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Franchise Law

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TABLE OF CONTENTS

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I. INTRODUCTION

THIS article provides an overview of recent case law and legislative efforts that have had, or will have, an impact on franchises and dealers in Texas and the Fifth Circuit. This update does not detail all franchise and distribution cases during the Survey period; but instead, provides an overview of the more significant developments and opinions. During the Survey period, franchisors adjusted to the amended Federal Trade Commission (FTC) Franchise Rule and replaced the Uniform Franchise Offering Circular with the Franchise Disclosure Document. There were also interesting developments in case law, including creative use of the Lanham Act to stop a supplier from holding itself out as an exclusive supplier for a franchise system and enforcement of a Texas choice of law clause despite anti-waiver provisions contained in out-of-state franchise protection acts.

II. FRANCHISE BASICS

As of July 2008, the FTC requires all franchisors to comply with the amended FTC Franchise Rule.[1] On May 9, 2008, the FTC released the Franchise Rule Compliance Guide (Compliance Guide)[2] to supplement the amended Franchise Rule and serve as an example and explanation for franchisors and counsel responsible for preparing Franchise Disclosure Documents. The Compliance Guide is largely a compilation of key points from the Statement of Basis and Purpose of the amended Franchise Rule, the amended Franchise Rule Frequently Asked Questions, and FTC staff advisory opinions. The Compliance Guide provides further clarification and guidance on required disclosures, including clarifying definitions and the type of information to be included in various disclosures.

Significantly, the Compliance Guide provides clear direction on the topic of media claims that franchisors may make.[3] The Compliance Guide specifies that Item 19 of the Franchise Disclosure Document must contain full information for the representation provided in the media claim, and that the franchisor must include the media claim information in Item 19 for at least six months after the franchisor stops making the claim. If a franchisor updates the media claim, the Compliance Guide specifies that only the updated information should be included in Item 19. But if a franchisor runs multiple advertisements with different earnings claims, all must be included in Item 19. In addition, the advertisement itself must contain: (a) "the number and percentages of outlets . . . that actually attained or surpassed the represented level of financial performance"; (b) "the time period when the performance results were

1. FEDERAL TRADE COMMISSION, FRANCHISE RULE COMPLIANCE GUIDE, 1 (2008), *available at* http://www.ftc.gov/bcp/edu/pubs/business/franchise/bus70.pdf.
2. *Id.*
3. *Id.* at 133-34.

achieved"; and (c) "a clear and conspicuous admonition that a new franchisee's results" are likely to differ.[4]

III. PROCEDURE

A. Choice of Law

In *Momentum Marketing Sales & Services, Inc. v. Curves International, Inc.*,[5] a Texas federal court ruled that Texas law trumped out-of-state statutory claims asserted by franchisees, even in states whose franchise statutes contained anti-waiver provisions. The initial actions were brought by franchisees asserting claims against Curves and its president in Texas, New Jersey, New York, and Florida federal courts. The franchisees contended that Curves fraudulently induced them to enter franchise agreements to open a Curves franchise in their respective communities, but then over-saturated the market in breach of the franchise agreements. In addition to other causes of action, the plaintiffs asserted twenty-six claims alleging violations of non-Texas, out-of-state franchise and deceptive trade practices acts.[6]

The New Jersey, New York, and Florida cases were transferred to Texas based on the forum selection clauses contained in the franchise agreements and were consolidated in federal court in Texas. Defendants moved to dismiss the out-of-state claims under Federal Rule of Civil Procedure 12(b)(6) based on the Texas choice of law provision in the franchise agreements and on the "most significant relationship" test contained in the Restatement (Second) of Conflicts of Law. The plaintiffs argued that the anti-waiver provisions in eleven of the franchise protection statutes operated to invalidate the choice of Texas law provision in the franchise agreements and required application of the laws of the franchisees' home states.[7] The magistrate judge ultimately rejected this argument because the laws of the franchisees' home states were inapplicable based on the application of the "most significant relationship" set forth in the Restatement (Second) of Conflicts of Law.[8] The plaintiffs objected and the district court made a de novo review of the findings and recommendations of the magistrate.[9]

The district court noted that the only way that the out-of-state claims could void a choice of law clause was "if that particular state's law applie[d] to the matter before the court."[10] The district court rejected the

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4. *Id.* at 133.

5. Momentum Mktg. Sales & Servs., Inc. v. Curves Int'l, Inc., Bus. Franchise Guide (CCH) ¶ 14,047, at 1 (W.D. Tex. Dec. 17, 2008). (Haynes and Boone attorneys Deborah S. Coldwell, Iris Gibson, and Will White served as counsel for Curves International, Inc.)

6. *Id.* at 6. The background facts were outlined in the Amended Report and Recommendation of the U.S. Magistrate Judge and adopted by the court. *Id.* at 2.

7. *Id.*

8. *Id.* at 3.

9. *Id.* at 2.

10. *Id.*

plaintiffs' objection to the magistrate judge's recommendation concerning the application of the "most significant relationship" test found in the Restatement (Second) of Conflicts of Law. The plaintiffs argued that the magistrate misapplied Sections 145 and 6 of the Restatement, and that every factor that the magistrate found to be neutral or to weigh against the plaintiffs actually weighed in their favor. The district court disagreed.[11]

The district court evaluated the four factors of the Restatement in addressing a choice of law analysis: "1) the place where the injury occurred; 2) the place where the conduct causing the injury occurred; 3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and 4) the place where the relationship, if any, between the parties is centered."[12] As for the first factor, the district court found "that the injury from [the] Defendants' alleged over-saturation of markets occurred in [the] Plaintiffs' respective home states."[13] However, the plaintiffs' injury from misrepresentations took place in Texas at the time the franchise agreements were entered into. Therefore, the district court concluded (and agreed with the magistrate judge) that this factor was neutral.[14]

As for the place where the conduct causing the injury occurred, the district court observed that, based on the allegations asserted in the complaint, facts regarding employee agreements and compensation structure took place in Texas. The district court noted that it was even more important that the plaintiffs did not allege any facts to the contrary. Therefore, the second factor weighed in favor of application of Texas law. Although none of the plaintiffs were from Texas, the district court found that the plaintiffs "half-heartedly" objected to the magistrate judge's finding concerning the domicile, residence, and place of business of the parties.[15] The court agreed that "'because of the diversity of citizenship of the parties, these contracts do not seem to indicate any particular state.'"[16]

The district court next analyzed the fourth factor—where the relationship between the parties was centered. The basis of the relationship between the parties was the franchise agreement, and the choice of law provisions in the contracts indicated that each plaintiff agreed that the contract would be governed by Texas law. The district court disregarded the applicability to pre-contractual misrepresentations and held that the choice of law provisions show that Texas is most strongly associated with the contract (i.e., the basis of the parties' relationships).[17]

11. *Id.* at 3 (holding that Tex. Taco Cabana, L.P. v. Taco Cabana of N.M., Inc., 304 F. Supp. 2d 903 (W.D. Tex. 2003) was applicable).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 4.

16. *Id.*

17. *Id.*

Because the plaintiffs' claims also involved allegations of fraud and misrepresentation, the court conducted an additional analysis under the Restatement. The court considered (i) "[w]here the Plaintiff[s] [a]cted in [r]eliance, (ii) [w]here the Plaintiff[s] [r]eceived the [r]epresentations," (iii) "[w]here [the] Defendant[s] [m]ade the [r]epresentations," (iv) the "[d]omicile, [r]esidence, and [n]ationality of the [p]arties," (v) "[w]here the [t]angible [t]hing was [s]ituated," and (vi) "[w]here [the] Plaintiff[s are] to render performance."[18] After considering these factors, the district court found that the factors weighed in favor of the defendants. The court also found that Texas courts had a greater interest in punishing and regulating individuals who operate businesses and "make misrepresentations from within the state."[19]

Thus, the court held that the magistrate judge was correct in recommending that Texas law be applied to the consolidated action.[20] In returning to the plaintiffs' original objection—that the magistrate judge incorrectly rejected the plaintiffs' anti-waiver clause argument—the court reasoned that "even if the eleven different anti-waiver clauses of the eleven [franchise protection acts] operate[d] to invalidate the [Texas] choice of law provisions in the franchise agreements, the Restatement analysis" by the court (and the magistrate) would remain the same.[21] "Because Texas law applies to the claims in the case before the Court, the laws of the Plaintiffs' homes states are inapplicable."[22] Thus, the court granted the defendants' Rule 12(b)(6) motion as to the twenty-six out-of-state claims.[23]

B. Forum Selection

During the Survey period, courts increasingly enforced the specific language in agreements between the parties, including forum selection clauses. In *Hull v. Pizza Inn, Inc.*, a franchisee and its guarantors filed a lawsuit against Pizza Inn in the Eastern District of Texas.[24] One of the first documents the franchisee received from Pizza Inn, however, was the franchise offering circular that stated "THE FRANCHISE AGREEMENT PERMITS YOU TO SUE US ONLY IN DALLAS, TEXAS. OUT OF STATE LITIGATION MAY FORCE YOU TO ACCEPT A LESS FAVORABLE SETTLEMENT FOR DISPUTES. IT MAY ALSO COST MORE TO LITIGATE WITH US THERE THAN IN YOUR HOME STATE."[25] Consistent with the language of the offering circular, the franchise agreement provided that any action arising out of

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18. *Id.* at 4-5.
19. *Id.* at 5.
20. *Id.*
21. *Id.* at 5-6.
22. *Id.* at 6.
23. *Id.*
24. Hull v. Pizza Inn, Inc., Bus. Franchise Guide (CCH) ¶ 13,710, at 1-2 (E.D. Tex. Sept. 17, 2007) (Haynes and Boone attorneys Deborah S. Coldwell and Altresha Q. Burchett-Williams served as counsel for Pizza Inn in this matter).
25. *Id.* at 2.

the franchise agreement shall be brought in Dallas County, Texas. Nonetheless, the plaintiffs filed their suit against Pizza Inn in the federal court in the Eastern District of Texas, Marshall Division. At the time of the filing, Pizza Inn had moved its headquarters to Collin County, Texas, located in the Eastern District, Sherman Division, and was no longer located in Dallas County. Pizza Inn moved to dismiss the case for improper venue or, alternatively, to transfer venue pursuant to 28 U.S.C. § 1404(a) to the Northern District of Texas, Dallas Division.[26]

The district court first noted that § 1404(a) governed the question of whether an action should be transferred based on a forum selection clause. The court held that while "the forum selection clause 'will be a significant factor that figures centrally in the district court's calculus,' the clause should receive neither dispositive consideration nor no consideration."[27] The plaintiffs argued that based on *Brock v. Baskin-Robbins USA Co.*, the court should exercise its discretion to retain venue in the Eastern District of Texas.[28] The district court disagreed and held that the § 1404(a) factors favored transfer to the Northern District of Texas.[29]

When analyzing the convenience of the parties and witnesses, the district court held that this factor favored transfer in light of the parties' expressed preference for the Dallas venue.[30] After considering the parties' relative bargaining power, the court held that the plaintiffs received ample notice of the forum selection clause before they invested any money in the franchise. Also, as all but one of the plaintiffs' witnesses would be party witnesses, it would not be unfair to hold the parties to their agreement. In evaluating the convenience of the parties and witnesses factor, the court also rejected the plaintiffs' contention that the forum selection clause should be narrowly construed. Because the plaintiffs' claims all arose under the franchise agreement, the court held that all of the plaintiffs' claims fell within the scope of the forum selection clause.[31] Likewise, the court rejected the plaintiffs' argument that their claim of fraudulent inducement would bar enforcement of the forum selection clause.[32]

In evaluating the other factors, the court concluded that although a plaintiff's right to its preferred forum is "well-established," "[a] forum selection clause . . . is a powerful counterweight to this principle."[33] In addition, the court observed that Pizza Inn's headquarters—the location of a substantial portion of the parties' dealings—were closer to the federal court in Dallas. Neither the location of counsel, nor the administrative difficulties caused by court congestion had any weight on the court's

26. *Id.* at 4.
27. *Id.* (internal citation omitted).
28. *Id.*
29. *Id.* at 5.
30. *Id.*
31. *Id.*
32. *Id.* at 6.
33. *Id.*

decision. However, the court gave great weight to the forum selection clause when evaluating the local interests in adjudicating local disputes. The court noted that Pizza Inn's headquarters were located within the Sherman Division of the Eastern District of Texas. Nevertheless, the district court held that the closer, and thus more local forum, is the one assigned by the contract.[34] Therefore, even though no party was located in Dallas County at the time suit was filed, the district court granted Pizza Inn's motion to transfer venue because the parties agreed to litigate in Dallas County.

C. Arbitration

During the Survey period, Texas state and federal courts also enforced arbitration clauses in parties' contracts and upheld arbitrator's decisions. In *In re Bath Junkie Franchise, Inc. v. Hygiene, L.L.C.*, franchisor Bath Junkie Franchise, Inc. (Bath Junkie) sought relief from the trial court's denial of its motion to compel arbitration.[35] Bath Junkie and Hygiene, L.L.C. (Hygiene) entered into a franchise agreement in April 2005. The franchise agreement contained an arbitration clause that provided that if their dispute was not resolved by informal negotiations, the dispute was to be settled by arbitration in accordance with the then current rules of the American Arbitration Association. The arbitration provision, in addition to other sections of the franchise agreement, was subject to a "survival" clause, which provided that the provision would survive termination "regardless of which party initiat[ed] termination or whether termination [was] wrongful."[36]

Shortly after execution of the franchise agreement, the parties' relationship deteriorated, and they executed a termination agreement in October 2005. When Bath Junkie refused to pay the termination fee of $61,400 to Hygiene, based on Hygiene's refusal to transfer its unencumbered lease to Bath Junkie, Hygiene sued Bath Junkie for breach of contract and conspiracy. Bath Junkie subsequently counterclaimed for breach of contract and tortious interference. After the lawsuit had been pending for over a year, Bath Junkie filed an application to compel arbitration and to abate the lawsuit pending arbitration.[37]

Despite the survival clause in the franchise agreement, Hygiene argued "that the Termination Agreement terminated the Franchise Agreement

34. *Id.*

35. In re Bath Junkie Franchise, Inc. v. Hygiene, L.L.C., 246 S.W.3d 356, 361 (Tex. App.—Beaumont 2008, no pet.).

36. *Id.* at 362. Although the franchise agreement contained an Arkansas choice-of-law provision, the Beaumont Court of Appeals applied Texas law to the dispute because neither party filed a motion to request the application of Arkansas law. In addition, the court of appeals noted that, in the absence of a request for a court to take judicial notice that another state's law applied, a Texas court presumes that the law of the other state is identical to Texas law.

37. *Id.* The court of appeals also noted that the arbitration provision provided "'that any dispute or controversy arising out of or relating to [the Franchise Agreement]' would be subject to arbitration." *Id.* at 366.

and constituted a new contract between the parties" (i.e., novation).[38] Hygiene relied on the termination agreement's failure to "include or incorporate the Franchise Agreement's arbitration provision" as well as the termination agreement's merger clause.[39] Bath Junkie initially argued "that the arbitrator . . . should decide the effect of the Termination Agreement," but the Beaumont Court of Appeals disagreed.[40] The appellate court noted that "[w]hen determining whether a later agreement between the parties revokes an arbitration clause, the determination lies with the court because '[w]ithout an agreement to arbitrate, arbitration cannot be compelled.'"[41]

To establish novation, Hygiene was required to "prove (1) the validity of a previous obligation, (2) an agreement among all parties to accept a new contract, (3) the extinguishment of the previous obligation, and (4) the validity of the new agreement."[42] In opposition to Hygiene's novation and merger arguments, Bath Junkie asserted that (i) "the termination agreement specifically provided that the parties would remain liable under the Franchise Agreement unless both parties complied with certain obligations," and (ii) the survival clause establishes "that the parties did not intend for the Termination Agreement to extinguish all of the obligations in the Franchise Agreement."[43]

The court of appeals held that the language of the release in the termination agreement was conditional, which did not support Hygiene's contention that the termination agreement was "to replace and extinguish preexisting claims and rights" between the parties.[44] The court of appeals concluded "that the parties intended to create a release upon each party's performance of the Termination Agreement."[45]

The court of appeals further held that the claims were within the scope of the arbitration agreement. "'[A] court should not deny arbitration *unless it can be said with positive assurance* that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue.'"[46] Hygiene's petition relied solely on facts pertaining to the termination agreement. Nevertheless, the court of appeals found that these facts "related to" the franchise agreement and were within the scope of the arbitration clause.[47] "Without the parties' relationship that arose from the Franchise Agreement, Hygiene and Bath Junkie would not have

38. *Id.* at 364.
39. *Id.*
40. *Id.*
41. *Id.* (quoting Valero Energy Corp. v. Teco Pipeline Co., 2 S.W.3d 576, 586 (Tex. App.—Houston [14th Dist.] 1999, no pet.)).
42. *Id.*
43. *Id.* at 365.
44. *Id.*
45. *Id.*
46. *Id.* at 366 (quoting Prudential Sec. Inc. v. Marshall, 909 S.W.2d 896, 894 (Tex. 1995)) (internal quotations omitted).
47. *Id.*

entered into the Termination Agreement."[48] Accordingly, the court of appeals upheld enforcement of the arbitration agreement and rejected Hygiene's defenses of specific performance and waiver.[49]

The Western District of Texas also enforced an arbitration agreement contained in a franchise agreement during this Survey period. In *Cohen v. Brooke Corp.*, franchisee Cohen Insurance Agency, Ltd. sued its franchisor (Brooke Franchise Corporation) and finance companies (Brooke Credit Corporation and The American Heritage, Inc.), alleging causes of action for breach of contract, "breach of fiduciary duty, fraud, civil conspiracy, and fraudulent concealment."[50] The franchise agreement and financing agreements all contained or incorporated arbitration provisions containing language that required arbitration for "[a]ny issue, claim, dispute or controversy that may arise out of or in connection with" or relating to the agreements.[51]

Cohen "concede[d] that the agreements contain[ed] valid arbitration provisions and that several of his causes of action . . . [were] subject to arbitration."[52] Cohen, however, argued "that his tort claims of fiduciary duty, fraud, civil conspiracy, and fraudulent concealment [did] not fall within the scope of the arbitration provisions because they could all be maintained without reference to the contracts containing the arbitration clauses."[53]

The district court noted the U.S. Supreme Court's holding that the "'presumption of arbitrability' is particularly applicable where the clause is . . . broad."[54] Furthermore, the district court also noted several authorities in which identical arbitration agreements had been held to be broad enough to be "subject to this enhanced presumption."[55] The district court held that broad arbitration clauses were "'capable of expansive reach'" and were "intended 'to reach all aspects of the [parties'] relationship.'"[56] In addition, the "Fifth Circuit has held that a dispute 'relates to' a contract if the 'subject matter of the litigation has some connection, has some relation, or has some reference' to the contract."[57]

Based on the broad nature of the arbitration provisions, the district court held that the provision was "to govern both contractual claims and extra-contractual claims such as fraud, fraudulent inducement, [and] civil

48. *Id.*
49. *Id.* at 368-69.
50. Cohen v. Brooke Corp., No. SA-07-CA-594-OG, 2007 U.S. Dist. LEXIS 95450, at *3 (W.D. Tex. Dec. 18, 2007).
51. *Id.* at *2-3.
52. *Id.* at *3.
53. *Id.* at *3-4.
54. *Id.* at *5 (citing AT&T Techs., Inc. v. Comm'ns Workers of Am., 475 U.S. 643, 650 (1986)).
55. *Id.* (citing, *e.g.*, Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 398 (1967)).
56. *Id.* at *6 (quoting Penzoil Exploration & Prod. Co. v. Ramco Energy Ltd., 139 F.3d 1061, 1067 (5th Cir. 1998)).
57. *Id.* at *7 (citing Acosta v. Master Maint. & Constr., Inc., 452 F.3d 373, 378-79 (5th Cir. 2006)).

conspiracy."[58] The "plaintiff's claims fundamentally depend[ed] on a finding that the defendants did not act properly under their agreements or lied about their performance obligations under them."[59] Therefore, all of the plaintiffs' claims were arbitrable.

The Texas Supreme Court also weighed in on when a party will be deemed to have waived his contractual right to arbitration. In *In re Fleetwood Homes of Texas, L.P.*, Fleetwood Enterprises, Inc., a manufacturer of mobile homes, entered into a dealer agreement with Gulf Regional Services, Inc. in January 2005.[60] The dealer agreement contained an arbitration clause covering "any dispute, controversy or claim among the Parties."[61] Fleetwood terminated the dealer agreement in August 2005, and Gulf filed suit in October 2005. Fleetwood answered and demanded arbitration, but it did not move to compel arbitration until July 2006. Gulf opposed the motion to compel arbitration on the grounds of express waiver and unconscionability.[62]

Gulf based its express waiver argument on emails from Fleetwood's counsel regarding a proposed trial setting and limited discovery during the first eight months of the lawsuit. The supreme court noted that "'[a] party waives an arbitration clause by substantially invoking the judicial process to the other party's detriment or prejudice.'"[63] The supreme court highlighted its recent decision in *Perry Homes v. Cull*, where it based its opinion on the nonmovant's failure to show any prejudice to the motion to compel arbitration. Fleetwood did not take any depositions and served only one set of written discovery the day before it moved to compel arbitration. Because Gulf failed to show prejudice by exchanging emails about a trial setting, the supreme court "conditionally grant[ed] Fleetwood's petition for writ of mandamus and direct[ed] the trial court to compel arbitration."[64]

In a busy Survey period for arbitration, the Northern District of Texas analyzed the *functus officio* doctrine. The *functus officio* doctrine bars an arbitrator from revisiting the merits of an award once the award has been rendered."[65] In *Xenium S.A. De C.V. v. Regent Hotels Worldwide, Inc.*, a franchisee initiated an arbitration proceeding against its franchisor for breach of the parties' franchise agreement.[66] The franchisee alleged that the franchisor caused the franchisee to lose the financing necessary to complete its hotel project. The "parties both agreed to bifurcate the trial into two phases, liability and damages."[67]

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58. *Id.*
59. *Id.*
60. *In re* Fleetwood Homes of Tex., L.P., 257 S.W.3d 692, 693 (Tex. 2008).
61. *Id.*
62. *Id.* at 694.
63. *Id.* (quoting Perry Homes v. Cull, 258 S.W.3d 584, 590 (Tex. 2008)).
64. *Id.* at 695.
65. Xenium S.A. De C.V. v. Regent Hotels Worldwide, Inc, BUS. FRANCHISE GUIDE (CCH) ¶ 13,750, at 3 (N.D. Tex. Nov. 8, 2007).
66. *Id.* at 2.
67. *Id.* at 3.

The arbitration panel released its award on liability, finding that the franchise agreement was terminated and that the franchisor was liable to the franchisee for an amount to be determined in the damages award, and dismissed the franchisor's counterclaim. The panel subsequently issued its damages award, and the franchisee filed a motion to vacate the damages award. The franchisee contended that the panel violated the *functus officio* doctrine by, in essence, reversing the panel's finding in the liability award with the damages award. The district court disagreed.

The district court first held that the *functus officio* doctrine applied in this case because the liability award was a final award for purposes of the doctrine.[68] Because (i) the parties had agreed to bifurcation and (ii) the damages award stated that the liability award would not be reopened, the district court held that the *functus officio* doctrine applied, and the panel had no further authority to determine liability once the liability award was rendered.[69] Furthermore, although the franchisee "effectively assert[ed] possible mistakes made in the calculation of damages, the [c]ourt declin[ed] to comment on the correctness of the award."[70] The court focused on whether the panel employed fundamental fair procedures and held that it had.[71] The district court concluded that the panel's damages award could be construed as being consistent with the language of the franchise agreement, and therefore, denied the franchisee's motion to vacate the damages award.[72]

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

A. Statutory Update

Congress passed the Energy Independence and Security Act of 2007,[73] which contained amendments to the Petroleum Marketing Practices Act that prohibits franchisors from restricting franchisees' activities with respect to renewable fuels. Specifically, franchise agreements or other agreements between franchisors and franchisees executed after December 2007 may not contain provisions restricting a franchisee from any of the following activities: (1) installing renewable fuel pumps or tanks on premises, so long as such premises are not leased from the franchisor; (2) "converting an existing tank or pump . . . for renewable fuel use, so long as [the] tank or pump . . . is warranted . . . or certified" for use with renewable fuels; (3) "advertising . . . the sale of any renewable fuel"; (4)

68. *Id.*
69. *Id.* (citing Trade & Transp., Inc. v. Natural Petroleum Charterers Inc., 931 F.2d 191 (2d Cir. 1991) as "[t]he seminal case . . . dealing with the question regarding the finality of a partial final award").
70. *Id.*
71. *Id.*
72. *Id.*
73. Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 241, 121 Stat. 1492, 1539-40 (2007) (codified as amended in scattered sections of 42 U.S.C., 49 U.S.C.).

selling renewable fuel on the franchised business' premises; (5) "listing renewable fuel availability or prices" on signs; (6) "allowing for payment of renewable fuel with a credit card;" (7) "purchasing renewable fuel from sources other than the franchisor if the franchisor does not offer . . . renewable fuel"; or (8) substituting renewable fuel for a grade of gasoline if the franchise agreement requires the sale of at least three grades of gasoline.[74] But if the specified activities would "constitute mislabeling, misbranding, willful adulteration, or other trademark violations by the franchisee," the Act's restrictions on such clauses do not apply.[75]

B. Dealership Termination

In *Freightliner Corp. v. Motor Vehicle Board*,[76] the Austin Court of Appeals revisited a more than decade-old terminated dealer's challenge to termination. In 1998, the Motor Vehicle Board of the Texas Department of Transportation determined that Ford had good cause to terminate the dealership franchise and the court of appeals upheld the Board's determination.[77] The court of appeals remanded the matter to the Board for a determination of remedy. Two years later, the Board issued a Final Order After Remand that did not include the determination that there was good cause for termination, and instead, included a determination that Ford lacked good cause to terminate the dealer. Ford and Freightliner appealed, asserting that the Board lacked the authority to revisit its earlier determination which had been affirmed by the court of appeals. The court of appeals agreed, concluding that a court does not remand that part of a decision which it affirms.[78] The court of appeals stated "the express power to affirm in part necessarily means that courts have some control over *what issues* the agency can reconsider on remand subject to the limitations of judicial authority over agencies."[79] The court of appeals concluded that, by reconsidering its prior determination that there was good cause for termination, the Board exceeded its authority.[80]

C. Distribution Rights

A beer distributor's claims under the Texas Beer Industry Fair Dealing Law (BIFDL) were barred by limitations in *Gambrinus Co. v. Galveston*

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74. Petroleum Marketing Practices Act, 15 U.S.C. § 2807 (2007).
75. *Id.*
76. Freightliner Corp. v. Motor Vehicle Bd., 255 S.W.3d 356, 357 (Tex. App.—Austin 2008, pet. filed).
77. *Id.* at 358 (citing Ford Motor Co. v. Motor Vehicle Bd., 21 S.W.3d 744, 748-54 (Tex. App.—Austin 2000, pet. denied)).
78. *Id.* at 362.
79. *Id.*
80. *Id.* at 368; *see also* Ford Motor Co. v. Motor Vehicle Bd., No. 03-05-00290-CV, 2008 Tex. App. LEXIS 3189, at *7 (Tex. App.—Austin May 1, 2008, pet. filed); Sterling Truck Corp. v. Motor Vehicle Bd., 255 S.W.3d 368, 380 (Tex. App.—Austin 2008, pet. denied) (reversing the Motor Vehicle Board's determinations due to the Board's failure to give proper effect to a previous court decision).

Beverage, Ltd.[81] The Texas Alcoholic Beverage Code creates a three-tier system strictly separating ownership and operations between manufacturers, wholesalers, and retailers of alcoholic beverages in Texas. It also strictly prohibits vertical integration of the manufacturing, distribution, or sale of alcoholic beverages.[82] Galveston Beverage was a wholesaler and distributor for the Gambrinus Company, a manufacturer and importer of beer. Galveston Beverage and Gambrinus had a written distribution agreement which granted Galveston Beverage "the exclusive right to distribute all three of the Gambrinus beer lines to retailers in Galveston County."[83] Another distributor offered to purchase Galveston Beverage's distribution rights, and then a second distributor, Del Papa, offered to purchase distribution rights to one of the beer lines. Galveston Beverage notified Gambrinus of the written offer to purchase one beer line. Gambrinus objected to the proposed sale on the grounds that it desired to maintain the three lines together. Ultimately, in 1999, Galveston Beverage proceeded to sell the single beer line to Dienst for a lesser sum than Del Papa had offered, and to sell all of its other assets to Dienst as well.

In 2003, Galveston Beverage sued Gambrinus alleging that Gambrinus unreasonably refused to approve the proposed 1999 transfer in violation of section 102.76 of the BIFDL.[84] Galveston Beverage sought to recover the value of the Del Papa offer. The trial court granted summary judgment in favor of Galveston Beverage and awarded $1.6 million in damages plus attorney's fees.

On appeal, the San Antonio Court of Appeals reversed the trial court's grant of summary judgment and held that the proper statute of limitations for a claim brought pursuant to BIFDL section 102.79(a) was two years, not the four years that Galveston Beverage claimed.[85] The court of appeals reasoned that a claim pursuant to BIFDL section 102.79(a) is more closely analogous to a tort-based cause of action like tortious interference with business relations than to a contract-based cause of action.[86] The court of appeals was persuaded by Gambrinus' arguments that Galveston Beverage effectively pled all of the elements of a claim for tortious interference with prospective business relations, but was not as much persuaded by the argument that section 102.79(c) of the BIFDL only permits "actual damages,"[87] which is also consistent with a conclusion that the nature of a BIFDL claim is tort-based. The court of appeals determined that under the "[Texas] Supreme Court's more recent approach in determining limitations absent a prescribed statute of limitations," the court was to look to the underlying nature of the claim and ascertain an analo-

81. Gambrinus Co. v. Galveston Beverage, Ltd., 264 S.W.3d 283, 286 (Tex. App—San Antonio 2008, pet. denied).

82. *Id.* (citing Dickerson v. Bailey, 336 F.3d 388, 397 (5th Cir. 2003)).

83. *Id.*

84. *Id.* at 287 (citing Tex. Alco. Bev. Code Ann. § 102.76(a) (Vernon 2007)).

85. *Id.* at 291.

86. *Id.* (citing First Nat'l Bank v. Levine, 721 S.W.2d 287, 289 (Tex. 1986)).

87. *Id.* at 290.

gous cause of action.[88]

V. INTELLECTUAL PROPERTY

A. Trademarks

In *Schlotzsky's, Ltd. v. Sterling Purchasing & National Distribution Co.*, the Fifth Circuit, following a jury verdict and injunction in favor of Schlotzsky's, considered a distributor's challenge to the applicability of the Lanham Act to commercial activity beyond misuse of the trademark.[89] Schlotzsky's, Inc. (predecessor to plaintiff Schlotzsky's, Ltd.) filed for bankruptcy in August 2004. Prior to the bankruptcy filing, the Schlotzsky's Independent Franchisee Association (SIFA), who did not have the power to bind any franchisee or to contract on any franchisee's behalf, and defendant Sterling agreed that Sterling would act as a supply-chain manager for the Schlotzsky's, Inc. system. "SIFA designated Sterling as an exclusive purchase and distribution representative, but had no authority to do so."[90] Faced with a possible shortage of products, Schlotzsky's, Inc. began negotiations with Sterling, but these negotiations were not successful.[91]

Shortly after its bankruptcy filing, "Schlotzsky's, Inc. approved Sterling as a non-exclusive supply chain manager for its restaurant system, [yet] retain[ed] the right to revoke this designation upon written notice to Sterling."[92] During this time, through at least eight contracts, Sterling made representations that it was a "purchasing agent appointed by both Schlotzsky's, Inc.' and SIFA and was 'appointed by Schlotzsky's, Inc. and [SIFA] to be their exclusive representative in the purchasing of products."[93] In thirty-two contracts, "Sterling claimed to be the exclusive representative for purchasing and distribution of all goods and services within the Schlotzsky's system."[94] After being unable to reach any agreement, Schlotzsky's, Inc. and Sterling reached an impasse as to the non-exclusive nature of their relationship and the negotiations were terminated. Sterling, however, "continued to act as a non-exclusive distribution manager, and Schlotzsky's, Inc. continued to build relationships with other manufacturers and distributors."[95] With no authority to do so, "Sterling began to hold itself out to manufacturers and distributors as the exclusive representative for purchasing and distribution of all goods and services within the Schlotzsky's system."[96]

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88. *Id.* (citing Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507, 518 (Tex. 1998)).
89. Schlotzsky's, Ltd. v. Sterling Purchasing & Nat'l Distrib. Co., 520 F.3d 393, 395 (5th Cir. 2008).
90. *Id.*
91. *Id.* at 396.
92. *Id.*
93. *Id.* at 398.
94. *Id.*
95. *Id.* at 396.
96. *Id.*

In January 2005, Schlotzsky's Ltd. became the owner of the Schlotzsky's restaurant system, trademarks, and associated rights. At that time, the new management began negotiating with potential new distributors. "In March 2005, Schlotzsky's contracted with two primary distributors for their branded and proprietary products" and "terminated Sterling as the non-exclusive supply chain manager," effective June 30, 2005.[97] "Two weeks after Schlotzsky's notified Sterling that it would no longer be a non-exclusive supply chain manager," Sterling made misrepresentations to PepsiCo.[98]

In March 2005, Schlotzsky's filed an action against Sterling based on violations of the Lanham Act. A year later, "a jury found that Sterling willfully committed false designation of affiliation, sponsorship, or approval with respect to Schlotzsky's commercial activities."[99] Sterling appealed and argued that the Lanham Act related only to trademarks, not to all commercial activity.[100]

After identifying the relevant language of section 43(a) of the Lanham Act, the Fifth Circuit noted that the language "is broader than much of the Lanham Act in that it 'prohibits actions like trademark infringement that deceive consumers and impair a producer's goodwill.'"[101] Nevertheless, the Fifth Circuit noted that while the Act has a broad scope, it "'should not be stretched to cover matters that are typically of no consequence to purchasers.'"[102] The Fifth Circuit concluded that section 43(a) was broad enough to encompass Sterling's deceptions because it extended beyond mere trademark protection.[103] In addition, Sterling's actions (i) "threatened the goodwill of the Schlotzsky's brand," (ii) "caused confusion with franchisees," and (iii) was used "to further Sterling's position in the marketplace."[104]

The Fifth Circuit also upheld the district court's grant of injunctive relief.[105] "The district court found that each of Sterling's misrepresentations was literally false."[106] Although Sterling was no longer in business and ceased to do business with franchisees in June 2005, the district court was concerned that Sterling's principal currently operated a new franchise supply chain business. Therefore, "[t]he district court tailored the injunctive relief to cover [Schlotzsky's] specific concern," but also to prohibit "Sterling's affiliates from engaging in the kind of misrepresenta-

97. *Id.* at 396-97.
98. *Id.* at 398.
99. *Id.* at 397.
100. *Id.*
101. *Id.* at 399-400 (quoting Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 29 (2003)).
102. *Id.* (quoting *Dastar*, 539 U.S. at 33).
103. *Id.* (quoting *Dastar*, 539 U.S. at 32 ("Section 43(a) is 'one of the few provisions that goes beyond trademark protection.'")).
104. *Id.* at 399 (citing Zyla v. Wadsworth Div. of Thompson Corp., 360 F.3d 243, 251 (1st Cir. 2004) as holding that the "existence of a trademark is not a necessary prerequisite to a § 43(a) action," and also citing similar Second and Sixth Circuit holdings).
105. *Id.* at 403.
106. *Id.*

tions that Sterling repeatedly used."[107] The Fifth Circuit, therefore, rejected Sterling's argument regarding the lack of irreparable harm or threatened further conduct.[108]

In *Great American Restaurant Co. v. Domino's Pizza L.L.C.*, the Great American Restaurant Company (Pizzeria) failed to prevail on its claim that Domino's use of "Brooklyn Style Pizza" infringed on Pizzeria's trademark "Brooklyn's Old Neighborhood Style Pizzeria."[109] Pizzeria alleged that Domino's use of "Brooklyn Style Pizza" would cause confusion between the "Pizzeria's high quality, hand-made pizza [and] Domino's *inferior quality, machine-produced* pizzas, even though Pizzeria [did] not sell a 'Brooklyn style pizza.'"[110]

The district court outlined the factors used to determine whether a likelihood of confusion existed: "'(1) strength of the plaintiff's mark; (2) similarity of design between the marks; (3) similarity of the products; (4) identity of retail outlets and purchasers; (5) similarity of advertising media used; (6) the defendant's intent; (7) actual confusion; and (8) degree of care exercised by potential purchasers.'"[111] Domino's argued that the name "Brooklyn Style Pizza" was generic or, at best, descriptive and, secondly, that Pizzeria could not establish likelihood of confusion. The district court remarked that if the primary significance of "Brooklyn Style Pizza" is to identify the product, and not to identify the source of that product, there could be no infringement action.

Domino's presented evidence that surveys showed that seventy-seven percent of the surveyees had an opinion that Brooklyn Style Pizza was a common generic name. Domino's also presented evidence that certain media articles referred to the generic use of Brooklyn Style Pizza. Domino's also showed that hundreds of restaurants used Brooklyn Style Pizza, and that even the U.S. Patent and Trademark Office recognized Brooklyn Style Pizza as a generic term. Pizzeria countered Domino's evidence by submitting proof that there was no such thing as a Brooklyn Style Pizza, trying to prove that "Brooklyn Style Pizza" was a descriptive term. However, because Pizzeria could not show that "Brooklyn Style Pizza," as a descriptive mark, had acquired a secondary meaning for the term, the district court held that there was no trademark violation.[112]

Likewise, the district court found that Pizzeria could not prove that Domino's actions created a likelihood of confusion. In reviewing the one probative survey on point, the district court held that the survey demon-

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107. *Id.*

108. *Id.* at 402.

109. Great Am. Rest. Co. v. Domino's Pizza L.L.C., No. 4:07CV52, 2008 U.S. Dist. LEXIS 32495, at *3-4 (E.D. Tex. Apr. 21, 2008) (noting that Pizzeria had also alleged infringement regarding its "'A TASTE OF THE OLD NEIGHBORHOOD'" trademark, and Domino's agreed to cease its advertising using this mark).

110. *Id.* at *3.

111. *Id.* at *4 (citing Am. Rice, Inc. v. Producers Rice Mill, Inc., 518 F.3d 321, 329 (5th Cir. 2008)).

112. *Id.* at *10.

strated a lack of confusion.[113] Furthermore, the district court found that Domino's had not selected the "Brooklyn Style Pizza" name to compete with Pizzeria. Therefore, the district court recommended that Domino's motion for summary judgment be granted as to Pizzeria's federal and state law infringement claims.[114]

VI. COMMON LAW CLAIMS

A. Contract Issues

Reversing a verdict from the trial court of $8.5 million, the Dallas Court of Appeals also awarded the franchisor its attorneys' fees on appeal in *Blockbuster, Inc. v. C-Span Entertainment, Inc.*[115] This dispute arose from the franchisee's purchase of eleven Blockbuster stores. Sunil Dharod attended a two-day informational seminar with Blockbuster and, at the end of the seminar, expressed an interest in purchasing eleven Blockbuster stores in Tyler, Texas. With the representation of legal counsel during the transaction, Dharod purchased the stores for $5.9 million. The parties executed the asset sale agreement and franchise agreements in connection with the closing. Dharod signed the asset sale agreement in his individual capacity and on behalf of C-Span, a Subchapter S corporation in which Dharod was the sole shareholder, as its president. Dharod signed the franchise agreements in his individual capacity.[116]

In October 1999, Dharod, C-Span, and Blockbuster executed a transfer agreement, which transferred all of Dharod's interests in the stores under the franchise agreements to C-Span and provided for a release that stated, in part, that "IT IS THE EXPRESSED INTENTION OF [DHAROD] THAT THIS RELEASE BE GENERAL AND AS BROAD AS PERMITTED BY LAW FOR SUCH MATTERS EXISTING OR ARISING AT ANY TIME PRIOR TO OR AFTER THE DATE OF THIS CONSENT."[117] When the Blockbuster stores did not perform as anticipated, Dharod and C-Span sued Blockbuster and their attorneys, Akin Gump Strauss Hauer & Feld LLP. In addition to claims for breach of contract, Dharod and C-Span claimed that Blockbuster fraudulently induced Dharod to enter into the asset sale agreement when it provided him with the August 1999 profit and loss statement, which was more favorable than the profit and loss statement included in the bid package, but still showed a negative number for cost of goods for the month of July. Blockbuster answered and asserted the affirmative defense of release, among its other defenses. Blockbuster also counterclaimed for breach of contract.[118]

113. *Id.*
114. *Id.* at *18.
115. Blockbuster, Inc. v. C-Span Entm't, Inc., 276 S.W.3d 482, 491 (Tex. App.—Dallas 2008, pet. granted) (Haynes and Boone, L.L.P., represented Blockbuster at the trial court and on appeal in this matter).
116. *Id.* at 485.
117. *Id.* at 486.
118. *Id.*

Neither party claimed ambiguity of the contracts, so the court interpreted the contracts as a question of law.[119] Dharod argued that the release defined "agreements" as the franchise agreements and would not release his claims under the profit and loss statements. The court held that Dharod's premise ignored the remainder of the phrase "'or under federal, state or local law.'"[120] Because Dharod's claims for breach of the asset sale agreement and fraudulent inducement arose under state law, the court concluded that the claims were within the scope of the release.[121] Furthermore, the court held that the release had valid consideration taking into account that Blockbuster's consent was only to be effective upon execution of the franchise agreements and any additional, required documents.[122] This conditional consent in the asset purchase agreement did not constitute past, but present, consideration.[123]

The court also sustained Blockbuster's third issue regarding the award of attorneys' fees to Dharod. Because Dharod was not entitled to prevail on his contract claims, the court agreed that Dharod was not entitled to attorneys' fees.[124] On the other hand, the court awarded Blockbuster its costs and attorney's fees of over $2 million as the prevailing party under the contract.[125]

In *Bennigan's Franchising Co. v. Swigonski*, a federal court dealt with an area developer's failure to comply with the terms of the development agreement and awarded future lost profits based solely on the terms of the development agreement.[126] Several individual developers entered into a development agreement with Bennigan's for the development and operation of six Bennigan's franchise locations in the state of New York. Pursuant to the development agreement, the area developers were required to pay Bennigan's an initial fee, a continuing (royalty) fee, and a production fee for each restaurant. The development agreement also allowed for future lost profits (in the form of the initial, continuing, and production fees) as a result of the area developers' breach of the agreement. In July 2004, the parties entered into an amendment to the development agreement, which required the fourth location to open and operate by December 2005. The area developers failed to timely open the fourth location and failed to pay the required fees. Bennigan's sent the area developers a notice of breach, informing the developers that they had thirty days to cure the default and comply with the development schedule. When the developers failed to cure their default within thirty days, Bennigan's sent them a notice of termination in October 2006. Bennigan's sought the fees owed to it under the development (i.e., the

119. *Id.* at 487.
120. *Id.*
121. *Id.*
122. *Id.* at 488.
123. *Id.* at 489.
124. *Id.*
125. *Id.* at 491.
126. Bennigan's Franchising Co. v. Swigonski, No. 3-06-CV-2300-BH, 2008 U.S. Dist. LEXIS 14871, at *2, *12-13 (N.D. Tex. Feb. 26, 2008).

initial fee, royalty fees, and production fee).[127]

Under Texas law, the district court found that the developers had "breached the [d]evelopment [a]greement by failing to open a fourth Bennigan's [r]estaurant franchise location in accordance with the amended [d]evelopment [s]chedule."[128] Moreover, the district court held that the developers were jointly and severally liable to Bennigan's for fees owed for the fourth franchise location—an initial fee of $25,000, a continuing royalty fee of $1,005,452, and a production fee of $251,363.[129]

B. Fraud and Misrepresentation

In *Schlotzsky's, Ltd. v. Sterling Purchasing & National Distribution Co.*,[130] the Fifth Circuit addressed Sterling's challenge to the district court's grant of judgment to Schlotzsky's, Ltd. on Sterling's state law claims for tortious interference with its contracts. Sterling argued that it presented sufficient evidence of this tort by proving that Schlotzsky's, Ltd. required its franchisees to purchase 95% of their products from Schlotzsky's, Ltd.'s two exclusive distributors (i.e., economic duress). Although Sterling failed to plea duress, the Fifth Circuit held that Sterling's pleadings and the evidence it presented on this issue adequately preserved the issue for review.[131]

The Fifth Circuit outlined the elements of economic duress: "(1) a threat to do something beyond the legal right of the party making the threat; (2) an 'illegal exaction or some fraud or deception' occurs; and (3) a restraint arises that is 'imminent' and destroys 'free agency without present means of protection.'"[132] The Fifth Circuit recalled that Schlotzsky's, Ltd.'s non-exclusive agreement was revocable upon written notice. "[T]he non-exclusive and revocable nature of Schlotzsky's authorization with Sterling allowed Schlotzsky's to pursue its own financial interests."[133] The Fifth Circuit held that Schlotzsky's, Ltd. acted within its legal rights, and that the district court properly granted Schlotzsky's, Ltd.'s judgment on Sterling's tortious interference claims.[134]

VII. STATUTORY CLAIMS

A. Texas Deceptive Trade Practices—Consumer Protection Act

In *Birkenfeld v. Metro General Management*, the parties litigated the issue of whether the purchaser of a franchised business fell under the

127. *Id.* at *6.
128. *Id.* at *9-10.
129. *Id.* at *10.
130. Schlotzsky's, Ltd. v. Sterling Purchasing & Nat'l Distrib. Co., 520 F.3d 393, 393 (5th Cir. 2008).
131. *Id.* at 403.
132. *Id.* at 404 (citing Beijing Metals & Materials Imp./Exp. Corp. v. Am. Bus. Ctr., Inc., 993 F.2d 1178, 1184-85 (5th Cir. 1993)).
133. *Id.* at 405.
134. *Id.*

definition of "consumer" under the Texas Deceptive Trade Practices Act (DTPA), and the Amarillo Court of Appeals found that he did.[135] Randy Birkenfeld worked in one of Metro Management's retail stores in Lubbock for approximately ten years before he reached an agreement with Metro to purchase the business.[136] According to the "Franchise/Purchase Agreement," Birkenfeld purchased a license to operate the store, goodwill, furniture, fixtures, equipment, current inventory, and an automobile.[137] Metro argued that Birkenfeld was not a consumer under the DTPA, which applies to one who "'seeks or acquires by purchase or lease, any goods or services.'"[138] The court disagreed with Metro, noting that in addition to purchasing a license to sell the goods, Birkenfeld purchased $30,000 worth of inventory, the automobile, the services of a Metro "advisory personnel," and an option to purchase inventory from Metro.[139] The court concluded by stating that, "[g]iven these circumstances, we cannot say that the primary object in purchasing the business in question consisted of acquiring general intangible assets . . . ."[140]

B. ANTITRUST

In *Schlotzsky's, Ltd. v. Sterling Purchasing & National Distribution Co.*, the Fifth Circuit ruled in favor of the franchisor on the antitrust claim of a supplier on the issue of franchisor-mandated exclusive suppliers.[141] As noted, Schlotzsky's, Ltd. brought suit against Sterling under the Lanham Act, alleging that Sterling willfully committed a false designation of affiliation, sponsorship, or approval with respect to Schlotzsky's, Ltd.'s commercial activities.[142] Sterling filed a counterclaim under the Sherman Act, alleging that Schlotzsky's, Ltd.'s actions of forcing its franchisees to enter into exclusive distribution agreements created an illegal tying arrangement.[143] Sterling argued that by tying the right to use its trademark to the purchase of specific products, Schlotzsky's, Ltd. engaged in illegal "lock-in" conduct.[144]

The Fifth Circuit rejected Sterling's counterclaim on several grounds. First, the Fifth Circuit noted the requirement that a "'not insubstantial' amount of interstate commerce [be] affected" by the tying arrangement.[145] The Fifth Circuit stated that a "significant flaw" in Sterling's counterclaim was that there was "no proof, and indeed it was unlikely,

135. Birkenfeld v. Metro Gen. Mgmt., No. 07-06-0199-CV, 2008 WL 696174, at *5 (Tex. App.—Amarillo 2008, no pet.).
136. *Id.* at *1.
137. *Id.*
138. *Id.* at *5 (quoting TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon Supp. 2007)).
139. *Id.*
140. *Id.*
141. Schlotzsky's, Ltd. v. Sterling Purchasing & Nat'l Distrib. Co., 520 F.3d 393, 405, 408 (5th Cir. 2008).
142. *Id.* at 397.
143. *Id.* at 405.
144. *Id.* at 406.
145. *Id.* (citing N. Pac. Ry. v. United States, 356 U.S. 1, 6 (1958)).

that a substantial amount of interstate commerce was affected by Schlotzsky's efforts to get potato chips, sauce, and bread products sold at its franchises purchased through one of two distributors."[146]

Second, the Fifth Circuit noted the requirement that an illegal tying arrangement be the result of market dominance over the tying product.[147] The Fifth Circuit pointed out that in the franchise context, a franchisor controls its franchisees typically through voluntary agreement as opposed to market power.[148] The Fifth Circuit described the franchisor-franchisee relationship as a "symbiotic one" that requires deeper analysis of what "superficially could be described as" a tying arrangement.[149] The Fifth Circuit noted that it was undisputed "that Schlotzsky's had the contractual right to require franchisees to purchase [products] from a specific distributor," and that this right "is distinguishable from [the] market power" required for an illegal tying arrangement.[150] The Fifth Circuit upheld the district court's judgment as a matter of law on the antitrust claims.[151]

C. Texas Motor Vehicle Board

In *Freightliner Corp. v. Motor Vehicle Board*, the Austin Court of Appeals held that the Motor Vehicle Board of the Texas Department of Transportation erred in revisiting and reversing a determination of good cause termination, which was previously affirmed by the court of appeals.[152] This case has a long procedural history going back to 1993. In short, Ford attempted to terminate Metro Ford Truck Sales, Inc.'s franchise to sell Ford trucks.[153] Metro filed a protest before the Motor Vehicle Board, and the Board determined that Ford had good cause to terminate the franchise agreement and that Metro would be required to sell its franchise.[154] Metro sought review in the district court, and the district court affirmed the good cause determination but concluded that the sale remedy was unlawful. Therefore, the district court remanded to the Motor Vehicle Board.[155] The Austin Court of Appeals affirmed the ruling of the district court.[156]

On remand, it took the Board more than four years to dispose of the case. Ultimately, the Board issued a final order that Ford had in fact failed to show good cause for termination.[157] Ford appealed, arguing that

146. *Id.* at 406-07.
147. *Id.* at 407 (citing *N. Pac. Ry.*, 356 U.S. at 1, 6-7 (1958)).
148. *Id.*
149. *Id.*
150. *Id.* at 407-08.
151. *Id.* at 408.
152. Freightliner Corp. v. Motor Vehicle Bd., 255 S.W.3d 356, 357 (Tex. App.—Austin 2008, pet. filed).
153. *Id.* at 357-58.
154. *Id.*
155. *Id.*
156. *Id.* at 358-59.
157. *Id.* at 359-60.

the Board exceeded its authority by revisiting the good cause determination that had been affirmed in the previous proceeding.[158] The Board argued that the court of appeals only had the authority to identify error, and therefore, did not have the authority to limit its remand.[159] Consequently, the issue before the court of appeals the second time was whether the Board properly reconsidered its judicially affirmed determination "that Ford had good cause to terminate Metro's franchise."[160]

The court of appeals noted that it could not find any authority supporting the proposition that a court usurps agency authority by not remanding an affirmed portion of an agency order.[161] The court of appeals stated that, while courts may not dictate how an agency reviews issues, courts do have control over what issues the agency may consider.[162] Furthermore, this was consistent with the principle that appellate courts have an obligation to decide only the issues necessary to the disposition of the appeal.[163] The court of appeals concluded that, "a court's affirmance in part of an agency decision binds the agency to that part of the decision affirmed and limits the scope of issues the agency considers on remand."[164] Therefore, the Board erred in revisiting the good cause for termination finding, and only had authority to render a decision on the termination.[165]

VIII. REMEDIES

A. Compensatory Damages

In *In re Magna Cum Latte, Inc.*, the bankruptcy court held that a coffee store franchisee could recover lost profits against its franchisor based on breach of the implied covenant of good faith and fair dealing and wrongful termination under the California Business Code (California law applied to the case).[166] The court stated that California law supported the award of lost profits to a franchisee for a breach of contract, but that the plaintiff had to prove the occurrence and extent of the lost profits.[167]

Both plaintiff and defendant put forth expert testimony on lost profits, and the court found errors in both.[168] The court concluded that the proper calculation of lost profits involved taking a twelve-month "base year" of historical revenue and a cost of goods sold ratio based more on recent history.[169] The court stated that depreciation and amortization

158. *Id.* at 360.
159. *Id.*
160. *Id.*
161. *Id.* at 362.
162. *Id.*
163. *Id.*
164. *Id.* at 363.
165. *Id.* at 367-68.
166. *In re* Magna Cum Latte, Inc., Bankr. No. 07-31814, 2008 WL 2047937, at *1-2 (Bankr. S.D. Tex. May 9, 2008).
167. *Id.* at *13 (citing Sanchez-Corea v. Bank of Am., 701 P.2d 826 (Cal. 1985); Postal Instant Press, Inc. v. Sealy, 51 Cal. Rptr. 2d 365 (Cal. App. 1996)).
168. *Id.* at *14-15.
169. *Id.*

should not be included in the calculation, as these were accounting measures related to financial reporting.[170] Finally, the court noted that California law was unclear as to whether to apply a risk-adjusted discount rate or a risk-free rate to measure the present value of lost profits.[171] The court concluded that a risk-adjusted rate was appropriate, noting that the profit forecasts at issue were inherently risky.[172]

B. Injunctive Relief

Schlotzsky's, Ltd. v. Sterling Purchasing & National Distribution Co., discussed above for its Lanham Act and antitrust rulings,[173] also involved a claim for injunctive relief. The franchisor, Schlotzsky's, Ltd., was granted an injunction under the Lanham Act prohibiting Sterling, together with its principal and affiliates, from representing to manufacturers that it was the "exclusive" distributor of products for Schlotzsky's, Ltd. franchisees, when, in fact, it was not authorized by Schlotzsky's, Ltd. to do so.[174] "Sterling argue[d] that the injunction was improper because the district court did not make, nor could it have made, findings concerning irreparable harm or threatened future conduct."[175]

The Fifth Circuit found that while Federal Rule of Civil Procedure 52(a) required "specific findings . . . to explain a judgment after a bench trial or interlocutory order, a 'request for a permanent injunction [after] a jury trial does not trigger [that] rule.'"[176] "[P]ermanent injunctive relief may be [awarded under section 43(a) of the Lanham Act when the] plaintiff demonstrates 'that a commercial advertisement or promotion is . . . literally false' and 'that it will suffer irreparable harm if the injunction is not granted.'"[177] The Fifth Circuit noted that the district court found that Sterling's "misrepresentations were willfully made in bad faith" and were "literally false."[178] In addition, the Fifth Circuit noted that the district court was concerned about the fact that Sterling's principal was operating a new franchise supply chain business.[179] The Fifth Circuit noted that the district court's injunction was tailored to cover the specific harm suffered by Schlotzsky's and affirmed the injunction.[180]

In *Sirrah Cos. v. Budget Rent-A-Car Corp.*, two Budget rental car franchisees sued franchisor Budget over a dispute involving commissions pay-

170. *Id.* at *16.
171. *Id.* at *17.
172. *Id.* at *18.
173. Schlotzsky's, Ltd. v. Sterling Purchasing & Nat'l Distrib. Co., 520 F.3d 393, 403 (5th Cir. 2008).
174. *Id.*
175. *Id.* at 402.
176. *Id.* at 402-03 (quoting Dresser-Rand Co. v. Virtual Automation, Inc., 361 F.3d 831, 847 (5th Cir. 2004)).
177. *Id.* at 402 (citing Logan v. Burgers Ozark Country Cured Hams, Inc., 263 F.3d 447, 465 (5th Cir. 2001)).
178. *Id.* at 403.
179. *Id.*
180. *Id.*

able to online travel companies.[181] Budget maintained that the plaintiffs were responsible for all commissions owed to online travel agencies, while the plaintiffs argued that their franchise agreements did not require them to pay the commissions.[182] The plaintiffs sought a preliminary "injunction to prevent [Budget] from terminating their franchise agreements or blocking reservation services."[183]

The court noted that in order to obtain a preliminary injunction, the plaintiffs had to show a likelihood of success on the merits.[184] In analyzing the relevant franchise agreements, the court found that the agreement either expressly provided for the franchisee to pay the online commissions, or that the agreement predated the advent of online booking services by so long a time that Budget had a strong defense of commercial impracticability or impossibility.[185] In addition, the court noted that Budget had a potentially strong claim of quantum meruit, in that the plaintiff franchisees received the benefit of valuable services from online reservations and did not fully pay the commissions.[186] Having decided that the plaintiffs were not likely to prevail on the merits, the court denied the motion for a preliminary injunction.[187]

181. Sirrah Cos. v. Budget Rent-A-Car Corp., No. SA-06-CA-523-OG, 2008 WL 637610, at *1 (W.D. Tex. Mar. 3, 2008).
182. *Id.* at *1.
183. *Id.*
184. *Id.* at *2.
185. *Id.* at *2-7.
186. *Id.* at *7.
187. *Id.* at *8.