.
143. *Id.*
144. No. H-16-2588, 2017 U.S. Dist. LEXIS 213327 (S.D. Tex. July 5, 2017). Haynes and Boone attorneys Deborah S. Coldwell and Sally Dahlstrom represented Holiday Hospitality in this matter.
145. *Id.* at *1.
146. *Id.* at *2.
147. *Id.* at *7.
148. *Id.* at *5–10.

expressly provide[d] that 'this License is not renewable.'"[149] Similarly, plaintiff's breach of contract and implied duty of good faith and fair dealing claims based on Holiday Hospitality's licensing competing hotels in the same area failed based on the provision in the license agreement that expressly provided that the license agreement was non-exclusive.[150] The district court also dismissed plaintiffs' fraud claim under Federal Rule 9(b) after determining that the fraud claims that plaintiffs relied on false promises were "hopelessly convoluted and conclusory allegations."[151] The district court found that plaintiffs failed to identify *who* made the representation, *when* and *how* the representation was made, or explain *why* the statements were fraudulent so as to satisfy Rule 9(b).[152]

Dalwadi was decided under Georgia law, which, unlike Texas, recognizes a contractual duty of good faith and fair dealing. But *Dalwadi* establishes that even in states that recognize such duties of good faith and fair dealing, the duty cannot be invoked to imply terms that contradict the express terms of a contract. *Dalwadi* also provides that fraud claims in federal court will be subject to dismissal if the elements are not articulated with particularity.

C. Fiduciary Duty

CBIF, Limited Partnership v. TGI Friday's Inc.[153] demonstrates what happens when contractual rights and fiduciary duties overlap. In this case, TGI Friday's and CBIF became joint venture (JV) partners in 1995 pursuant to a joint venture agreement with the purpose of operating multiple restaurants in terminals at the Dallas-Fort Worth airport.[154] In 2009, the airport announced its plan to renovate, which required the joint venture to sign new leases.[155] Friday's initially sued its JV partner CBIF for breaching fiduciary duties for (1) unreasonably withholding consent based on its refusal to revise JV governing documents, enter a franchise agreement, and amend a lease at the DFW Airport; and (2) by acting out of its own self-interest in threatening the joint venture and its partners with the total loss of the venture's business if it was not paid millions of dollars in order to buy out its interest in the venture.[156]

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149. *Id.* at *7.
150. *Id.* at *8–9.
151. *Id.* at *17.
152. *Id.* at *14.
153. No. 05-15000157-CV, 2017 Tex. App. LEXIS 3605 (Tex. App.—Dallas Apr. 21, 2017, pet. filed). Haynes and Boone attorneys Deborah S. Coldwell, Nina Cortell, Karen Precella, and Ryan Paulsen represented TGI Friday's in the appeal. For a synopsis of the underlying case and a thorough explanation of the unique issues that franchisors may face while operating joint ventures at non-traditional venues—such as airports—see Deborah Coldwell & Katie Dolan-Galaviz, *TGI Friday's Case Highlights Issues at Non-Traditional Venues*, 17 Franchise Law. 4 (Fall 2014). Ms. Coldwell and Ms. Dolan-Galaviz were members of the trial team for TGI Friday's.
154. *CBIF Ltd. P'ship*, 2017 Tex. App. LEXIS 3605, at *2–3.
155. *Id.* at *13.
156. *Id.* at *15.

At trial, Friday's sought to dissolve the joint venture, as well as damages for the breach of fiduciary duty claim and certain declaratory relief and attorney's fees.[157] CBIF claimed that it could not be held liable for any "breach of fiduciary duty because it was merely exercising its contractual right to vote against proposed changes to the venture's governing documents and that its refusal to agree to" the changes therefore did "not constitute a breach of fiduciary duty" because CBIF was merely exercising its contractual rights.[158]

The Dallas Court of Appeals, however, affirmed a finding that CBIF breached its fiduciary duty.[159] Importantly, the court held that CBIF's argument that it did not breach any duty because it was just enforcing its contractual rights was incorrect: "[C]ontracts do not exist in a vacuum. Rather, contractual rights, such as those claimed by CBIF, do not 'operate to the exclusion of fiduciary duties.' . . . Instead, where the two overlap, contractual rights must be exercised in a manner consistent with fiduciary duties."[160]

CBIF is a useful reminder that contractual rights do no operate to exclude fiduciary duties. While it is clear that there are no duties of good faith and fair dealing in Texas contracts, where a special relationship exists—such as the relationship between joint venturers—contract rights must not be exercised in a manner that is inconsistent with fiduciary duties. And although CBIF involved a franchisor (but no franchise relationship), the joint venture established the special relationship.

D. Tortious Interference

The "meeting of the minds" element discussed above also often arises in conspiracy claims, as was the case in *TeamLogic, Inc. v. Meredith Group IT, LLC*,[161] which was previously discussed for its intellectual property issues. In this case, the U.S. District Court for the Northern District of Texas determined that the complaint adequately alleged a claim for conspiracy against the franchisee's principal. Under Texas law, the essential elements of a civil conspiracy claims are: "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result."[162] Because the complaint alleged that the principal delayed providing notice to the franchisee's clients or to the franchisor of the termination of the franchise agreement and because she "agreed to 'look the other way'" as her son and other employees diverted

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157. *Id.*
158. *Id.* at *37.
159. *Id.* at *38–39
160. *Id.* at *37 (quoting Fleming v. Kinney, 395 S.W.3d 917, 925 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (citing Ritchie v. Rupe, 443 S.W.3d 856, 883–84 (Tex. 2014); Anderton v. Cawley, 378 S.W.3d 38, 53–54 (Tex. App.—Dallas 2012, no pet.)).
161. No. 3:16-CV-2542-BH, 2017 WL 1837114 (N.D. Tex. May 8, 2017) (mem. op.).
162. *Id.* at * 7 (quoting Rodgers v. City of Lancaster Police, No. 3:13-CV-2031-M-BH, 2017 WL 457084, at *16 (N.D. Tex. Jan. 6, 2017) (quotations omitted).

customers to her new business, franchisor had sufficiently alleged a claim for conspiracy against the principal.[163]

Similarly, the district court made quick work of the two remaining common law claims for tortious interference with business relationship and breach of contract. Franchisee argued that the complaint failed to identify any valid and enforceable contract that franchisee interfered with.[164] In rejecting franchisee's argument, the district court emphasized that "[t]ortious interference with a business relationship is a distinct cause of action from tortious interference with a contract."[165] And although tortious interference with a contract requires that a party plead and ultimately prove an existing contractual relationship, to establish a claim for tortious interference with a business relationship, a plaintiff must plead and ultimately prove:

> (1) a reasonable probability that the parties would have entered into a contract or relationship; (2) an intentional and malicious act by which the defendant prevented the relationship from occurring, with the purpose of harming the plaintiff; (3) lack of privilege or justification of the defendant to do the act; and (4) actual harm or damage resulting from the defendant's interference.[166]

The district court determined that the allegations that franchisee diverted clients to former franchisee's newly-formed corporation and the resulting interference with TeamLogic's relationships with its other franchisees adequately stated a claim for tortious interference with business relationships.[167] These alleged acts by the franchisee also violated the terms of the franchise agreement, which was enough to state a claim for breach of contract.[168]

E. Fraud and Misrepresentation

In Texas, the economic loss rule generally prohibits recovery in tort for economic losses resulting from a party's failure to perform under a contract.[169] Thus, a franchisee's claim that it did not receive the promised contractual services or benefits, without more, is usually barred by the economic loss rule. However, claims for fraudulent inducement generally fall outside the application of the economic loss rule since "it is well established that the legal duty not to fraudulently procure a contract is separate and independent from the duties established by the contract itself."[170] Thus, although franchisee's claims for fraudulent inducement

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163. *Id.*
164. *Id.* at *8.
165. *Id.*
166. *Id.* (citing Apani Sw., Inc. v. Coca-Cola Enters., Inc., 128 F. Supp. 2d 988, 1002 n.5 (N.D. Tex. 2001)).
167. *Id.*
168. *Id.*
169. Lamar Homes, Inc. v. Mid-Continent Cas. Co., 242 S.W.3d 1, 12 (Tex. 2007).
170. Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc., 960 S.W.2d 41, 46 (Tex. 1998).

generally survive franchisor's challenges based on the economic loss rule, franchisee's negligent misrepresentation claims do not.

But in *QSL Waco, Inc. v. Lube Holdings, Inc.*,[171] franchisees' negligent misrepresentation claim based on franchisor's representations that caused franchisees to lose their investment in the franchise survived franchisor's motion to dismiss. In this case, franchisees and Quaker State defendants entered into a franchise agreement for the operation of a "motor-themed" Quaker State and Lube Restaurant in Waco, Texas.[172] After the Waco location closed less than two years later, franchisees sued the Quaker State defendants for, among other claims, negligent misrepresentation. The U.S. District Court for the Eastern District of Texas rejected franchisor's argument that the economic loss rule barred franchisees' negligent misrepresentation claim.[173] In determining whether the economic loss rule applied, the district court reviewed the nature of the remedy sought by franchisees.[174] Under the economic loss rule, which applies the independent injury rule, the district court determined that recovery in tort is precluded when the loss complained of is the subject matter of a contract between the parties.[175] Franchisees argued that the economic loss rule did not apply to the negligent misrepresentation claim because franchisees sought recovery of the money they invested as a result of the alleged misrepresentation.[176] The district court agreed with franchisees because franchisees' theory of recovery was "based on their out-of-pocket damages, not the benefit-of-the bargain damages."[177]

While the economic loss rule has been narrowed in Texas,[178] *QSL* may be an outlier. The economic loss rule precludes recovery in tort for economic losses that result from a party's failure to perform a contract when the harm consists only of the economic loss from the contract. In *QSL*, franchisees' negligent misrepresentation arose from the contractual relationship between the parties. Although the district court in *QSL* attempted to distinguish the damages sought as out-of-pocket damages, such out-of-pocket damages are available for breach of contract. It will be interesting to see if other courts interpret the independent injury rule in the same manner. Under *QSL*, negligent misrepresentation claims arising out of a contract between the parties would be barred to the extent a plaintiff sought expectancy damages (benefit of the bargain), but would not be barred to the extent a plaintiff sought reliance (out of pocket) and possibly restitution (quantum meruit) damages.

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171. No. 4:14CV591-ALM-KPJ, 2017 WL 3405039 (E.D. Tex. July 10, 2017).
172. *Id.* at *1.
173. *Id.* at *4.
174. *Id.* at *3.
175. *Id.* at *3–4
176. *Id.* at *4.
177. *Id.*
178. Chapman Custom Homes, Inc. v. Dall. Plumbing Co., 445 S.W.3d 716 (Tex. 2014) (economic loss rule does not bar all claims arising out of contractual setting).

V. STATUTORY CLAIMS

A. Texas Uniform Trade Secret Act

In *Lifesize, Inc. v. Chimene*, the U.S. District Court for the Western District of Texas confirmed that acquisition of trade secrets through improper means is not the only path to a violation under the Texas Uniform Trade Secret Act (TUTSA) and that use or disclosure of the trade secrets, when one knew that they were under a duty not to do so, also violates the TUTSA.[179]

Prior to September 1, 2013 when TUTSA was enacted, franchisors and other owners of trade secrets were faced with inconsistent common law definition of "trade secrets" and inconsistent common law claims. Now the definition of "trade secret" is provided by TUTSA. In May 2016, the U.S. Congress passed the Defend Trade Secrets Act (DTSA), a federal law that creates a civil cause of action for misappropriation of trade secrets. In the 2017 Texas Legislative Session, the state legislature introduced House Bill 1995 in part to amend TUTSA to make some of its provisions consistent with DTSA. The amendment, which became effective September 1, 2017, made several changes to the definitions in TUTSA. The definition of "trade secrets" is now aligned with the definition in DTSA as follows:

> "Trade secret" means all forms and types of information, including business, scientific, technical, economic, or engineering information, and any formula, design, prototype, pattern, plan, compilation, program device, program, code, device, method, technique, process, procedure, financial data, or list of actual or potential customers or suppliers, whether tangible or intangible and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing.[180]

This revised trade secret definition is different from the definition found in DTSA in one important respect. While DTSA limits a trade secret to "financial, business, scientific, technical, economic, or engineering information,"[181] TUTSA's revised definition provides that a trade secret is any form or type of information and specifically lists "business, scientific, technical, economic, or engineering information" as examples. In addition, TUTSA includes "a list of potential customers or suppliers" as an example of trade secret information. Under the current TUTSA, this information is protected only if:

> (A) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and
> (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person

179. Lifesize, Inc. v. Chimene, No. 1:16-CV-1109-RP, 2017 WL 1532609, at *1–2 (W.D. Tex. Apr. 26, 2017).
180. Tex. Civ. Prac. & Rem. Code Ann. § 134A.002(6) (West 2017).
181. 18 U.S.C. § 1839(3).

who can obtain economic value from the disclosure or use of the information.[182]

The amended TUTSA also clarifies the proper scope and limits for injunctive relief. While actual or threatened misappropriation can be enjoined, the amended TUTSA now indicates that an injunctive order should "not prohibit a person from using general knowledge, skill, and experience that person acquired during employment."[183] The amended TUTSA also defines "willful and malicious misappropriation" to obtain exemplary damages and requires "clear and convincing" evidence to show willful and malicious misappropriation.[184] Furthermore, the amendment defines a trade secret "owner," which is either someone holding legal or equitable title or someone holding rights of enforcement.[185] Finally, the amendment codifies a seven-factor balancing test that courts should consider before excluding a party from the courtroom while discussing trade secrets, a test adopted by the Texas Supreme Court in *In re M-I L.L.C.*[186]

As discussed in *Lifesize*, TUTSA defines misappropriation as acquisition of the trade secret through improper means or in circumstances where a defendant knows that "he obtained the information in circumstances giving rise to a duty to maintain its secrecy."[187] Thus, although the former employee in *Lifesize* did not acquire the trade secrets at issue by improper means because his initial access was with the permission of his employer, acquisition by improper means is "not the sole path to liability" under the express language of TUTSA.[188] Rather, pursuant to the express language of TUTSA, misappropriation also occurs when "at the time of the unauthorized use or disclosure of the information, the defendant knew he obtained the information in circumstances giving rise to a duty to maintain its secrecy."[189] Thus, even though the former employee initially acquired the trade secrets by proper means, misappropriation can occur when the defendant "later disclosed or used the information in violation of that confidence."[190] As such, allegations that the former employee signed confidentiality agreements were sufficient to show that the former employee understood that he was under a duty to maintain confidentiality and to state a claim for misappropriation under TUTSA.[191]

TUTSA offers a clear definition of what constitutes trade secrets. In 2017, TUTSA was amended in part to align the Texas trade secret definition with the federal one in DTSA. These amendments bring TUTSA

182. TEX. CIV. PRAC. & REM. CODE ANN. § 134A.002(6)(A)–(B).
183. *Id.* § 134A.003(a).
184. *Id.* § 134A.002(7), .004(b).
185. *Id.* § 134A.002(3-a).
186. 505 S.W.3d 569 (citing TEX. CIV. PRAC. & REM. CODE § 134A.006).
187. Lifesize, Inc. v. Chimene, No. 1:16-CV-1109-RP, 2017 WL 1532609, at *9 (citing TEX. CIV. PRAC. & REM. CODE § 134A.002(3)(B)(ii)(b)).
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*

closer to DTSA, but key differences remain. For example, the Texas definition of "trade secret" is broader, which might result in forum shopping. It will be interesting to follow how Texas courts will interpret these changes. In addition, *Lifesize* reminds us that an employee who obtains trade secret information under a non-disclosure agreement can be liable under TUTSA if he discloses that information to a competitor.

B. Texas Deceptive Trade Practices-Consumer Protection Act

Generally, a franchisee qualifies as a "consumer" under the Texas Deceptive Trade Practices Act (DTPA).[192] As such, franchisors have been subject to the application of the DTPA, with the resulting ability that franchisees can assert claims for treble damages and recover attorneys' fees.

The DTPA provides five types of wrongful conduct that support a consumer's lawsuit: (1) deceptive acts or practices; (2) breach of warranty; (3) unconscionable acts; (4) violations of the Texas Insurance Code; and (5) violations of tie-in statutes.[193] *Autobahn Imports, L.P. v. Jaguar Land Rover North America, LLC*[194] is a useful reminder of potential tie-in liability for franchised dealerships under the DTPA. And with this tie-in liability, treble damages and attorneys' fees become available.

In *Autobahn Imports*, a dispute arose between Autobahn Imports, L.P. (Autobahn), a Jaguar dealership, and Jaguar Land Rover North America, LLC (Jaguar) over whether the manufacturer's incentive-based sales program that was partially dependent on dealer sales applied to sales made to leasing companies.[195] After Jaguar performed an audit and "charged-back against Autobahn" about $317,000 for benefits it had received for selling vehicles to leasing companies, the dealership launched an administrative claim against Jaguar before the Board.[196] The Board determined that Jaguar inappropriately charged back the dealership $317,000 in violation of Section 2301 of the Texas Occupations Code and then Jaguar appealed to state court.[197] While Jaguar's state court appeal was pending, Autobahn initiated a separate action in state court for violations of the DTPA by virtue of the DTPA tie-in statute contained in the Texas Occupations Code and for breach of contract.[198] After Jaguar removed to federal court, Autobahn sought summary judgment on its DTPA claim, breach of contract claim, and claim for attorneys' fees under the DTPA.[199] "Jaguar's main resistance" to Autobahn's summary judgment

192. AdvoCare Int'l, L.P. v. Ford, No. 05-10-00590-CV, 2013 WL 505210, at *5 (Tex. App.—Dallas Feb. 5, 2013, pet. denied).
193. Tex. Bus. & Com. Code Ann. § 17.50(a)(1)–(4), (h) (West 2017).
194. No. 4:16-CV-1172-A, 2017 WL 2684055 (W.D. Tex. June 20, 2017).
195. *Id.* at *1.
196. *Id.*
197. *Id.*
198. *Id.* at *1–2.
199. *Id.* at *2.

motion was that "Autobahn [had] not exhausted its administrative remedies" because the appeal from the Board was still pending.[200] After rejecting Jaguar's exhaustion arguments, the U.S. District Court for the Northern District of Texas determined that the findings of facts and conclusions of law in the Board's final order established as a matter of law that Autobahn is entitled to economic damages under the DTPA.[201] In addition, the district court also found as a matter of law that "Jaguar's conduct was 'committed knowingly,'" and that Autobahn was therefore "entitled to receive as damages from Jaguar treble its economic damages" under the DTPA.[202] The district court made this determination based on the Board's findings and conclusions regarding the "committed knowingly" element, as well as Jaguar's subsequent conduct in continuing to withhold money it acquired through unlawful chargebacks.[203] The district court explained that "'[k]nowingly,' as defined . . . means 'actual awareness, at the time of the act or practice complained of, of the falsity, deception, or unfairness of the act . . .'"[204] In other words, "knowingly" under the DTPA occurs when "a person knows what he is doing is false, deceptive, or unfair" but decides to do it anyway.[205] For the same reasons that Autobahn was entitled to summary judgment on the DTPA claim, the district court also granted summary judgment on Autobahn's breach of contract claim.[206] But because the contract damages were based on the same harm, Autobahn was not entitled to double recovery.[207]

As a result of tie-in statutes such as those applicable to motor vehicle dealerships, the DTPA has a reach that goes beyond the language of the DTPA itself. As illustrated by *Autobahn Imports*, DTPA tie-in can result in the same economic and treble damages authorized by the DTPA.

C. Covenants Not to Compete

Most franchise agreements contain covenants not to compete that prohibit a franchisee's involvement in competing businesses during the term of the franchise and for a time period following termination or expiration of the franchise agreement. After the franchise relationship ends, most non-competes prohibit the former franchisee from operating a competing business at the former franchise site or within a specified distance from other franchised locations. Texas courts will enforce a non-compete agreement as long as it complies with the Covenants Not to Compete Act, Texas Business and Commerce Code § 15.50. This statute provides that a covenant-not-to-compete will be enforced if:

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200. *Id.* at *5.
201. *Id.*
202. *Id.* at *6.
203. *Id.*
204. *Id.*
205. *Id.* (quoting St. Paul Surplus Lines Ins. Co., Inc. v. Dal-Worth Tank Co., 974 S.W.2d 51, 53–54 (Tex. 1998)).
206. *Id.* at *7.
207. *Id.*

> it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.[208]

In *Fantastic Sams Franchise Corp. v. Mosley*,[209] the U.S. District Court for the Southern District of Texas examined the reasonableness of a five-mile restriction on competition. Fantastic Sams, a hair salon franchisor, and Mosley were parties to a franchise agreement that was not renewed and expired after an eleven-year relationship.[210] After the franchise agreement expired, Mosley opened a new salon about two miles from his prior location in Cypress, Texas.[211] Fantastic Sams then sought to enforce the non-compete provision in the franchise agreement, which prohibited the former franchisee from owning or operating a competing hair salon within five miles of the former Fantastic Sams' franchise for two years.[212] Fantastic Sams sought a preliminary injunction barring Mosley from competing within the five mile radius and from using its trademarks.[213] The district court found the non-compete enforceable. First, it rejected the franchisee's argument that the non-compete agreement was not ancillary or part of an otherwise enforceable agreement.[214] The franchisee argued that there was no consideration given, making the non-compete unenforceable. The district court explained that in order "to be considered 'ancillary' to an 'otherwise enforceable agreement,'" the following two elements must be met: "(1) consideration given to the otherwise enforceable agreement must give rise to the party's interest in restraining competition, and (2) the covenant must be designed to enforce the returned consideration or promise."[215] The district court determined that franchisee received "proprietary and confidential information in the form of training, business models, and operations manuals" and "also received an exclusivity commitment."[216] As such, these benefits gave rise to Fantastic Sams' interest in restraining the former franchise from competition and were given in exchange for the non-compete promise.[217]

Second, the district court determined that the non-compete was reasonably limited as to time, geographic area, and scope of activity.[218] The franchisee did not argue that the two-year time restriction was unreason-

208. Tex. Bus. & Com. Code Ann. § 15.50(a) (West 2017).
209. No. H-16-2318, 2016 WL 7426403 (S.D. Tex. Dec. 23, 2016) (mem. op.).
210. *Id.* at *1.
211. *Id.*
212. *Id.* at *3.
213. *Id.*
214. *Id.* at *4.
215. *Id.* (citing Ray Mart, Inc. v. Stock Bldg. Supply of Tex., L.P., 302 Fed. App'x 237, 237 (5th Cir. 2008)).
216. *Id.*
217. *Id.*
218. *Id.*

able and only contested the five-mile radius restriction, arguing that it was inequitable because Fantastic Sams could "license another franchise location within 0.5 miles under the [franchise] [a]greement.[219] The district court rejected the franchisee's argument and determined that a non-compete "does not need to be fully equitable to be reasonable."[220] Because the district court determined that a five-mile radius was a "fairly small geographic area," the district court concluded that the geographic scope limitations were reasonable.[221]

As set forth above, to be enforceable under the Texas Covenants Not to Compete Act, non-competes must be reasonably limited "as to time, geographical area, and scope" and "not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee."[222] In the franchise relationship, examples of legitimate interests include goodwill, trade secrets, and confidential and proprietary information. Non-competes are necessary to protect the franchise system from unfair competition, and as *Fantastic Sams* illustrates, these covenants will be enforced as determined on a case-by-case basis. In addition, *Fantastic Sams* demonstrates that the reasonableness of the geographic limitation is not judged based on the territory radius for the franchised location.

D. Bankruptcy

Collateral estoppel prevents a party from re-litigating identical issues of fact or law that were actually litigated and essential to the final judgment in a prior suit.[223] The application of collateral estoppel applies to adversary proceedings in bankruptcy court where bankruptcy courts give full faith and credit to prior state-court judgments. But state courts can also apply collateral estoppel to bankruptcy court findings to preclude a franchisee's common law claims, as was demonstrated in *BP Automotive LP v. RML Waxahachie Dodge, LLC*.[224] This case involved a failed asset purchase agreement for the sale of assets of a car dealership located in Waxahachie, Texas. The previous actions of *BP Automotive* relating to the current controversy have been partially litigated in several hearings in bankruptcy court, appeals of the bankruptcy court findings, additional appeals of federal court rulings, and a state court suit, which resulted in summary judgments that were appealed.[225] The current appeal considered in *BP Automotive* involved the collateral estoppel effect of the bankruptcy court's findings on the dealership's state court claims.

In 2009, BP Automotive LP (Automotive) and RML Dodge entered into an asset purchase agreement where the parties agreed that Automo-

219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.* at *3.
223. State & Cty. Mut. Fire Ins. Co. v. Miller, 52 S.W.3d 693, 696 (Tex. 2001).
224. 517 S.W.3d 186 (Tex. App.—Texarkana 2017, no pet.).
225. *Id.* at 191–92.

tive would sell its assets, including its Chrysler and Dodge franchises.[226] One condition of the deal was that RML Dodge would enter into a lease with the real estate holding company (BPRE), whose ownership was identical to Automotive's, "for the land and improvements on which Automotive operated its dealership."[227] Another condition of the deal was that RML Dodge would seek the approval of Chrysler Motor, L.L.C. (Old Chrysler).[228] Old Chrysler thereafter filed for bankruptcy and rejected Automotive's franchise agreement as part of the bankruptcy proceedings.[229] The asset purchase agreement never closed and the associated lease with BPRE never came into effect.[230] Subsequently, the reorganized Chrysler awarded RML Dodge a franchise agreement in Waxahachie for "not only the Chrysler and Dodge franchises previously owned by Automotive, but also the Jeep franchise."[231] Automotive asserts that RML Dodge delayed closing the asset purchase agreement because RML Dodge had "insider information" regarding Old Chrysler's bankruptcy, a desire to obtain a Jeep franchise that RML Dodge did not disclose to Automotive, and RML Dodge's insider deal to obtain the Chrysler, Dodge, and Jeep franchises from the reorganized Chrysler.[232]

BPRE then filed for Chapter 11 bankruptcy protection and asserted an adversary proceeding in the bankruptcy case against RML Dodge for breach of contract, tortious interference with a prospective business relationship, fraud, unfair competition by misappropriation, and several other causes of action.[233] Automotive filed a petition in state court against RML Dodge, which was almost identical to the adversary complaint filed by BPRE in the bankruptcy case.[234] In 2010, the bankruptcy court, after a trial on the merits, found against BPRE on all of its causes of action asserted in the adversary proceeding.[235] After the bankruptcy judgment was entered, the opinion was appealed and finally affirmed by the U.S Court of Appeals for the Fifth Circuit in 2015.[236] Based on the bankruptcy court's take-nothing judgment against BPRE, the state court granted RML Dodge's motion for summary judgment on Automotive's claims for breach of contract, quantum meruit, and fraud based on collateral estoppel. Subsequently, the Freestone County District Court granted RML's motion for summary judgment on Automotive's tortious interference and unfair competition claims, but did not state the basis for its ruling.[237] The Texarkana Court of Appeals considered whether the district

226. *Id.* at 193.
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.* at 195.
232. *Id.* at 196.
233. *Id.* at 193.
234. *Id.* at 195–96.
235. *Id.* at 196–97.
236. *Id.* at 194.
237. *Id.* at 198.

court properly granted summary judgment based on the application of collateral estoppel to the bankruptcy court's earlier decision involving BPRE.

First, determining that collateral estoppel precluded Automotive's claims for breach of contract, fraud, and unfair competition by misappropriation, the court of appeals affirmed the district court's summary judgment as to these claims.[238] Under both state and federal law, collateral estoppel has the following three elements: "(1) the facts sought to be litigated in the second action were fully and fairly litigated in the first action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action."[239] In addition, the issues in the first and second actions must be "identical," although the causes of action may be different.[240] In order to be cast adversaries in the first suit, "it is only necessary that the party against whom the doctrine is asserted was a party or in privity with a party in the first action."[241] In determining that collateral estoppel precluded Automotive's claims for breach of contract, fraud, and unfair competition by misappropriation, the court of appeals first determined that Automotive and BPRE were in privity for the purposes of collateral estoppel "since the owners of both companies controlled and fully participated in the prior litigation and because Automotive's interest in establishing" the breach of contract, fraud, and unfair competition claims "was fully represented by BPRE in the adversary proceeding."[242] The court of appeals then determined that the issues were identical, that the bankruptcy court's findings were essential, and that the issues were fully and fairly litigated in the bankruptcy court.[243] As such, Automotive's claims for breach of contract, fraud, and unfair competition by misappropriation were precluded by the application of collateral estoppel.

As to the tortious interference with prospective business relations claim, however, the court of appeals found that collateral estoppel could not be applied because the bankruptcy court did not make any findings essential to its judgment as to the tortious interference with business relations claim.[244] The bankruptcy courts findings were not essential to its judgment because the factual basis for Automotive's claims in the state court was not based on the failure of RML Dodge to execute the asset purchase agreement and leases, but on RML Dodge's alleged interference with the sale of Automotive's service equipment to a third party.[245]

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238. *Id.* at 200–08.
239. *Id.* at 199 (quoting Nu-Way Energy Corp. v. Delp, 205 S.W.3d 667, 677 (Tex. App.—Waco 2006, pet. denied) (quotations omitted)).
240. *Id.* at 200.
241. *Id.* (quoting Sysco Food Servs., Inc. v. Trapnell, 800 S.W.2d 796, 801–02 (Tex. 1994) (quotations omitted) (emphasis removed)).
242. *Id.* at 203 (citing HECI Expl. Co. v. Neel, 982 S.W.2d 881, 890 (Tex. 1999)).
243. *Id.* at 203–205.
244. *Id.* at 209.
245. *Id.*

Although procedurally complicated, *BP Automotive* is a useful reminder of the collateral effect of judgment rendered by a bankruptcy court, which can preclude state court actions. Texas does not require that the parties be identical for collateral estoppel to apply—only that privity exists. Thus, where a franchisee is associated with other related entities with common ownership, franchisee and the related entities should consider the potential collateral estoppel effects of any anticipated adversary proceeding before filing for bankruptcy. Because the franchisee could potentially lose the right to assert claims against the franchisor if its related entity is unsuccessful in any adversary proceeding involving the franchisor.

VI. REMEDIES: DAMAGES AND INJUNCTIVE RELIEF

A. Compensatory Damages and Punitive Damages

In *Armstrong I*, discussed above for contractual interpretation issues, the U.S. District Court for the Western District of Texas denied Curves' summary judgment on franchisees' sole-remaining claim for breach of contract. In *Armstrong II*, after a jury trial and verdict, the district court explained the evidence necessary to establish lost profits.[246] In *Armstrong II*, "[t]he jury awarded damages [on the breach of contract claim] to each [p]laintiff that reported losses on their income tax returns in the respective, equivalent amounts."[247] In its motion for judgment as a matter of law, Curves argued that "income tax returns were incompetent proof of causation and damages and . . . thus the jury's verdict was arbitrary."[248] The district court reiterated that lost profits "must be shown by competent evidence with reasonable certainty" and "[a]t a minimum, opinions or estimates of lost profits must be based on objective, facts, figures or data from which the amount can be ascertained."[249] Plaintiffs presented the following evidence supporting their lost profits: (1) tax returns; (2) Curves' statements regarding expected profit when a franchise owner operated according to the Curves system; (3) plaintiffs' testimony about the operation of their franchises and their adherence to the Curves system; and (4) plaintiffs' testimony about the lack of support and promotions received from the franchise.[250] The district court held that was enough for the jury to conclude that the income tax returns demonstrated loss.[251]

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246. Armstrong v. Curves Int'l, Inc. (Armstrong II), No. 15-294, 2017 WL 5256997, at *3 (W.D. Tex. Nov. 2, 2017).

247. *Id.* at *1.

248. *Id.* Curves also argued that the income tax returns were inadmissible hearsay, but because Curves did not raise this argument at the time of trial, the court did not consider the argument. In addition, the court held that this argument would not serve as the basis of a successful motion for new trial.

249. *Id.* at *3; *see* ERI Consulting Engr's, Inc. v. Swinnea, 318 S.W.3d 867, 876–80 (Tex. 2010).

250. *Armstrong II*, 2017 WL 5256997, at *3.

251. *Id.*

Curves also argued that the jury could not find causation as to the amount of damages awarded because plaintiffs offered no expert opinion as to damages.[252] In determining whether expert testimony was required, the district court determined that "[u]nless the issues concerning lost profits are 'highly technical,' expert testimony is not required."[253] As such, the district court held that the plaintiffs' testimony on the operation of the Curves facilities, historical net profits, and evidence of decline and losses was enough.[254] The district court acknowledged that new ventures face a more difficult burden to show that the lost profits claimed are not "too uncertain or speculative."[255] As to the newer-franchise-owner plaintiffs, evidence that Curves' principal told these franchisees that they could reasonably expect to realize net operating profits and that franchises were profitable was sufficient to support the jury's implicit finding that the lost profits claim was not too uncertain or speculative.[256]

B. Injunctive Relief

Franchisors have increasingly sought injunctive relief and the courts have increasingly granted injunctive relief in Texas. In *Mr. Rooter LLC v. Akhoian*, the U.S. District Court for the Western District of Texas confirmed that even when a franchise agreement contains an arbitration provision, certain disputes, such as a preliminary injunction, may be brought in court in limited circumstances opening up the possibility for the granting of more preliminary injunctions.[257] Here, the district court held that even when a franchise agreement contains a clear provision to arbitrate, when the agreement also contains a provision for emergency relief outside of arbitration, a party may seek an injunction bypassing arbitration.[258]

In *Fantastic Sams Franchise Corporation v. Mosley*, discussed above for the enforceability of non-compete clauses, the U.S. District Court for the Southern District of Texas granted a preliminary injunction to a plaintiff-franchisor to enforce post-termination and non-compete provisions of its franchise agreement.[259] After determining that the non-compete was enforceable, the district court turned to whether Fantastic Sams was entitled to a preliminary injunction. The post-termination provision of the franchise agreement required the franchisee to "cease using Fantastic Sams' marks and trade dress, to transfer the telephone numbers he used while operating the Fantastic Sams salon, and to not conduct business

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252. *Id.* at *4.
253. *Id.*
254. *Id.* at *5.
255. *Id.* (quoting Sw. Battery Corp. v. Owen, 115 S.W.2d 1097, 1099 (Tex. 1938)).
256. *Id.*
257. Mr. Rooter v. Akhoian, No. W-16-CA-00433-RP, 2017 WL 5240886, *1–2 (W.D. Tex. Jan. 30, 2017).
258. *Id.*
259. Fantastic Sams Franchise Corp. v. Mosley, No. H-16-2318, 2016 WL 7426403, at *6 (S.D. Tex. Dec. 23, 2016).

that gives the public the impression that the Agreement is in force."[260]

First, the district court determined that Fantastic Sams was likely to succeed on its breach of contract claim that Mosley violated his post-termination obligations under the franchise agreement.[261] The district court concluded that there was a substantial likelihood that Mosley would be found to have breached these obligations because he continued to use the same telephone number, the online yellow page listing identified the new location as a Fantastic Sams, his cosmetology license was still under the Fantastic Sams' name, and customer receipts and bank statements reflected Fantastic Sams.[262] In addition, the district court determined that it was substantially likely that Mosley would be found in violation of the enforceable non-compete discussed above.[263] Second, the district court also determined that Fantastic Sams had established the element of irreparable harm.[264] The district court agreed that Mosley's continued operation of a nearby salon, which prevented Fantastic Sams from licensing a new franchise in the area, caused irreparable harm to Fantastic Sams, which could not be remedied with damages.[265] As such, the district court granted the preliminary injunction with respect to the non-compete and related violations of the termination provisions.[266] In weighing the balancing of hardships, the third factor in determining whether a preliminary injunction should be granted, the district court interestingly gave significant weight to the fact that although willing, franchisee had failed to comply with the easy-to-accomplish post-termination provisions such as transferring the phone, correcting the receipts, and removing identification materials related to Fantastic Sams, as well as the fact that the franchisee's hardship was self-induced by opening a salon in violation of the non-compete.[267] Finally, the district court held that the public interest factor favored valid non-competes to increase efficiency and business performance.[268] Thus, the district court granted the preliminary injunction with respect to the non-compete and related violations of the post-termination provisions.[269]

With regard to the trademark and trade dress violations, however, the district court did not grant the preliminary injunction.[270] On both counts, the district court held that the franchisor had not established a substantial likelihood on the merits to succeed on a preliminary injunction.[271]

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260. *Id.* at *3.
261. *Id.* at *5.
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.* at *6.
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.* at *8.
271. *Id.*

In *Dickey's Barbecue Pit, Inc. v. Celebrated Affairs Catering, Inc.*, the U.S. District Court for the Eastern District of Texas found that the franchisor established all of the elements necessary for a preliminary injunction to prevent a former franchisee from use of the franchisor's trademarks after the termination of the franchise agreement.[272] In this case, the franchise agreement specifically required the franchisee to cease use of the franchisor's marks following the termination of the franchise agreement, so the franchisee's continued use of the franchisor's marks showed a likelihood of success on the merits.[273] The district court held that the franchisee's continued use of the mark amounted to actual and imminent harm and that the franchisor's "loss of control over the mark led to loss of goodwill, reputation, or customer confusion."[274] In addition, the district court held that the balance of hardships weighed in favor of granting the injunction and that the public interest of the public not to be confused or deceived by the franchisee's continued use of the franchise's marks also weighed in favor of granting the injunction.[275]

Interestingly, the injunction included requirements that the franchisee: (1) deliver to the franchisor all inventory or merchandise bearing the franchise mark or a confusing mark; (2) supply the franchisor with a list of downstream purchasers of products from the restaurants along with related correspondence, invoices, and receipts; (3) file to the court and serve on the franchisor within 10 days a report detailing the manner they have complied with the order; and (4) submit an accounting to franchisor of all gains, profits, and advantages derived from the unauthorized use of the franchise's marks.[276] This example shows the onerous requirements that a preliminary injunction in the franchise context might impose.

Though these cases indicate that preliminary injunctions are a vehicle increasingly used in franchise cases, ultimately preliminary injunctions in franchise cases must be narrowly tailored and the party requesting the preliminary injunction bears a high burden.

As discussed above, in *Stockade Companies, LLC v. Kelly Restaurant Group, LLC*, the franchisor-plaintiffs asked the court to enjoin a former franchisee from: (1) "using [its] confidential information in violation of the parties' [f]ranchise [a]greement" with respect to the buffet system setup of the newly rebranded restaurants; (2) "misappropriating [its] trade secrets in violation of the Texas Uniform Trade Secrets Act"; and (3) "infringing on [the franchise's] trade dress in violation of the Lanham Act."[277] The plaintiff's high burden of establishing that a trade secret was discovered through improper means and that confidential information

272. Dickey's Barbecue Pit, Inc. v. Celebrated Affairs Catering, Inc., No. 4:17-CV-00127, 2017 WL 1079431, at *2 (E.D. Tex. Mar. 22, 2017) (mem. op.).
273. *Id.* at *2–3.
274. *Id.* at *4.
275. *Id.*
276. *Id.* at 5.
277. Stockade Cos., LLC v. Kelly Rest. Grp., LLC, No. 1:17-CV-143-RP, 2017 WL 4640443, at *1 (W.D. Tex. Oct. 16, 2017).

was used demonstrates that a preliminary injunction for such types of violations will only issue where the plaintiff shows direct evidence of a violation. In addition, plaintiff's failure to allege a use of trade dress establishes the specificity with which franchisors must allege claims to succeed on receiving injunctive relief.

C. Attorneys' Fees

In *Prescription Health Network, LLC v. Adams*, discussed above in Section IV, the Fort Worth Court of Appeals affirmed the trial court's confirmation of an arbitration award, which granted the franchisee attorneys' fees as the "prevailing party."[278] The court, with very little discussion, affirmed the attorneys' fees award even though franchisees only won on two of the ten claims.[279] This case demonstrates that a plaintiff need not win on all counts to receive a large attorneys' fees award, even an award far exceeding the total of damages recovered by the plaintiff.[280]

278. Prescription Health Network, LLC v. Adams, No. 02-15-00279-CV, 2017 WL 1416875, at *6–7 (Tex. App.—Fort Worth Apr. 20, 2017, pet. denied).
279. *Id.*
280. *Id.*