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United States District Court,
E.D. Texas, Texarkana Division.

PIZZA HUT, LLC, as successor-in-interest to Pizza Hut, Inc., Plaintiff,

v.

RONAK FOODS, LLC, et al., Defendants.

and

Ronak Capital, LLC, Intervenor

Civil Action No. 5:21-CV-00089-RWS
|
Signed June 17, 2022

Attorneys and Law Firms

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

ROBERT W. SCHROEDER III, UNITED STATES DISTRICT JUDGE

***1** In this franchise dispute, Plaintiff Pizza Hut, LLC, as successor-in-interest to Pizza Hut, Inc. ("Plaintiff" or "Pizza Hut") alleges breach of contract and various violations of the Lanham Act. Defendants/Counter-Plaintiffs Ronak Foods, LLC; Pandya Restaurants, LLC; JNP Foods, LLC; Jignesh N. Pandya, individually; 8 New Britain Pizza LLC and Third-Party Intervenor Ronak Capital, LLC (collectively "Defendants" or "Franchisee Defendants" herein) allege various counterclaims, principally including fraud, breach of contract and tortious interference with prospective business relations.

The Court held a five-day bench trial in this matter between March 28 and April 4, 2022. Docket Nos. 379, 381–83, 386. The parties submitted their proposed findings of fact and conclusions of law on February 22, 2022 (Docket Nos. 343–44) and supplemented their submissions with citations to the record on May 31, 2022 (Docket Nos. 399–400).

Pursuant to Federal Rule of Civil Procedure 52(a) and after having considered the record and applicable law, the Court concludes that:

(1) Ronak Foods breached its Franchise Agreement with Pizza Hut;

(2) Pandya Restaurants breached its Franchise Agreement with Pizza Hut;

(3) JNP Foods breached its Franchise Agreement with Pizza Hut;

(4) Pandya individually breached the Guaranties with Pizza Hut;

(5) Franchisee Defendants breached the Forbearance Agreement with Pizza Hut;

(6) Franchisee Defendants, including Intervenor Ronak Capital, breached the Transfer Agreement with Pizza Hut;

(7) Franchisee Defendants failed to de-identify certain restaurants and Pizza Hut is entitled to injunctive relief;

(8) Franchisee Defendants violated the Lanham Act and Pizza Hut is entitled to injunctive relief;

(9) Franchisee Defendants' counterclaims for fraud/fraudulent inducement, tortious interference with prospective business relations and one count of defamation are barred by the parties' General Release;

(10) Franchisee Defendants' counterclaim for breach of the Transfer Agreement fails;

(11) Franchisee Defendants' counterclaim for defamation on one count while the Transfer Agreement was in effect fails;

(12) Pizza Hut's request for an accounting is moot;

(13) Pizza Hut is entitled to recover damages, fees for indemnified matters and attorneys' fees as damages in part;

(14) Pizza Hut is not entitled to lost future royalties on this record;

(15) Pizza Hut is entitled to recover reasonable attorneys' fees and expenses;

(16) Pizza Hut is entitled to recover pre-and post-judgment interest and costs; The Court's evidentiary rulings, findings of fact and conclusions of law are detailed below.

EVIDENTIARY RULINGS

As an initial matter, the Court must assess the Franchisee Defendants' evidentiary objections to Pizza Hut's proffered exhibits. Docket No. 397, Ex. A. Pizza Hut has represented that it "withdrew or resolved all of its exhibit objections." Docket No. 398 at 2 n.1.

The Court requested the parties file "a summary chart listing the exhibits, the objections that remain, and any response to the ... offering party to that objection." Docket No. 367 (Pretrial Conf. Tr.) at 51:13–20. While the Franchisee Defendants arguably exceeded that instruction with its trial brief (Docket No. 397), the Court determines it is of no import. The Court addresses below the disputed exhibits introduced at trial that are contained in the Court's findings of facts and conclusions of law.

(1) PX183

***2** Franchisee Defendants object to PX183 (Steritech's 2021 Report) as: (1) hearsay under Rules 801–02, (2) lacking foundation under Rule 602 and (3) cumulative under Rule 403. *Id.* at 14–15; *see also id.*, Ex. A at 8.

Franchisee Defendants argue that Steritech's report is disallowed hearsay and "does not qualify as a proper business record because no custodian, qualified witness, or certification establishes the criteria set forth in Rule 803(6) for proving up this exception." *Id.* at 14. Franchisee Defendants contend that only a single Pizza Hut witness testified to this exhibit. Franchisee Defendants further contend that "Steritech was a third-party auditor." *Id.* Franchisee Defendants maintain that Steritech is not a party to this case and did not provide a witness at trial. Further, Franchisee Defendants assert that a Pizza Hut witness is not the "proper custodian or qualified witness to establish PX183 as a business record." *Id.* (citing *Weinhoffer v. Davie Shoring, Inc.*, 23 F.4th 579, 583 (5th Cir. 2022)). Lastly, Franchisee Defendants contest the exhibit's foundation and cursorily object that PX183 is cumulative.

Pizza Hut responds that "[t]he report qualifies for the business records hearsay exception because it was made by a person with knowledge of the restaurants that were the subject of the report." Docket No. 397, Ex. A at 8. Pizza Hut argues that the report was made "at or near the time of the relevant site visits" which are both a "regular business practice" and "regularly conducted activity." *Id.* As to foundation, Pizza Hut contends that the report was "introduced during testimony" by its witness who "identified the document and explained Steritech's role" in creating the report. *Id.* (citing Trial Tr. (Day 1) at 215:10–23). Pizza Hut does not directly address Franchisee Defendants' cumulativeness argument.

A business record must satisfy the following requirements to be admissible—as an exception to the rule against hearsay—under Rule 803(6):

(A) [T]he record was made at or near the time by—or from information transmitted by—someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Fed. R. Evid. 803(6).

The record in question (PX183) was an audit report of Franchisee Defendants' facilities prepared by Steritech on behalf of Pizza Hut. *See* PX183 at 2–89. These reports were created regularly pursuant to these inspections—which were done regularly pursuant to the Franchise, Forbearance and Transfer Agreements. *See* PX15 § 6.4 (Inspections); PX32 § 4.1; PX114 §§ 1, 4(C)(ii). Accordingly, these records were kept in the course of a regularly occurring activity conducted by Steritech in conjunction with Pizza Hut. For their part, Franchisee Defendants have not challenged the trustworthiness of the report.

***3** The Court further determines that Sarah Crow (Pizza Hut's Managing Counsel and corporate representative) is a qualified witness to establish PX183 as a business record under Rule 803(6). Under Rule 803(6), "to be an 'other qualified witness,' it is not necessary that the person laying the foundation for the introduction of the business record have personal knowledge of their preparation." *Dyno Construction Co. v. McWane, Inc.*, 198 F.3d 567, 575–76 (6th Cir. 1999). Rather, the witness is required to be "familiar with the record keeping procedures of the organization." *United States v. Brown*, 553 F.3d 768, 793 (5th Cir. 2008). "Furthermore, there is no requirement that the records be created by the business having custody of them." *United States v. Duncan*, 919 F.2d 981, 986 (5th Cir. 1990).

Crow testified that Pizza Hut uses Steritech for auditing and inspection purposes on a consistent basis. *See* Trial Tr. (Day 1) at 215:16–23. In view of Crow's responsibilities effectuating the parties' agreements, overseeing the portfolio of restaurants previously operated by the Franchisee Defendants—as well as having consistently received inspection reports and coordinated with Steritech—she would have been familiar with the record keeping procedures Pizza Hut undertook for such inspection reports. Moreover, because Crow "commonly dealt with these records," PX183 is admissible under the business records exemption to the rule against hearsay. *United States v. Jenkins*, 345 F.3d 928, 936 (6th Cir. 2003).

For these reasons, the Court also determines that a proper foundation was laid. There is also no indication that this exhibit is cumulative which, in any event, the Court is capable of discounting in a bench trial setting. *See Gulf States Utilities Co. v. Ecodyne Corp.*, 635 F.2d 517, 519 (5th Cir. 1981).

(2) PX189, PX189-A to D

Franchisee Defendants also object to PX189 and PX189-A to D (David Harper's Expert Report and all exhibits and documents relied upon) as: (1) hearsay under Rules 801–2, (2) lacking foundation under Rule 602 and (3) cumulative under Rule 403. Docket No. 397 at 15–16; *id.*, Ex. A at 9.

Franchisee Defendants argue that "expert reports 'are hearsay and, absent agreement to their admissions, are inadmissible.' " Docket No. 397 at 15 (citing *Bianco v. Globus Med., Inc.*, 30 F. Supp. 3d 565, 570 (E.D. Tex. 2014)). Franchisee Defendants note that the parties have not agreed to Harper's expert report being admitted into evidence. *Id.* And Franchisee Defendants contend that no witness authenticated the attachments to Harper's expert report, which are also cumulative of other evidence in the record. *Id.* at 15–16.

Pizza Hut responds initially—to both the hearsay and foundation objections—that Harper "provided sworn testimony at trial identifying his expert report as PX189." *Id.* (citing Trial Tr. (Day 3) at 594:25–595:4. Pizza Hut also argues that should Harper's report contain any inadmissibly hearsay, "the Court is capable of giving appropriate weight to any hearsay statements" in the bench trial context. *Id.* (citing *Harris v. Rivera*, 454 U.S. 339, 346–47, 102 S.Ct. 460, 70 L.Ed.2d 530 (1981) (per curiam)). Pizza Hut maintains that Crow provided "testimony authenticating and otherwise proving up PX189-A, PX189-B, PX189-C, and PX189-D" at trial. Docket No. 398 at 2. Pizza Hut does not explicitly respond to the Franchisee Defendants' cumulativeness objection.

An "expert's written report 'is hearsay to which no hearsay exception applies.' " *Robroy Indus. — Tex., LLC v. Thomas & Betts Corp.*, No. 2:15-CV-512, 2017 WL 1319553, at *3, 2017 U.S. Dist. LEXIS 54230, at *6–7 (E.D. Tex. Apr. 10, 2017) (quoting *Hunt v. City of Portland*, 599 F. App'x 620, 621 (9th Cir. 2013)). These manner of expert reports "are out-of-court statements by witnesses offered for their truth, and therefore fall within the definition of hearsay in Federal Rule of Evidence 801(c)." *Worldwide Sorbent Prods. v. Invensys Sys.*, No. 1:13-CV-252, 2014 WL 12596585, at *4, 2014 U.S. Dist. LEXIS 195932 ,at *10 (E.D. Tex. Oct. 29, 2014) (quoting *Bianco v. Globus Med., Inc.*, 30 F. Supp. 3d 565, 570 (E.D. Tex. 2014)).

***4** Such is the case here with PX189: an " 'unsworn pre-trial report[ ] prepared by [an] expert witness[ ]' " that is being "offered for the truth of the matters asserted" in the expert report. *Worldwide Sorbent*, 2014 WL 12596585, at *4, 2014 U.S. Dist. LEXIS 195932, at *11–12. To the extent permissible, Pizza Hut does not advance a hearsay exception

applicable to the report. Consequently, Harper's expert report (PX189) will not be considered as evidence in the record.

Nevertheless, Pizza Hut did provide extensive testimony to authenticate the attachments (PX189-A–D) to Harper's expert report. *See* Trial Tr. (Day 1) at 204:25–206:6, 221:6–227:2. Pursuant to Federal Rule of Evidence 1006, "[t]he proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court." FED. R. EVID. 1006. Pizza Hut did just that in proffering PX1 as a summary exhibit of hundreds of pages of itemized invoices, billing records and associated materials contained in PX189-A–D. *See* PX1 (Itemized Invoices - AFD and Itemized Invoices - Indemnification tabs); *see also* Trial Tr. (Day 3) at 605:14–606:9.

These underlying, voluminous billing documents are not cumulative—but rather exhaustive—to account for the full amounts in fees at issue. *Id.* at 606:20–607:24. The Court will utilize this summary exhibit (PX1) to the extent necessary in its findings of fact and conclusions of law below. *Taira Lynn Marine Ltd. No. 5, L.L.C. v. Water Quality Ins. Syndicate*, 420 Fed. Appx. 330, 336 (5th Cir. 2011) (upholding admission of "summaries of the voluminous billing records" where—as here—opposing party "did not object to the summaries.").

FINDINGS OF FACT

This section contains the Court's findings of fact on the issues raised by the parties during trial. The Court makes the below findings of fact by a preponderance of the evidence. *LLOG Expl. Co., L.L.C. v. Signet Mar. Corp.*, 673 Fed. Appx. 422, 424 (5th Cir. 2016) (reviewing bench trial concerning breach of contract cause).

I. The Parties

[FF1] The parties stipulated that "Plaintiff Pizza Hut, LLC ("Pizza Hut") is a Delaware limited liability company with its principal place of business in Plano, Collin County, Texas. Pizza Hut's sole member is Pizza Hut Guarantor, LLC, which is a Delaware limited liability company with its principal place of business in Plano, Collin County, Texas. Pizza Hut is therefore a citizen of Delaware and Texas." Docket No. 350 at 32; Docket No. 141 ¶ 1.

[FF2] The parties stipulated that "Pizza Hut is the successor-in-interest to Pizza Hut, Inc. Pizza Hut's indirect parent company is YUM! Brands, Inc. ("YUM")." Docket No. 350 at 32.

[FF3] The parties stipulated that "Defendant Ronak Foods, LLC ("Ronak Foods") is a Pennsylvania limited liability company. Its sole member, Jignesh N. Pandya, is a citizen of Newtown, Bucks County, Pennsylvania. Ronak Foods is therefore a citizen of Pennsylvania." *Id.*; Docket No. 201 ¶ 3.

[FF4] The parties stipulated that "Defendant Pandya Restaurants, LLC ("Pandya Restaurants") is a Pennsylvania limited liability company. Its sole member, Jignesh N. Pandya ("Pandya"), is a citizen of Newtown, Bucks County, Pennsylvania. Pandya Restaurants is therefore a citizen of Pennsylvania." Docket No. 350 at 32; Docket No. 201 ¶ 4.

[FF5] The parties stipulated that "Defendant JNP Foods, LLC ... is a Pennsylvania limited liability company. Its sole member, Jignesh N. Pandya, is a citizen of Newtown, Bucks County, Pennsylvania. JNP Foods is therefore a citizen of Pennsylvania." Docket No. 350 at 32; Docket No. 201 ¶ 5.

***5 [FF6]** The parties stipulated that "Defendant Jignesh (Jay) N. Pandya ... is an individual, natural person and citizen of Newtown, Bucks County, Pennsylvania." Docket No. 350 at 32; Docket No. 201 ¶ 2.

[FF7] The parties stipulated that "Defendant 8 New Britain Pizza LLC ("8 New Britain" ...) is a Connecticut limited liability company. Its sole member, Pandya, is a citizen of Newtown, Bucks County, Pennsylvania. 8 New Britain is therefore a citizen of Connecticut and Pennsylvania." Docket No. 350 at 33.

[FF8] The parties stipulated that "Intervenor Ronak Capital, LLC ("Ronak Capital") is a Pennsylvania limited liability company. Its members are Pandya and his wife Mital Pandya, both of whom are individual, natural persons and citizens of Newtown, Bucks County, Pennsylvania. Ronak Capital is therefore a citizen of Pennsylvania." *Id.*; Docket No. 201 ¶ 6; Trial Tr. (Day 3) at 676:14–17.

[FF9] Pandya controls and owns the franchisee entities as their sole member[1]; Ronak Capital is Pandya's capital company. *See* Docket No. 350 at 32–34; Docket No. 201 ¶¶ 2–6; *see also* Trial Tr. (Day 3) at 676:14–17.

II. Procedural History

[FF10] On October 4, 2019, Pizza Hut filed an initial complaint in the Sherman Division against Defendants Ronak Foods, LLC; Pandya Restaurants, LLC; JNP Foods, LLC; and Jignesh N. Pandya for various breaches of contract. Docket No. 1. Pizza Hut filed a First Amended Complaint on November 21, 2019, adding 8 New Britain Pizza LLC; Mozzarella Kitchen Company, LLC; and Ronak Pandya individually as Defendants. Docket No. 12 at 1.

[FF11] The Court entered a temporary restraining order on November 26, 2019, against Defendants Jignesh Pandya; Ronak Foods, LLC; JNP Foods, LLC; Pandya Restaurants, LLC; and 8 New Britain Pizza from:

> Engag[ing], or assist[ing] others to engage, directly or indirectly, individually or as a partner, joint venturer, shareholder, officer, creditor, director, employee, or agent, in the production or sale (at wholesale or retail) of any pizza, pasta or other food items similar to Approved Products: (a) within a 25-mile radius of any Location; (b) anywhere within the county within which one or more Locations are situated; or (c) anywhere within 10 miles of a location in the United States at which [Pizza Hut] or any subsidiary, Affiliates or franchisee of Pizza Hut operates a System Restaurant on the date of termination or expiration of the Franchise Agreement.

Docket No. 34 at 9. A preliminary injunction hearing was not held because the parties reached an agreement to extend the specific injunctive relief the Court had previously ordered. *See id.*; *see also* Docket Nos. 39, 44.

[FF12] On January 10, 2020, Defendants filed a counterclaim for breach of contract against Pizza Hut. Docket No. 49 at 20–21. The parties jointly resolved several counts of Pizza Hut's breach of contract claims (Docket No. 95-1 at 1–2) and the Court entered judgment on those claims (Docket Nos. 142, 155). Pizza Hut and Defendant Mozzarella Kitchen Company likewise resolved similar aspects of their disputes. Docket No. 97.

***6 [FF13]** Pizza Hut filed a Second Amended Complaint against Defendants on December 11, 2020, asserting additional allegations of breach of contract and tortious interference. Docket No. 102 at 11–25. Defendants responded one week later and filed their First Amended Counterclaims against Pizza Hut for breach of contract. Docket No. 103 at 22–23.[2]

[FF14] Pizza Hut filed its Third Amended Complaint on April 27, 2021, against Defendants that included further information gathered from fact discovery. Docket No. 141. Defendants answered and filed their Second Amended Counterclaims on May 11, 2021, and continued to assert a breach of contract counterclaim. Docket No. 143 at 31–32. After several rounds of new counsel entering appearances, the parties agreed to transfer this matter on July 7, 2021, from the Sherman Division to the Texarkana Division. Docket No. 182.

[FF15] Ultimately, on September 23, 2021, Defendants filed their Third Amended Counterclaims against Pizza Hut, alleging new causes of action including: (1) fraud/fraud in the inducement; (2) breach of fiduciary duty; (3) tortious interference with prospective business relations; (4) tortious interference with existing contracts and business relations; and (5) business disparagement and/or defamation. Docket No. 201 at 12–17. The Court dismissed without prejudice Defendants' tortious interference with existing contracts and business relations counterclaim, and the Court dismissed with prejudice Defendants' breach of fiduciary duty and business disparagement counterclaims. Docket No. 317. The Court also struck Defendants' belated jury demand. *Id.*

[FF16] Pizza Hut moved for summary judgment on (1) the liability elements of counts 1–4 in its Third Amended Complaint (Docket No. 252) and (2) counts 1, 2, 4, 5 and 6 of Defendants' Third Amended Counterclaims (Docket No. 257). Defendants moved for summary judgment on (1) Pizza Hut's Third Amended Complaint (Docket No. 261) and (2) Defendants' Third Amended Counterclaims (Docket No. 263). These motions were denied at the pretrial conference. Docket No. 364.

[FF17] The Court also ruled on, and denied, the following pretrial motions (Docket No. 368): (1) Pizza Hut's Motion for Summary Judgment on all claims against itself for breach of the Transfer Agreement (Docket No. 255); (2) Pizza Hut's Motion to Exclude Testimony of John Mercy and Michael Hurst (Docket No. 323) (denied-as-moot); (3) Pizza Hut's Motion to Strike Defendants' Sealed Sur-Reply Arguments and Related New Exhibits (Docket No. 336); (4) Pizza Hut's Motion to Compel (Docket No. 279); (5) Defendants' Motion to Exclude Testimony of Charles Short (Docket No. 272); and (6) Defendants' Motion to Exclude Testimony of Plaintiff's Expert David Harper (Docket No. 273) (denied-as-moot). The Court also ordered a supplemental deposition of Pandya prior to trial in accordance with Pizza Hut's Motion to Exclude Untimely Damages Evidence (Docket No. 324).

III. Background

***7 [FF18]** Between November 2010 and April 2012, Pizza Hut—acting as franchisor—entered into various 20-year Location Franchise Agreements with Franchisee Defendants Ronak Foods (PX15 at 1; entered into on November 8, 2010), Pandya Restaurants (PX18 at 1; entered into on September 15, 2011) and JNP Foods (PX19 at 1; entered into on April 20, 2012) (collectively, the "Franchise Agreements"). *See* Docket No. 1 ¶ 11; Docket No. 201 ¶ 8 n.1; *see also* Docket No. 350 at 33 ("Ronak Foods, Pandya Restaurants, and JNP Foods are former Pizza Hut franchisees owned by Pandya who operated 43 Pizza Hut restaurants in Pennsylvania and 1 restaurant in Connecticut.").

[FF19] Ultimately, the relationships between the parties soured, and the Franchisee Defendants defaulted on their obligations to Pizza Hut. Docket No. 1 ¶ 18. On October 15, 2018, Pizza Hut terminated the Franchise Agreements. *Id.* ¶ 19.

[FF20] Subsequently, "Pizza Hut and Franchisee Defendants entered into a forbearance agreement effective October 15, 2018 (the "Forbearance Agreement")." Docket No. 350 at 34. The Forbearance Agreement "extended some of the Franchisees' obligations under the Franchise Agreements while they engaged in a sale process for certain locations." Docket No. 1 ¶ 20. Pursuant to the Forbearance Agreement, Pizza Hut "agreed to forbear from enforcing its remedies under the Franchise Agreements and provide [Mr.] Pandya with sufficient time and resources to sell his franchises." Docket No. 201 ¶ 16. Pizza Hut alleges that Franchisee Defendants did not comply with several terms of the Forbearance Agreement. Docket No. 1 ¶ 21.

[FF21] After some time, "[o]n April 10, 2019, a federal receiver was appointed over Franchisee Defendants' Restaurants." Docket No. 350 at 34 (citing *First Franchise Cap. Corp. v. Pandya Rests.*, No. 1:19-CV-254, Docket No. 8 (S.D. Ohio Apr. 10, 2019)). The federal receivership ended on July 31, 2019. *Id.*

[FF22] Following the federal receivership, Pizza Hut terminated the Forbearance Agreement (Docket No. 201 ¶ 20) and entered into a Transfer Agreement with Franchisee Defendants that ran from August 21, 2019 until October 3, 2019 (Docket No. 208 at 6) "to effectuate a transfer of [Defendants' restaurants] to a buyer approved by [Pizza Hut] in its sole discretion." PX114 § 5. In conjunction with the Transfer Agreement, Franchisee Defendants and Pizza Hut also negotiated and agreed to a General Release of claims. *Id.*, Ex. D.

[FF23] In October 2019, Pizza Hut terminated this Transfer Agreement with the Franchisee Defendants. Docket No. 201 ¶ 29.

IV. Franchise Agreements

[FF24] The Franchise Agreements "granted the Franchisees the non-exclusive, non[-]sublicensable right to operate the Restaurants in the Philadelphia, Pennsylvania market using the Pizza Hut trademarks (the 'Pizza Hut Marks'), trade dress (the 'Pizza Hut Trade Dress'), recipes, and other confidential and proprietary information (the 'System') in exchange for paying certain fees and meeting Pizza Hut's brand standards, among other things" pursuant to the parties' stipulations and uncontested facts. Docket No. 350 at 34 (parties' stipulations and uncontested facts); *see also* PX15 §§ 2.1 (Grant of Franchise); 2.2 (No Sub-franchise Right).[3]

***8 [FF25]** The parties have stipulated that the "Franchise Agreements ... are valid and enforceable contracts." Docket No. 350 at 34.

A. Key provisions

[FF26] The Franchise Agreements are governed by "and should be construed in accordance with" Texas law. PX15 § 20.1; *see also id.* § 6.5. ("Franchisee will comply with all applicable laws and regulations governing the operation of its System Restaurants.").

[FF27] The parties agreed to the negotiated terms in the Franchise Agreements in an arms-length manner; Mr. Pandya signed each of the Franchise Agreements on behalf of the Defendants. *See* PX15 at 26, PX18 at 26, PX19 at 27; *see also* Trial Tr. (Day 4) at 14:11–19.

[FF28] Accordingly, the Court gives full force and effect to the plain meaning of the Franchise Agreements' provisions that the parties contracted to and agreed upon. *Certain Underwriters at Lloyd's v. Axon Pressure Prods.*, 951 F.3d 248, 261 (5th Cir. 2020) ("We read contracts as a whole and give words their plain meaning unless the provision is ambiguous.") (internal quotations omitted). In pertinent part, the key provisions of the Franchise Agreements operate as follows.

1. *Brand standards, Upkeep*

[FF29] Pizza Hut's brand standards include requirements that its various franchisees must contractually satisfy. *See* Trial Tr. (Day 1) at 76:7–78:2 (describing brand standards and assorted franchisee obligations). These brand standards are spelled out in the Franchise Agreements and memorialized in Pizza Hut manuals referenced in the agreements. *See, e.g.*, PX38. In pertinent part, these standards include and cover the following areas described below.

[FF30] Section 6.2 promulgates Pizza Hut's brand standards:

> In the Manual, [Pizza Hut] has promulgated standards of operation for each type of System Restaurant. [Pizza Hut] has also promulgated standards of usage for the Pizza Hut Marks, and other standards intended to ensure the consistency of the System Restaurant Concepts. [Pizza Hut] may, from time-to-time, add to, delete, or change standards.

PX15 § 6.2. The promulgation section continues on to note that "Franchisee will comply with any change in the standards within the time-frame set by [Pizza Hut]. At all times throughout the Term, Franchisee will comply with all standards then current." *Id.* Accordingly, the brand standards are robust, ongoing obligations for the Franchisee Defendants.

[FF31] Section 2.3 concerns delivery service. This provision requires that "Franchisee shall provide Adequate Delivery Service to the entire Delivery Area throughout the Term." *Id.* § 2.3. "Adequate Delivery Service means delivery service in accordance with [Pizza Hut]'s then-current standards for delivery, taking into account criteria including potential sales volume, market demographics, saturation analysis ...." *Id.*

[FF32] The parties also agreed to aesthetic and cleanliness provisions. Pursuant to Section 10.5, Franchisee Defendants agreed to "at all times, maintain the interior and exterior of the System Restaurants as well as the surrounding premises in a clean and orderly condition." *Id.* § 10.5.

[FF33] To ensure all of these standards were met, Pizza Hut conducts periodic inspections of its franchisee properties. *See* Trial Tr. (Day 1) at 78:3–23. Section 6.4 of the Franchise Agreement governs such inspections:

> ***9** [i]f any inspection indicates any deficiency, Franchisee will correct or repair the deficiency within 48 hours after Franchisee receives a written report of the deficiency from [Pizza Hut]. If (a) the deficiency is one that Franchisee has a right to cure under Section 18.2 and (b) the deficiency cannot be cured within 48 hours, Franchisee will not be in default if Franchisee begins the necessary corrections or repairs within the 48-hour period, and diligently pursues the work to completion.

PX15 § 6.4; Trial Tr. (Day 2) at 370:16–371:4. However, Pizza Hut deployed stricter criteria with franchisees if health or safety issues are involved. Accordingly, the Franchise Agreements further provide that "[i]f the deficiency is one that imminently threatens the health or safety of Franchisee's employees or the consuming public, [Pizza Hut] may (instead of terminating this Agreement as allowed by Section 18.1 H) require Franchisee to cease operating the effected System Restaurant until the deficiency is corrected." PX15 § 6.4.

[FF34] Under the Franchise Agreements, "[i]f Franchisee does not cure the deficiency within the permitted time, [Pizza Hut] may make, or hire someone else to make, the corrections or repairs. Franchisee will reimburse [Pizza Hut], upon demand, for all of [Pizza Hut]'s repair expenses." *Id.* In sum, the Franchisee Defendants had to timely cure any issue identified by a Pizza Hut representative during an inspection, or they would be liable for any associated remedial costs.

[FF35] Further, Pizza Hut scores its franchisees' performance during such inspections and creates "rack and stack" reports to compare stores' compliance, speed and customer service. *See* Trial Tr. (Day 1) at 96:22–97:14; Trial Tr. (Day 2) at 370:16–24.

2. *Worker's compensation insurance*

[FF36] The Franchise Agreements also contain provisions specific to general liability and worker's compensation insurance. Pursuant to Section 16.2, Franchisee Defendants had to carry liability insurance to comply with the Franchise Agreements. PX15 § 16.2. In particular, the Franchise Agreements required that "Franchisee will obtain and maintain throughout the Term, at its own expense, with a financially-responsible insurance company, comprehensive general liability insurance (including products liability and completed operations coverage) ... as well as workers' compensation insurance (coverage B)." *Id.* The Franchise Agreements further clarify that all of the liability insurance maintained by the Franchisee Defendants "will designate [Pizza Hut] as an additional insured, as its interests may

appear, and will insure against [Pizza Hut]'s vicarious liability for actual and (unless prohibited by applicable law) punitive damages assessed against Franchisee." *Id.*

3. *Trademarks*

[FF37] The Franchise Agreements also account for trademark protection. Section 3.2 of the Franchise Agreement governs the use of Pizza Hut's trademarks and associated intellectual property. *Id.* § 3.2. In full, this comprehensive provision provides that:

> The franchise granted to Franchisee to use the Pizza Hut Marks is applicable only to Franchisee's System Restaurants located at the Location(s), except that Franchisee may use the Pizza Hut Marks in connection with advertisements for the System Restaurants and may deliver products produced at the System Restaurants throughout the Delivery Area. Franchisee will use the Pizza Hut Marks strictly according to the terms and conditions of this Agreement. Franchisee may not offer or sell any food, beverage, or other product (whether or not an Authorized Product) at or from any System Restaurant under or in connection with any trademark, service mark, trade name, or trade dress (including product package design) other than the Pizza Hut Marks, without [Pizza Hut]'s prior, written consent in each case. Franchisee will cause all point of purchase materials and all other paper goods, all exterior/interior signage, and all promotional and advertising materials to bear the Pizza Hut Marks as instructed by [Pizza Hut].

***10** *Id.* Accordingly, Pizza Hut's trademark and trade dress protection provisions are robust. The Franchisee Defendants agreed to the use of Pizza Hut's intellectual property in the limited circumstances described above.

[FF38] As to ownership, the parties stipulated that "Pizza Hut owns numerous trademarks that are registered with the United States Patent and Trademark Office." Docket No. 350 at 34 (parties' stipulations and uncontested facts).

[FF39] Pizza Hut has registered with the United States Patent and Trademark Office ("USPTO") "PIZZA HUT®" alongside the following trademarks:

> 729,847; 1,116,486; 1,430,605; 1,865,062; 1,865,063; 1,865,064; 1,865,065; 2,440,574; 2,459,365; 3,707,636; 3,975,582; 2,470,575; 2,546,893; 2,900,578; 2,916,738; 3,042,453; 3,595,346; 3,693,836; 3,707,636; 3,975,582; 4,286,349; 4,286,350; 4,286,351; 4,286,352; 4,353,380; 4,557,718; 4,969,539; 4,969,540; 5,055,509; 5,287,465; 5,341,046; 5,602,401; 5,641,304; 6,164,200.

See USPTO TRADEMARK ELEC. SEARCH SYS., http://tmsearch.uspto.gov (basic word mark search); *see also* Trial Tr. (Day 1) at 66:10–67:19 (describing examples of Pizza Hut's trademarks). The Court takes judicial notice of these public trademark registrations. *Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011).

[FF40] These trademark registrations are currently active. *See* FF38–FF39.

[FF41] The Pizza Hut trademarks are also used in commerce; Pizza Hut's products associated with the marks are likewise sold in interstate commerce. *See, e.g.*, Trial Tr. (Day 1) at 76:13–22.

[FF42] Pizza Hut has also registered its trade dress for its distinctive "cupola" red roofs: Trademark Reg. Nos. 1,865,062; 1,865,063; 1,865,064; 1,865,065. *See* USPTO TRADEMARK ELEC. SEARCH SYS., http://tmsearch.uspto.gov (word and/or design mark search); *see also* Trial Tr. (Day 1) at 66:24–67:6. The Court likewise takes judicial notice of these public trade dress registrations. *Funk*, 631 F.3d at 783.

[FF43] Pizza Hut also has a distinctive color scheme—with stylized red fashioning—and an interior décor that is recognizable and standardized in commercial use across the country. Trial Tr. (Day 1) at 66:19–67:14; *see also* PX15 § 10.4 (describing "identifying architectural features"); PX114 at 17, 19–23 (depicting cupola, storefronts and interior view).

[FF44] Both the Pizza Hut trademarks and trade dress are utilized on displays and in public advertising. Trial Tr. (Day 1) at 58:19–59:17; 67:11–24.

[FF45] The Franchise Agreement also provides that the Franchisee Defendants—without Pizza Hut's prior written consent—may not "Transfer or offer to Transfer any assets that bear any of the Pizza Hut Marks, except (a) to [Pizza Hut] or a subsidiary or franchisee of [Pizza Hut], or (b) to an established salvage dealer, who destroys or disables the assets transferred under Franchisee's direct supervision." PX15 § 14.3.

4. *Fees*

[FF46] There are several fee provisions contained in the Franchise Agreements that the parties have agreed upon. These fees can be categorized into: (1) Monthly Service Fees; (2) Advertising Fees; (3) De-identification Fees and (4) Other Fees. *See* PX15 §§ 6.11, 7.1, 9.2, 19.1.[4]

a. Monthly Service Fees

***11 [FF47]** The primary payment Franchisee Defendants owed Pizza Hut were Monthly Service Fees. *Id.* § 9.2. These fees kept operations humming and allowed for continued use of the brand as part of the benefit of the bargain. In pertinent part, this payment provision required that:

> Franchisee will pay [Pizza Hut] monthly an amount equal to 6.0% of Franchisee's Gross Sales from each System Restaurant for the prior month.... Franchisee will pay all monthly service fees on or before the 20th day of the month. If [Pizza Hut] has not received the fee by the last day of the month in which the payment is due, Franchisee will pay a "late charge" equal to 1.5% of the delinquent amount (or such lesser amount as [Pizza Hut] may designate) and an equal late charge for each subsequent month that payment is delayed. [Pizza Hut] may apply any payments received from Franchisee to the oldest amounts due from Franchisee, regardless of any contrary designation by Franchisee.

Id. This provision entailed an effective royalty of 6-percent per month of total gross sales, non-inclusive of any late fees owed. *See* Trial Tr. (Day 1) at 71:15–72:11.

[FF48] Further, certain reporting requirements were necessary to ensure compliance with the parties' negotiated agreement. The Franchise Agreement provide that "[w]ith its payment of the monthly service fees (in accordance with Section 9.2), Franchisee will submit to [Pizza Hut], in writing, a monthly statement of Gross Sales." *Id.* § 11.2 (detailing other financial reporting requirements such as a quarterly profits and loss statement); *see also id.* § 11.3 (describing annual profit and loss statement and other inspection and audit requirements). These Monthly Service Fees provisions reflect the bulk of the Franchisee Defendants' payment obligations to Pizza Hut.

b. Advertising Fees

[FF49] In addition, the Franchise Agreements provide for Advertising Fees. *Id.* § 7.1(A). These fees went towards an "Advertising Fund" that Pizza Hut used to "develop and administer advertising, promotional, and marketing programs designed to promote and enhance the collective success of all System Restaurants." *Id.* The Advertising Fees provision states that:

> Franchisee will make a monthly payment to [Pizza Hut] (for the Advertising Fund) in an amount not more than 3% but in no event less than 2.5% of Franchisee's Gross Sales from each System Restaurant for the prior month.... [Pizza Hut], in its sole discretion, may rebate some or all of the Advertising Fund to Franchisee and other franchisees for use in local marketing. [Pizza Hut] need not expend payments to the Advertising Fund in the same year that they are received, and need not prove that Franchisee received any benefit from Franchisee's payments to the Advertising Fund. [Pizza Hut]'s good faith decisions regarding expenditure of the Advertising Fund will be final and binding. [Pizza Hut] may, in its sole discretion, seek input from Franchisee or other franchisees regarding expenditure of the Advertising Fund.

Id. The Franchise Agreement also maintain that Franchisee Defendants had to "timely pay the dues that IPHFHA [International Pizza Hut Franchise Holders Association] assesses its members for contribution to the national advertising fund." *Id.* at § 7.1.

[FF50] IPHFHA is key to the Advertising Fees framework as envisioned by the Franchise Agreements. This arrangement had long been contemplated by Pizza Hut:

> ***12** [Pizza Hut] is a party to an agreement dated March 31, 1975 (as subsequently amended) with IPHFHA concerning advertising for System Restaurants (the "Advertising Committee Agreement"). During the period that the Advertising Committee Agreement is in force, Franchisee will be a member of IPHFHA, will abide by the constitution, bylaws, rules and regulations of IPHFHA, and will timely pay the dues that IPHFHA assesses its members for contribution to the national advertising fund administered by the Advertising Committee under the Advertising Committee Agreement.

Id. § 7.1(B). Importantly, this provision provides that: "[t]he amount that Franchisee pays as dues to IPHFHA for contribution to the national advertising fund administered by

the Advertising Committee under the Advertising Committee Agreement will be credited, dollar for dollar, toward Franchisee's national advertising obligations set forth in Section 7.1.A." *Id.*; Trial Tr. (Day 1) at 113:4–8.

[FF51] In practice this means the dues each Franchisee Defendant pays to IPHFHA are "credited, dollar for dollar" towards their obligation to pay the Advertising Fees to Pizza Hut. *Id.*; *see also* Trial Tr. (Day 1) at 70:1–18, 243:17–244:11. Essentially, this crediting mechanism is an "I owe you" to Pizza Hut. *Id.* at 70:19–23; 71:2–13; *see also* Trial Tr. (Day 3) at 584:1–8 (describing same).

[FF52] The Franchise Agreement also continue on to note that Pizza Hut "will remit all of the national advertising payments that Franchisee makes to [Pizza Hut] to the Advertising Committee." *Id.*

[FF53] Franchisee Defendants allege that IPHFHA is not a party to this suit and therefore Pizza Hut has no damages or standing as to the Advertising Fees. Docket No. 344 ¶ 9. However, the Court determines otherwise, based on the aforementioned crediting operation in the Franchise Agreement. If a Franchisee Defendant fails to pay any of the fees it owes to IPHFHA, then that Franchisee Defendant would not get a credit to offset its payment obligations to Pizza Hut—and then Pizza Hut would be owed the amount due. *See* PX15 § 7.1(A)–(B).

c. Other Fees

[FF54] The Franchisee Defendants also agreed to pay SUS fees ("single unit system") "associated with back-of-house technologies." Trial Tr. (Day 1) at 92:16–93:1. The Franchise Agreement provide that:

> Franchisee will use and maintain in all System Restaurants the franchisee version of the SUS (Single Unit System) Computer System (or such other computerized point-of-sale system as [Pizza Hut] may designate or approve), including all enhancements, upgrades, modifications, and additions to the SUS system designated by [Pizza Hut].... Franchisee will acquire the SUS System software from [Pizza Hut] and/or its affiliates by signing a separate License and Support Agreement, a copy of the current version of which is attached as Appendix H. The SUS License and Support Agreement requires Franchisee to pay [Pizza Hut]'s and/or its affiliates' standard support and maintenance fees.

PX15 § 6.11.[5]

d. De-identification Schema & Fees

[FF55] The Franchise Agreements also account for the use of Pizza Hut's trademarks (and associated systems) for de-identification upon termination. *See* PX15 § 19.1.

> Upon expiration or termination of this Agreement, Franchisee will immediately discontinue use of the Pizza Hut Marks and of the System Restaurant Concepts. In addition, upon notice from [Pizza Hut], Franchisee will immediately discontinue use of [Pizza Hut]'s color scheme (by repainting, if necessary) and will immediately remove all identifying architectural superstructure (as set forth in the plans and specifications) and other distinguishing structures, decor items, furniture, and equipment from all former System Restaurants and other facilities as [Pizza Hut] may direct, in order to effectively distinguish Franchisee's former System Restaurants and other facilities from [Pizza Hut]'s proprietary design(s) and trade dress.

***13** *Id.* The provision repeatedly emphasizes the immediacy by which the de-identification must occur. *Id.*

[FF56] And this provision also contains the parties' agreement on fees associated with de-identification:

> If Franchisee does not make all required changes within 7 days after written notice, then [Pizza Hut], in addition to any other remedy it has, may enter upon the premises of any former System Restaurant owned or leased by Franchisee, and make or cause to be made all necessary changes at the expense of Franchisee (without being liable for trespass or any other tort), which expense Franchisee will pay upon demand.

Id. Accordingly, these de-identification fees would amount to the cost of the work incurred by Pizza Hut.

5. *Indemnification*

[FF57] The Franchisee Agreements also contain robust indemnification provisions wherein the Franchisee Defendants are obligated to cover Pizza Hut's specific legal matters. *Id.* §§ 13.1, 16.4.

[FF58] Franchisee Defendants agreed to "protect, defend, and indemnify [Pizza Hut], its affiliates, officers, and employees, **from any and all proceedings, claims, and causes of action** instituted by Franchisee's employees, or by others, that arise from Franchisee's employment practices." *Id.* § 13.1 (emphasis added).

[FF59] The Franchise Agreement further provided that "Franchisee will indemnify [Pizza Hut], its Affiliates, and their respective employees, officers, and directors **against all loss, damage, or liability (including attorneys' fees and costs)** incurred by any of them owing to claims that **arise directly or indirectly** from or in connection with Franchisee's operations under this Agreement." *Id.* § 16.4 (emphasis added). Accordingly, the indemnity provisions housed in the Franchise Agreements are quite robust. *See* Trial Tr. (Day 1) at 74:11–25.

[FF60] Section 16.4 extends the Franchisee Defendants' indemnification obligations to matters specific to insurance, and critically as to worker's compensation insurance:

> If Franchisee fails to maintain the insurance required by this Section 16, or fails to name [Pizza Hut] as an additional insured under that policy, then Franchisee's obligations of indemnity under this Section 16.4 will also extend to all liability that would have been insured by an appropriate policy (including liability arising from [Pizza Hut]'s own negligence).

Id. (further noting that "[t]he insufficiency of the insurance required to be maintained by Franchisee under the terms of this Section 16 will not be a defense to liability under this Section 16.4.").

[FF61] The Franchisee Defendants allege that Pizza Hut's indemnity provisions damages claims are limited to those relating to worker's compensation matters. Docket No. 344 ¶ 10. However, the Court determines that the Franchise Agreements are not so limited. As noted, the indemnification provisions are expansive, covering "any and all proceedings, claims, and causes of action instituted by Franchisee's employees, or by others, that arise from Franchisee's employment practices." PX15 § 13.1. The Franchisee Defendants take too narrow a reading of "in connection with Franchisee's operations" at the expense of all other clauses in this indemnity provision. *See, e.g., Hennings v. CDI Corp.*, 451 Fed. Appx. 359, 367 (5th Cir. 2011) (criticizing a party's "reading of the contract" as "too narrow.").

6. *Remedies & Relief*

***14 [FF62]** The Franchise Agreements also provide for various remedies and relief to Pizza Hut. For example, Section 20.4 details the injunctive relief potentially available to Pizza Hut:

> In case of a breach or a threatened breach of any provision of this Agreement by Franchisee, [Pizza Hut] will, in addition to any other remedy it has, and notwithstanding any other provision of this Agreement (including Section 20.3), be entitled to, an injunction restraining Franchisee from committing or continuing to commit any breach or threatened breach of this Agreement, without showing or proving any actual damage sustained by [Pizza Hut], and without posting bond or other security.

PX15 § 20.4; Trial Tr. (Day 1) at 111:3–7 (describing provision). And Section 20.5 outlines how attorneys' fees should be paid. Namely, "[i]f [Pizza Hut] and Franchisee become involved in litigation, [then] the losing party will reimburse the prevailing party's outside attorneys' fees and all expenses." *Id.* § 20.5.

B. Transformation Amendment

[FF63] On May 1, 2017, Pizza Hut and the Franchisee Defendants agreed to a Transformation Amendment to the Franchise Agreements that provided an incremental infusion of capital to transform the brand. *See* PX24; *see also* Trial Tr. (Day 1) at 80:22–81:23, 83:3–14; Trial Tr. (Day 4) at 15:4–7.

[FF64] Pizza Hut invested $131.5 million, divvied up between various franchisees nation-wide in exchange for certain agreements. PX24 § 1.01; Trial Tr. (Day 1) at 83:15–25.

[FF65] The three pertinent new agreements concerned: (1) the New Operational Brand Standards (*id.* § 3.03); (2) a new Digital Innovation Fees (termed "Digico") (*id.* § 4.03); (3) increased Monthly Advertising Fees (*id.* § 6.01); and (4) an increase in the SUS fee (*id.* § 5.03). *See also* Trial Tr. (Day 1) at 92:1–10.

[FF66] As to the New Operational Brand Standards, the Transformation Amendment provides that: "new or modified Brand Standards include (but are not limited to) speed metrics governing delivery time; requirements to maintain product temperature; customer service metric; and requirements that Franchisee continuously maintain organizational capabilities

through its engagement and maintenance of qualified operators and key organizational leaders." PX24 § 3.03; Trial Tr. (Day 1) at 85:15–86:20.

[FF67] Section 4.03 pertains to the new Digico Fees and states that Pizza Hut:

> [W]ill charge, and Franchisee will pay, a Digital Innovation Fee in connection with costs and projected expenses associated with products and services provided or obtained in connection with Digital Innovation for the benefit of the Pizza Hut System. Specifically, the Digital Innovation Fee shall apply to costs including, but not limited to ...

each transaction conducted through a digital or other automated channel. *See id.* § 4.03; *see also* Trial Tr. (Day 1) at 91:2–21.

[FF68] Specific to the SUS Fee increase, Section 5.03 provides that:

> Franchisee acknowledges and agrees that, effective June 1, 2017, the SUS Support Fee payable by Franchisee for each of its franchised Pizza Hut restaurants will be $2,500 until December 31, 2018. This provision shall not modify or otherwise limit [Pizza Hut]'s right to impose future fee increases pursuant to the SUS Agreement.

***15** *Id.* § 5.03.

[FF69] Lastly, Section 6.01 bolsters the Advertising Fund Contribution: "Franchisee's contribution to [Pizza Hut] for the Advertising Fund shall increase to 4.75% of Franchisee's prior monthly Gross Sales for each System Restaurant embraced by the Pizza Hut Franchise Agreement amended hereby." *Id.* § 6.01.

C. Pandya Guaranties

[FF70] In addition, "Pandya signed a personal guarantee with respect to each of the Franchise Agreements (the 'Guaranties' herein)." Docket No. 350 at 34 (parties' stipulations and uncontested facts); Trial Tr. (Day 1) at 73:6–21; Trial Tr. (Day 4) at 14:20–22.

[FF71] The parties further stipulated that Pandya's "Guaranties are valid and enforceable contracts." Docket No. 350 at 34.

[FF72] Principally, Section 15.2 of the Franchise Agreements concerns the following Guaranties:

> Upon the execution of this Agreement, upon each Transfer of an Interest in Franchisee, and at any other time upon [Pizza Hut]'s request, all holders of a 10% or greater Interest in Franchisee will execute a written agreement in the form of Appendix E, personally guaranteeing, jointly and severally with all other holders of a 10% or greater Interest in Franchisee, the full payment and performance of Franchisee's obligations to [Pizza Hut] and to [Pizza Hut]'s Affiliates.

PX15 § 15.2. These Guaranties were attached as Appendix E to the three Franchise Agreements. *See id.*, App'x E (Ronak Foods); *see also* PX18, App'x E (Pandya Restaurants); PX19, App'x E (JNP Foods).

[FF73] Pandya personally guaranteed the Franchise Agreements and "agree[d] to indemnify Pizza Hut, Inc." "and the officers, directors, and employees of each of them from any liability or expense (including reasonable attorneys' fees) sustained by reason of the failure of Franchisee to perform and comply with the terms and conditions of the Location Franchise Agreement." PX15, App'x E ¶ 2.

[FF74] Pandya made clear that:

> We also understand that **this is a continuing, absolute, and unconditional Guaranty**, coextensive with the Location Franchise Agreement. We each expressly waive notice of acceptance of this Guaranty, notice of default by Franchisee, and notice of nonpayment or nonfulfillment of Franchisee's duties, liabilities, and obligations under the Location Franchise Agreement.

PX15, App'x E ¶ 4 (emphasis added). Accordingly, Pandya's Guaranties serve principally to (1) underscore the "continuing, absolute, and unconditional" nature of the Franchisee Defendants' obligations under the Franchise Agreements and (2) acknowledge various prior defaults by the Franchisee Defendants. *See id.*

D. Default

[FF75] As such, the evidence in the record reasonably supports an inference that the Franchisee Defendants defaulted numerous times on their obligations under the Franchise Agreements.

[FF76] As an initial matter, the parties stipulated that "Pizza Hut provided Franchisee Defendants with multiple notices of default under the Franchise Agreements." Docket No. 350 at 34.

[FF77] The Franchisee Defendants further acknowledge such defaults in the Forbearance Agreement (discussed *infra* § V.A.3): "Notwithstanding the foregoing, Franchisee and Guarantor [Pandya] acknowledge the receipt of the notices of defaults and Franchisee's failure to timely cure all said defaults." PX32 § 7.1.

***16** **[FF78]** There is little dispute then that the Franchisee Defendants defaulted on their obligations under the Franchise Agreements. *See e.g.*, Trial Tr. (Day 1) at 97:15–104:13. These defaults were well documented; Pizza Hut provided extensive documentation of all the default notifications and reminders it transmitted to the Franchisee Defendants. *See id.*; *see also* PX6 (Compilation of Notices of Default from Pizza Hut under the Franchise Agreements).

[FF79] Between October 6, 2014 and October 15, 2018, Pizza Hut transmitted over 45 notices to the Franchisee Defendants. *Id.* at 1–145. These notices of default were between all of the franchisees (JNP Foods, Ronak Foods and Pandya Restaurants) at different times and in different capacities. These defaults ran the gamut of unauthorized store closures to operational and financial issues. *See* Trial Tr. (Day 1) at 97:24–98:6.

[FF80] For example, the following defaults were documented and include, but are not limited to: (1) Failure to pay monthly service and advertising fees:

> Your default consists of failure to pay, when due, sums owing to [Pizza Hut]... including monthly service fees pursuant to Section 9.2, failure to submit financial information pursuant to Section 11.2 ... and, failure to pay all charges and assessments made by I.P.H.F.H.A., Inc. (also known as International Pizza Hut Franchise Holders Association) as required by Section 7.1 of the Franchise Agreements.

PX6 at 1.

[FF81] (2) Failure to abide by Pizza Hut's Brand Standards:

> Pursuant to Section 5.2.2 of the Brand Standards ... you are required to use [Pizza Hut]'s approved Kitchen Management System, currently KMX, to the exclusion of any other Kitchen Management System. As contemplated by your Franchise Agreement, Pizza Hut (including its affiliates) is currently the only approved supplier of KMX. As of this communication, your System Restaurant 027025 located 2250 Street Road, Bensalem, Pennsylvania (the 'Restaurant') is using an unapproved Kitchen Management System. Accordingly, you are in default of the Franchise Agreement due to this violation of our Brand Standards and this breach of the Transformation Amendment.

Id. at 34.

[FF82] And (3) food safety and hospitality violations:

- "Failed three (3) consecutive Food Safety Compliance Check ('FSCC') audits." *Id.* at 98;
- "Failed three (3) consecutive Hospitality, Quality Product, Speed of Service, and Cleanliness ('HQSC') audits." *Id.* at 100;
- "[F]ailure to have a [Pizza Hut]-approved Qualified Operator in place." *Id.* at 105.

[FF83] Pandya himself acknowledged such defaults in the Guaranties (PX15, App'x E ¶ 4) and in a signed letter of acknowledgment dated June 20, 2018. *See* Docket No. 350 at 34 (parties' stipulations and uncontested facts); *see also* PX6 at 82 (admitting to numerous defaults, including failure to pay thousands of dollars in fees, operational defaults and lack of compliance with Pizza Hut's brand standards).

[FF84] Accordingly, the Court determines—as the parties themselves have—that the Franchisee Defendants committed numerous defaults under the Franchise Agreements.

E. Termination

[FF85] The parties agreed Pizza Hut could terminate each Franchise Agreement—without providing any opportunity to cure—if certain events transpired.

[FF86] Section 18.1 provides for certain defaults without a right to cure. PX15 § 18.1.

> Franchisee will be in default and, in addition to all other remedies [Pizza Hut] has at law or in equity, including money damages, injunctive relief, and attorney's fees, [Pizza Hut] may, upon written notice to Franchisee, terminate this Agreement without affording Franchisee any opportunity to cure the default upon the occurrence of any of the following events or conditions: ...

***17** *Id.*

[FF87] In pertinent part, concerning these defaults without cure right, these termination provisions include certain inadequate financial performance:

> If the total of Franchisee's debts is greater than the fair value of Franchisee's assets, or if Franchisee is generally not paying its debts as those debts become due, or if Franchisee admits in writing its inability to pay its debts, or if Franchisee makes a general assignment for the benefit of its creditors, or if Franchisee ceases doing business as a going concern, or if Franchisee files a petition commencing a voluntary case under any chapter of the Bankruptcy Code ....

Id. § 18.1(A). Further, no cure right was permitted under Section 18.1(G) for instances of habitual default: "[i]f Franchisee defaults under Section 18.2 on 3 or more occasions in any 12-month period, or on 5 or more occasions in any 36-month period, even if Franchisee would otherwise be given an opportunity under Section 18.2 to cure the particular default involved." *Id.* § 18.1(G).

[FF88] Endangerment was also covered as follows: "[i]f Franchisee conducts the business licensed by this Agreement so contrary to this Agreement and the Manual as to constitute an imminent danger to the public health." *Id.* § 18.1(H).

[FF89] In addition, two principal defaults were subject to modified cure rights pursuant to Section 18.2: (1) if the Franchisee Defendants do not promptly pay "any moneys ow[ed] to [Pizza Hut] or its Affiliates" and (2) if the Franchisee Defendants "breach[ ] any term, covenant, duty, or condition of this Agreement not listed in Section 18.1." PX15 § 18.2. This provision also details the subsequent, appropriate conditions for termination in accordance with the default:

> [Pizza Hut] will give Franchisee 30 days after the effective date of notice to cure any such default. If Franchisee's current default involves a failure to timely pay amounts owing [Pizza Hut] or its Affiliates, and if Franchisee has previously been in default for failure to timely pay under this Agreement in the 12 months immediately before the date on which [Pizza Hut] gives Franchisee notice of Franchisee's current default, [Pizza Hut] will only be required to give Franchisee 10 days to cure Franchisee's current default.

Id. § 18.2. Section 19.3 further clarifies the (lack of) effect these provisions have on other duties under the Franchise Agreement: "[i]n no event will a termination of this Agreement affect the obligations of Franchisee and its Related Persons to pay their accrued monetary obligations to [Pizza Hut] and to comply with their various post-term obligations, including the covenants in Section 12." *Id.* § 19.3.

[FF90] Ultimately, the above referenced defaults transpired and Pizza Hut terminated the Franchise Agreements under the Section 18 provisions listed above because the Franchisee Defendants did not cure. *See* Trial Tr. (Day 1) at 104:14–16. As noted, the Franchisee Defendants defaulted in numerous respects, relating to: operational defaults, $1.6 million in unpaid fees, failure to have a qualified operator and violations of Pizza Hut's Brand Standards—which the Franchisee Defendants repeatedly (and contractually) acknowledged. *See* PX6 at 82, *supra* § IV.D; *see also* Trial Tr. (Day 1) at 101:1–104:13. Pizza Hut terminated the Franchise Agreements effective October 15, 2018. PX33; PX34; Docket No. 350 at 34 (parties' stipulations and uncontested facts).

***18 [FF91]** And accordingly, Franchisee Defendants' defaults triggered Pandya's contractual obligations under the Guaranties. *See* PX15, App'x E; *id.* § 15.2. However, Pandya failed to pay the numerous fees owed or cure any of the violations under the Franchise Agreements. *See* PX32 § 7.1.

[FF92] In addition, pursuant to the Franchise Agreements, the Franchisee Defendants were obligated to indemnify Pizza Hut for various legal matters, which it did not. *See* PX15 §§ 13.1, 16.4, *supra* §§ IV.A.5, IV.C; *see also* Trial Tr. (Day 1) at 218:11–220:11. The Court credits the evidence describing these matters in detail—with individual billable entries and an Itemized Invoices tab—in PX1.

V. Forbearance Agreement

[FF93] After Pizza Hut terminated the Franchise Agreements, the parties next entered into a Forbearance Agreement concordant with their obligations to forbear. *See* PX32.

[FF94] The parties stipulated that the "Forbearance Agreement is a valid and enforceable contract." Docket No. 350 at 34. The Forbearance Agreement is governed by Texas law. PX32 § 8.7.

[FF95] The purpose of this agreement was to permit Franchisee Defendants to "proceed with diligence to effect a sale of the Restaurants to a third party or parties approved by [Pizza Hut] in its sole and absolute discretion." *Id.* § 3.1.

[FF96] For its part, Pizza Hut:

> agree[d] to forbear from enforcing the Terminations and exercising its remedies under the Guaranties or commencing any judicial proceedings to enforce the Terminations (to the extent applicable) or against the

> Guarantor to collect amounts due under the Guaranties until the earlier to occur of (a) Sale and satisfaction of all outstanding obligations due under Franchise Agreements and/or any other agreements between the parties; (b) March 3, 2019 or any extension (should one be granted); or (c) the date upon which any of the Forbearance Conditions (as defined below) is not satisfied by the date required (the "Forbearance Period").

Id. § 6.1 ("Forbearance"). The Franchisee Defendants agreed that "any continued operation of the Restaurants by Franchisee is strictly on a post-termination, at-will basis." *Id.* § 2.1.

A. Key provisions

[FF97] The parties agreed to the negotiated terms in the Forbearance Agreement in an arms-length manner; Mr. Pandya signed the Forbearance Agreement on behalf of the Franchisee Defendants. *See id.* at 14; *see also* Trial Tr. (Day 3) at 657:13–19.

[FF98] Accordingly, the Court gives full force and effect to the plain meaning of the Forbearance Agreement's provisions that the parties agreed upon. *Gonzalez v. Denning*, 394 F.3d 388, 392 (5th Cir. 2004) ("The terms used in the [contract] are given their plain, ordinary meaning unless the [contract] itself shows that the parties intended the terms to have a different, technical meaning."). In pertinent part, the key provisions of the Forbearance Agreement operate as follows.

1. *Enforceability*

[FF99] In the front matter, the Franchisee Defendants acknowledge that their prior commitments made in the Franchise Agreements (PX15; PX18–19) are valid and ongoing. Specifically, the Franchisee Defendants note that:

> Franchisee, Guarantor, and Franchisor acknowledge and agree that each of their respective obligations, liabilities and duties under the Franchise Agreements and Guaranties, which remain enforceable post-termination, are and shall remain valid, binding and enforceable against them. Guarantor acknowledges and agrees that his obligations, liabilities and duties under the Guaranties, which remain enforceable, are and shall remain valid, binding and enforceable against him and any other guarantor.

***19** PX32 § 2.2. This provision explicitly contemplates keeping intact the Franchise Agreements. *Id.*

2. *Forbearance Conditions*

[FF100] The Forbearance Agreement also contemplates several conditions whereby the parties would forbear on certain issues.

[FF101] Section 6.2(a) contemplates monthly fees continuing to accrue—and all past-due royalties were still owed—however, Pizza Hut had to forbear from collecting until a sale occurred or upon termination.

> Franchisee shall pay on a monthly basis any and all amounts to Franchisor ... royalties, advertising fees, and any other amounts typically paid to Franchisor by Franchisees or to any entities as may be required by the Franchise Agreements (e.g. IPHFHA) as aforesaid, accruing at the same rates as prior to Termination as set forth in the Franchise Agreements, for the period arising on and after the date of this Agreement. All past-due royalties, advertising fees, and any other amounts due to Franchisor and/or its related advertising cooperatives remain fully due and payable; however, Franchisor shall forbear from collecting the past-due royalties until a Sale of the Restaurants, at which time the past-due royalties shall be paid at closing. If the Sale of the Restaurants does not occur, the aforesaid amounts shall be due and payable immediately upon termination of the Forbearance Period.

Id. § 6.2(a). The forbearance conditions continue with a provision relating to brand standards: "Franchisee shall operate the Restaurants (and otherwise conduct Franchisee's Pizza Hut business) during the Forbearance Period in accordance with the Franchise Agreements and any and all Pizza Hut Brand Standards referenced therein." *Id.* § 6.2(b).

[FF102] The Forbearance Agreement also describe a series of events that the parties agreed needed to transpire on the following timeline to effectuate the parties' bargained for agreement:

- "Franchisee shall have on or prior to December 14, 2018 entered into a binding written Broker engagement in accordance with Section 3.1(c) above with a Broker preapproved by Franchisor." *Id.* § 6.2(f).
- "Franchisee shall have on or prior to December 21, 2018, entered into a letter of intent with a Purchaser to effect the Sale of the Restaurants." *Id.* § 6.2(g).
- "Franchisee shall have on or prior to January 28, 2019, entered into a binding written asset purchase agreement with a Purchaser to effect the Sale of all of the

Restaurants. The material terms of such Sale agreements must be approved by Franchisor in its sole discretion." *Id.* § 6.2(h).

- "Franchisee shall close the Sale of all of the Restaurants to a Purchaser on or before March 2, 2019. Franchisee may request an extension of this closing date upon a showing to Franchisor that it made its best efforts to timely close the Sale of all of the Restaurants." *Id.* § 6.2(i).

[FF103] In key part, the Franchisee Defendants needed to close on a sale of all the restaurants in question by March 2, 2019. *Id.* Irrespective of that date and associated obligations, Pizza Hut had no "obligation to forbear as set forth in Section 6.1" if "Franchisees fail[ed] to timely satisfy any of the conditions in Sections 6.2(f), (g), (h), or (i)." *Id.* § 6.2(j).

3. *Acknowledgments & Monies Owed*

***20 [FF104]** Importantly, Franchisee Defendants acknowledge receipt of the prior notices of default in the Forbearance Agreement. *See id.* § 7.1 ("Franchisee and Guarantor acknowledge the receipt of the notices of defaults and Franchisee's failure to timely cure all said defaults."); *see also* Trial Tr. (Day 1) at 113:9–114:1.

[FF105] Franchisee Defendants further acknowledge their indebtedness to Pizza Hut "for all royalties and advertisement fees that remain due and are identified in Schedule B attached hereto." PX32 § 2.3 (emphasis in original).

[FF106] In Schedule B, those figures total $1,670,101.75. *Id.* at 17.

[FF107] Further, the plain text of this attached schedule reads that Schedule B is an "Estimated Indebtedness to Franchisor and/or Designee as of October 15, 2018 only." *Id.* It continued on to note that "([f]or clarity: Franchisee remains responsible for all amounts that **have come or shall come due**.)" *Id.* (emphasis added).

[FF108] Schedule B also notes that "[l]ate charges" (as is the situation here) "will be recalculated when payment is received." *Id.*

[FF109] Franchisee Defendants argue that the amount of damages owed under the Forbearance Agreement is fixed at approximately $567,254.63—the amount allegedly owed to Pizza Hut as agreed to by the parties in Schedule B. Docket No. 344 ¶ 24. However, the Forbearance Agreement plainly contemplates ongoing damages, as opposed to a fixed payment.

[FF110] Schedule B further indicates that "Franchisee remains responsible" for royalty fees for "all amounts that have come or shall come due." PX32 at 17.

[FF111] The Court credits Pandya's testimony that acknowledged as much: MS. COLDWELL: I want to go to Section 2.3.

> Q. (BY MS. COLDWELL) In Section 2.3, you acknowledge and agree you are indebted to franchisor and its affiliates for all royalties and advertisement fees that remain due and are identified in Schedule B. Did I read that correctly?
>
> A. [By Mr. Pandya] Correct.
>
> Q. And you signed and agreed to this. Correct?
>
> A. Correct.
>
> Q. Okay. And let's look at Schedule B just for completeness here. And do you see at the top it says, "Estimated indebtedness to franchisor and/or designee as to October 15, 2018 only"?
>
> A. Yes.
>
> Q. And do you see in the parens there it says, "For clarity, franchisees remains responsible for all amounts that have come or shall become due."
>
> A. Yes.
>
> Q. So you had an ongoing obligation to continue to pay all amounts that have come or shall come due. Correct?
>
> A. Correct.

Trial Tr. (Day 4) at 17:23–18:19.

[FF112] Apart from the plain meaning found in Schedule B, Franchisee Defendants' argument belies Section 6.2(A) (Forbearance Conditions) of the Forbearance Agreement. PX32 § 6.2(A). This provision details how the Franchisee Defendants will "pay on a monthly basis" [and] "on and after." *Id.* This language is indicative of an ongoing obligation for Franchisee Defendants to pay.

[FF113] In sworn testimony, at trial Pandya confirmed he understood and agreed to this provision. The Court credits Pandya's testimony:

> MS. COLDWELL: Let's look at section 6.2A.
>
> Q. (BY MS. COLDWELL) And this states, "Franchisee shall pay on a monthly basis any and all amounts to franchisor, or its designees as the case may be, for royalties, advertising fees, and any other amounts typically paid to franchisor by franchisees or to any entities as may be required by the franchise agreements, IPHFHA as aforesaid, accruing at the same rates as prior to termination as set forth in the franchise agreements for the period arising on or after the date of this agreement." Did I read that correctly?
>
> ***21** A. [By Mr. Pandya] Correct.
>
> Q. And you agreed to that. Correct?
>
> A. Correct.
>
> Q. Okay. And those are the amounts that shall come due. Correct?
>
> A. Correct.

Trial Tr. (Day 4) at 18:20–19:11.

[FF114] Accordingly, the fees owed by Franchisee Defendants are not so limited.

4. *Indemnification*

[FF115] As with the Franchise Agreements, the Forbearance Agreement contains a robust indemnification provision that provides:

> Without in any way Limiting any of the rights and remedies otherwise available to any Releasee, Franchisee and Guarantor jointly and severally shall indemnify, defend and hold harmless each Releasee from and against all loss, liability, claim, damage (including incidental and consequential damages) or expense (including costs of investigation and defense and reasonable attorney's fees) involving third party claims, arising directly or indirectly from or in connection with the operation of the Restaurants, the Franchise Agreements, the Guaranties, the subject matter addressed by Exhibit I attached hereto, or any matter embraced by or contemplated in this Agreement, including (i) the assertion by or on behalf of Franchisee, Guarantor or any of their Affiliates of any claim or other matter released pursuant to this Article VII and (ii) the assertion by any third party of any claim or demand against any Releasee which claim or demand arises directly or indirectly from, or in connection with, any assertion by or on behalf of Franchisee, Guarantor or any of their Affiliates against such third party of any claims or other matters released pursuant to this Article VII.

PX32 § 7.2; *see also id.* § 7.1 (Release provisions).

[FF116] The Franchisee Defendants are responsible to indemnify the same matters as addressed previously and covered under the Franchise Agreements. *See supra* § IV.E (citing PX1). These obligations were reaffirmed in the Forbearance Agreement. PX32 §§ 2.2 (Enforceability of ongoing obligations under the Franchise Agreements), 7.2 (Indemnification, above).[6] These indemnification obligations "shall remain in full force and effect" and "survive any termination" of the Forbearance Agreement. *Id.* § 8.3 (Survival).

[FF117] The Franchisee Defendants did not fulfill these indemnification obligations. *See* Trial Tr. (Day 1) at 218:11–220:11.

B. Forbearance & Defaults

[FF118] In view of the Forbearance conditions listed above (*supra* § V.A), if the Franchisee Defendants did not meet certain terms and deadlines Pizza Hut would not be "oblig[ed] to forbear as set forth in Section 6.1." *Id.* § 6.2(j).

[FF119] For Pizza Hut's part, it had to provide an opportunity for notice and cure under Section 6.5. *Id.* § 6.5. In particular, Pizza Hut agreed to "provide Franchisee reasonable notice of failure to satisfy the Forbearance Conditions.... Upon such notice of a failure to satisfy Section 6.2(b) or (e) of this Agreement, Franchisee shall be given no more than three (3) days to remedy and/or cure any such failure." *Id.* However, no such cure right was afforded in the event of a default that: "(1) implicate[d] food safety (e.g. a FSCC [Food Safety Compliance Check] audit failure) in the Restaurants or (2) otherwise involve[d] actions and/or conduct that, in Franchisor's reasonable discretion, constitute(s) an imminent danger to the public or the public's health, Franchisee shall be provided no opportunity to cure." *Id.*

***22 [FF120]** The evidence in the record reasonably supports an inference that Franchisee Defendants defaulted numerous times on their obligations under the Forbearance Agreement.

[FF121] As an initial matter, the Franchisee Defendants acknowledged such defaults in the Forbearance Agreement as follows: "[n]otwithstanding the foregoing, Franchisee and Guarantor [Pandya] acknowledge the receipt of the notices of defaults and Franchisee's failure to timely cure all said defaults." *Id.* § 7.1.

[FF122] There is little dispute then that Franchisee Defendants defaulted on their obligations. *See* Trial Tr. (Day 1) at 117:2–119:11. These defaults were well documented; Pizza Hut provided extensive documentation of all the default notifications, reminders and opportunities provided to cure the defaults to the Franchisee Defendants. *See* PX4 (Compilation of Notices of Default from Pizza Hut to Pandya).

[FF123] Between November 7, 2018 and April 9, 2019, over 25 notices were transmitted by Pizza Hut to the Franchisee Defendants. *See id.* at 1–62. These notices of default were between all of the Franchisees at different times and in different capacities (*i.e.*, between JNP Foods, Ronak Foods and Pandya Restaurants). Franchisee Defendants' defaults ran the gamut of unauthorized store closures to operational and financial issues. *See generally id.*

[FF124] For example, the following defaults were documented:

- Food safety failures: "System Restaurant 028211 ... has failed four (4) out of five (5) Food Safety Compliance Check ('FSCC') audits." *Id.* at 1.
- Cleanliness failures, including *e.g.*, "heavy dust build-up," "encrusted debris," "excessive debris" and "excessive grease build-up." *Id.* at 8–9.
- Sanitation: Multiple issues with "Pest Control." *Id.* at 13.
- Failure to pay required fees: "Payment of Fees," "Advertising Contribution" and "Digico Fees." *Id.* at 41.
- Failure to upgrade assets: "System Restaurant 027025 ... failed to complete the specific asset upgrade on the Restaurant." *Id.* at 57.

[FF125] These select defaults were some amongst many others. *See id.* at 1–62.

[FF126] Accordingly, the Court determines that the Franchisee Defendants defaulted on their obligations on multiple grounds. Pizza Hut repeatedly provided the Franchisee Defendants with the opportunity to cure; Franchisee Defendants opted against doing so during the term of the Forbearance Agreement. *See id.*

C. Expiration, Receivership & Termination

[FF127] Ultimately, Pizza Hut did not extend the term of the Forbearance Agreement pursuant to Section 6.1. PX32 § 6.1.

[FF128] Pizza Hut had a right to terminate the Forbearance Agreement as of November 7, 2018, when the Franchisee Defendants had defaulted on their obligations, specifically by violating restaurant food safety standards. *See id.* § 6.5; *supra* § V.B.

[FF129] Further, as described above (*supra* § V.B), the Franchisee Defendants had defaulted on their obligations under the Forbearance Agreement.

[FF130] Franchisee Defendants did not "enter[ ] into a letter of intent with a Purchaser to effect the Sale of the Restaurants" by December 21, 2018 pursuant to Section 6.2(g). PX32 § 6.2(g); Trial Tr. (Day 4) at 20:2–25:12. And Franchisee Defendants did not, by January 28, 2019, "enter[ ] into a binding written asset purchase agreement with a Purchaser to effect the sale of the restaurant." *Id.*; PX32 § 6.2(h). Likewise, the Franchisee Defendants did not close the sale of the restaurants by March 2, 2019. *See* Trial Tr. (Day 1) at 120:16–21; Trial Tr. (Day 4) at 20:2–25:12; *see also* PX32 § 6.2(i).

***23 [FF131]** Consequently, Pizza Hut had termination rights—on multiple grounds—for "failure to satisfy the Forbearance Conditions" under Section 6.5. *See* PX32 § 6.5.

[FF132] Ultimately, a federal receiver was appointed over Franchisee Defendants' restaurants on April 10, 2019. *First Franchise Cap. Corp. v. Pandya Rests.*, No. 1:19-CV-254, Docket No. 8 (S.D. Ohio Apr. 10, 2019). This effectively terminated Pandya's ability to sell his restaurants under the Forbearance Agreement. *Id.* (describing how the receiver had "full control" over the restaurants and Franchisee Defendants had "neither possession nor control of, nor any right to," the assets placed into receivership).

[FF133] Pandya believed the Forbearance Agreement terminated on April 10, 2019. *See* Trial Tr. (Day 4) at 30:4–31:23.

[FF134] Ultimately, the receivership terminated right before midnight on July 31, 2019, and the Pizza Hut restaurants went unsold. *First Franchise*, No. 1:19-CV-254 at Docket No. 44.

VI. Transfer Agreement

A. Key provisions

[FF135] The parties agreed to the terms in the Transfer Agreements in an arms-length, heavily negotiated manner, with both sides represented by counsel. *See* Docket No. 317 at 10 (citing Docket No. 215, Exs. A–G (email exchanges between the parties showing the back and forth of contract negotiations and substantive changes made between them to the Transfer Agreement)); *see also* Trial Tr. (Day 1) at 143:8–144:4, 151:3–7; PX88 (correspondence between parties' counsel (dated Aug. 8, 2019)).

[FF136] Pandya made handwritten notes (*e.g.*, PX111), initialed the agreement pages and ultimately signed the Transfer Agreement on behalf of all the Franchisee Defendants, including Intervenor Ronak Capital. *See* PX114 at 29; Trial Tr. (Day 1) 160:12–17; *see also supra* n.1.

[FF137] Accordingly, the Court gives full force and effect to the plain meaning of the Transfer Agreement's provisions that the parties agreed upon. *ELF Expl. v. Cameron Offshore Boats*, 863 F. Supp. 386, 391 (E.D. Tex. 1994) ("A contract is given its plain grammatical meaning unless that meaning would defeat the intent of the parties.") (quoting *REO Indus. V. Natural Gas Pipeline Co.*, 932 F.2d 447, 453 (5th Cir. 1991)).

[FF138] In pertinent part, the key provisions of the Transfer Agreement operate as follows.

1. *Transfer, Commercially Reasonable Efforts*

[FF139] The heart of the Transfer Agreement provides that "Pandya will cooperate fully to effectuate a transfer of the Open [Pizza Hut] Stores to a buyer approved by [Pizza Hut] in its sole discretion (the 'Purchaser'), which transfer shall close no later than the expiration of the Term." PX114 § 5 (Full Cooperation re: Transfer of Assets and Other Rights). This term lasted from August 21, 2019 through October 3, 2019. *See id.* § 1 (defining the "Term").

[FF140] Specific to the exchange, Pizza Hut "agree[d] to use commercially reasonable efforts to identify a Purchaser willing to (i) enter into the transfer and assignment transactions contemplated by this Agreement and (ii) make an opening bid at any Article 9 Sale." *Id.* § 6.

[FF141] For their part, Franchisee Defendants "ha[d] no approval rights over the identity of the Purchaser or the purchase price, if any." *Id.*; Trial Tr. (Day 2) at 314:4–16.

***24 [FF142]** The Court credits the record evidence and contractual provisions to determine that the aforementioned obligations were what was required of Pizza Hut under the Transfer Agreement. Franchisee Defendants' understanding that Pizza Hut was required to do more is misplaced, as the Transfer Agreement does not require such. *See* PX114 §§ 5–6.

2. *Worker's Compensation Insurance*

[FF143] The Transfer Agreement requires Pandya to have necessary worker's compensation insurance. *Id.* § 9. In particular:

> Pandya will ensure it has in place insurance in amounts and coverages maintained by typical franchisees and otherwise required by law (e.g., worker's compensation and general liability insurance) and will, on or before the Effective Date, provide to [Pizza Hut] copies of the declaration pages for the applicable insurance policies and evidence that [Pizza Hut] is listed as an additional insured.

Id. As the provision indicates, Pandya was also required to provide and demonstrate to Pizza Hut that he in fact held the required worker's compensation insurance. *Id.*

3. *Tax Liens on Transferred Assets*

[FF144] The Transfer Agreement specifically contemplates that there should not be any tax liens on transferred assets. *See id.* § 5(A)(1) ("Full Cooperation re: Transfer of Assets and Other Rights"). The agreement details how:

> Pandya will transfer title to all furniture, fixtures and other equipment ('FF&E') currently located at the Open [Pizza Hut] stores (including all goods, inventory and other personal property) (the 'Store Assets') to [the] Purchaser ... [wherein] all such Store Assets must be transferred (and Pandya will take all actions necessary to accomplish such transfer) to Purchaser free and clear of any and all Liens.

Id. In effect, the Franchisee Defendants needed to run lien searches to identify any potential lienholders—as to the transferred assets—to effectuate the UCC Article 9 sale process. *See id.*; *see also id.* § 5(A)(2) ("Pandya will effect such transfer of the Store Assets to Purchaser no later than

the expiration of the Term by means of a sale that complies with all requirements applicable to a commercially reasonable disposition under UCC Article 9 ... The Article 9 Sale must ... result in the Store Assets being sold to Purchaser or such other successful [Pizza Hut] approved bidder free and clear of any and all Liens.").

[FF145] Further, the Transfer Agreement requires notice to be given to the seller's lienholders for the proposed UCC Article 9 sale, who had the ability to object to or claim an interest in the proposed sale proceeds. *Id.* As such, the existence of an outstanding tax lien on the assets of the restaurant could have interrupted a successful transaction.

4. *Landlord Matters*

[FF146] The Transfer Agreement also provides for several matters concerning landlords and leases as they related to the franchised Pizza Hut restaurants.

[FF147] Section 5(B) provides that all leases for open Pizza Hut stores with landlords affiliated with Pandya be assigned to the future purchase and that 90 percent of all other leases had to be assigned using commercially reasonable efforts. *Id.* § 5(B).

[FF148] Pandya further acknowledged he would "have the right to reject the Purchaser as assignee for a property wholly-owned by [him] if [he], acting commercially reasonably, determine[d] that the Purchaser [was] not reasonably creditworthy." *Id.* § 5(B)(2)(a).

***25 [FF149]** And Pandya agreed that "if any other landlord accept[ed] Purchaser as the assignee under a lease" he would have to accept the purchaser or be in breach of the Transfer Agreement. *Id.*

[FF150] However, the landlord's consent to assignment was required in many instances. *Id.* The evidence and experience support the inference that a landlord would be less likely to agree to a transfer if there were financial defaults under the leases.

[FF151] Further, Section 5(B)(2)(b) requires Pandya to be current on his lease and rental payments:

> For all such leases and/or Open [Pizza Hut] Store locations where Mr. Pandya or his affiliates (including any Pandya entity) are the landlord, the lease assignment for each such lease will provide that the Purchaser is not liable for any rent or other obligations accrued under the applicable lease prior to the effective date of such assignment and otherwise provide for commercially reasonable terms as requested by Purchaser.

Id. § 5(B)(2)(b). Notably, all of the Franchisee Defendants' prior obligations—contained in the Franchise and Forbearance Agreements—survived the Transfer Agreement (*id.* § 4(C)(ii)) including "satisfy[ing] in full all contingent lease liability (including any contingent liability of [Pizza Hut or its affiliates] and [would] provide evidence of same to [Pizza Hut]." *Id.* § 4(C).

5. *Section 7 Matters*

[FF152] The parties made certain agreements concerning the purchase price allocation and consideration in accordance with a completed sale. *See id.* § 7 (Consideration). If Pandya complied "with all of the terms and conditions of" the Transfer Agreement—including transferring the assets free and clear of all liens, following Section 5(B), indemnifying Pizza Hut and generally cooperating—and a purchaser paid $2 million or more, then Ronak Capital would have received the first $2 million of those funds. *Id.* In addition, Pandya would have been released to pay all "normally recurring fees" pursuant to the Guaranties. *Id.* § 7(A). If the sale did not go through, Pandya would "not be entitled to any payment," would "not receive the release of obligations" and the "remainder of the [Pizza Hut] Stores [would] be closed immediately and de-identified." *Id.* However, the Transfer Agreement clarified that in the latter scenario, "Pandya's surviving obligations set forth in the" Franchise Agreements, Guaranties and Forbearance Agreement would "remain in full force and effect." *Id.*

[FF153] Critically, this section and its accordant provisions also had no bearing on the Franchisee Defendants' indemnification obligations. *Id.* § 7(A)–(B).

6. *Lanham Act & Trademark Provisions*

[FF154] The Transfer Agreement also sets forth provisions concerning the use and protection of Pizza Hut's trademarks and trade dress.

[FF155] In Section 2 of the Transfer Agreement, Franchisee Defendants are granted a "limited, non-exclusive, non-sublicensable, non-transferrable license to use the Pizza Hut trademarks, service marks and other intellectual property and concepts relating to the Pizza Hut system" such as Pizza Hut's trade dress. *Id.* § 2.

[FF156] In addition, both Pizza Hut and the Franchisee Defendants "acknowledge[d] that since the expiration of that certain Forbearance Agreement, dated October 15, 2018, certain Pandya-affiliated entities have been using the Pizza Hut Marks without the consent of [Pizza Hut]." *Id.*

***26 [FF157]** In a related provision, the Transfer Agreement also contains non-disparagement obligations:

> Pandya acknowledges and agrees that it may not use any of the Pizza Hut Marks in any manner or in connection with any statement or material that is (in [Pizza Hut]'s reasonable judgment) in bad taste or inconsistent with [Pizza Hut]'s public image, or that could tend to involve [Pizza Hut] in a matter of political or public controversy, or tend to bring disparagement, ridicule, or scorn upon [Pizza Hut], the Pizza Hut Marks, or the goodwill associated with the Pizza Hut Marks.

Id. § 10. This provision effectively serves to refrain the Franchisee Defendants from using Pizza Hut's trademarked materials in any disparaging ways.

7. *Qualified Operator*

[FF158] The Franchisee Defendants were also required to have and fund a qualified operator to oversee their stores. The Transfer Agreement provides that:

> Pandya will fund in the ordinary course of business ... all fees and expenses of a third party manager/operator selected by Pandya (which manager/operator will be subject to approval by [Pizza Hut] (in its sole discretion)) to run the Open [Pizza Hut] Stores (the 'Pandya Operations Manager') with such fees and expenses of the Pandya Operations Manager not to exceed $25,000 for each 30 day period under this Agreement.

PX114 § 1. The Transfer Agreement specifies that this qualified operator "will be employed as a consultant by Pandya and will have full authority to run the day-to-day operations." *Id.* § 3. And Pandya agreed to not "manage or otherwise control" or "interfere with" the qualified operator's "decisions or authority." *Id.* § 3.

B. Section 8

[FF159] Section 8 of the Transfer Agreement contains provisions whereby Pizza Hut could "immediately terminate" the Transfer Agreement upon the occurrence of certain conditions and the Franchisee Defendants would "not be entitled to any of the consideration ... and Pizza Hut and its affiliates would not be liable to Defendants for any damages whatsoever." *Id.* § 8.

[FF160] In particular, Section 8 contemplates various avenues whereby the Franchisee Defendants would be unable to perform, and provides that:

> Pandya will not be entitled to any of the consideration (e.g., sales proceeds or the release of the personal guaranty obligations of Mr. Pandya) contemplated by Section 7 of this Agreement and [Pizza Hut] and its affiliates will not be liable to Pandya for any damages whatsoever. If this Agreement is terminated in accordance with this Section 8, (i) all of Pandya's unsatisfied and surviving obligations set forth in the Franchise Documentation will be unaffected and will remain in full force and effect, (ii) all of the [Pizza Hut] Stores (including any then-open [Pizza Hut] Stores) will be closed immediately and de-identified.

Id. The provisions for breach by Franchisee Defendants—such to activate Pizza Hut's termination rights under Section 8—principally include: (1) not having liens on transferred assets; (2) carrying worker's compensation insurance; and (3) certain lease and landlord matters.

[FF161] First, Pizza Hut was afforded termination rights under Section 8 if there were liens on any transferred assets. This included if "Pandya fail[ed] to transfer the Store Assets free and clear of all Liens in connection with the Article 9 Sale, and otherwise before the expiration of the Term of this Agreement." *Id.* § 8(B)(1).

***27 [FF162]** This obligation needed to be evidenced by the following:

> If Pandya does not provide all of the following items to [Pizza Hut] (which items must be satisfactory in all respects to [Pizza Hut] in its sole discretion) on or before the earlier of (i) the expiration of the Term and (ii) the closing of an acquisition transaction in which Purchaser is willing to pay at least $2,000,000 for the Transferred Assets: ...
>
> Evidence that the Transferred Assets are being transferred to Purchaser free and clear of all Liens (including federal, state or other tax liens) and such Liens have been satisfied in full.

Id. § 8(D)(3). In sum, to effectuate the Article 9 sale, the assets in question needed to be transferred—to a willing purchaser, after notice is provided to potential creditors—without any

incumbrances or liabilities. *See* Trial Tr. (Day 2) at 326:8–327:5; *see also* Trial Tr. (Day 3) at 696:14–20.

[FF163] The second Section 8 provision that permitted Pizza Hut termination rights, included a determination whether the Franchisee Defendants were carrying required worker's compensation insurance. The Transfer Agreement notes that:

> Evidence that Pandya has in effect (and did have in effect at all times before the Effective Date) required worker's compensation insurance, including without limitation, in respect of each of the worker's compensation cases in which [Pizza Hut] has been named as a defendant or interested party (it being agreed that Pandya must demonstrate to [Pizza Hut]'s satisfaction that [Pizza Hut] and its affiliates will have no liability in respect of any such worker's compensation cases, including those set forth on Exhibit E attached hereto).

PX114 § 8(D)(2); Trial Tr. (Day 3) at 697:14–17. This obligation is similar to that previously contemplated in the Franchise Agreements. *See* PX15 § 16.2; *supra* § IV.A.2.

[FF164] The third Section 8 provision that permitted Pizza Hut termination rights pertained to certain leasing and landlord matters. For example,

> [t]o the extent that [Pizza Hut] could have contingent lease liability under any [Pizza Hut] Store lease (including in respect of a lease relating to a Closed Store), executed releases and written confirmations from each of the landlords under such [Pizza Hut] Store leases that [Pizza Hut] is released from any and all contingent lease liability in respect of such lease.

PX114 § 8(D)(1). Thus, the two primary obligations the Franchisee Defendants had with respect to these landlord matters were (1) payment of all leases and (2) confirmation of such payments. *See* Trial Tr. (Day 1) at 163:15–164:13; Trial Tr. (Day 3) at 696:21–697:13.

[FF165] The Court addresses each of these three issues affording Pizza Hut termination rights under Section 8 of the Transfer Agreement in turn:

1. *No Liens on Transferred Assets*

[FF166] In Section 12(C) of the Transfer Agreement, Pandya represented that "there are no federal, state or other tax liens on any of the Transferred Assets." PX114 § 12(C); Trial Tr. (Day 1) at 161:5–162:9.

[FF167] Yet, tax liens were still pending on the assets in question as of date the parties signed the Transfer Agreement —and up until the agreement termination date (October 3, 2019). *See* PX186 (UCC lien search results for JNP Foods LLC); PX187 (same for Pandya Restaurants LLC); PX188 (UCC/Fixture Filings compilation for Ronak Foods); *see also* Trial Tr. (Day 4) at 71:23–74:10. The Court credits Pizza Hut's corporate representatives' testimony on this matter:

> ***28** Q. [By Ms. Coldwell] During the term of the Transfer Agreement, did you ever learn whether Mr. Pandya had liens on his assets?
>
> A. [By Ms. Crow] I did, yes.
>
> Q. How did you learn that?
>
> A. I ordered lien searches ...
>
> Q. And why did you order lien searches on the properties? ...
>
> A. I ordered them because I wanted to see if there was any viability left to this transaction. So Mr. Pandya had been telling us all along that there were no liens on the assets. We were concerned that there might be. The purchasers were concerned that there might be. But I wanted to find out for myself are there liens that are problematic.
>
> If the lien searches would have come back clean, then it would have told me that we still had a viable sale transaction without going through the Article 9 process.
>
> Q. And what did the liens show you -- lien searches show you?
>
> A. The lien searches showed extensive liens on the assets. There were state and federal tax liens, judgment liens, and other UCC filings.

Trial Tr. (Day 1) at 202:3–25. This was further confirmed by Pandya himself; the Court credits the following testimony:

> Q. [By Ms. Coldwell] Okay. So as of the date that you entered the transfer agreement, which was August 22nd of 2019, both of these liens were outstanding. Correct?
>
> A. [By Mr. Pandya] Correct.
>
> ...
>
> Q. So to confirm, we just saw that Ronak Foods, JNP Foods, and Pandya Restaurants had state -- or had federal

tax liens against them as of the date of the transfer agreement. Correct?

A. Correct.

Trial Tr. (Day 4) at 73:8–74:10; *see also* Trial Tr. (Day 4) at 45:6–46:17 (Pandya acknowledging liens).

[FF168] Pandya's position and lack of action on this issue was further violative of Section 8(B), which concerns if "[a]ny of the representations or warranties [of the Pandya Parties in the Transfer Agreement] [were] untrue in any respect." PX114 § 8(B).

[FF169] The Court credits the evidence that demonstrates Pizza Hut's repeated requests to Pandya and the Franchisee Defendants on this issue of whether liens existed. *See, e.g.*, PX132 (EM from S. Crow to Pandya's counsel (dated Sept. 6, 2019) noting that "running the lien searches is of the utmost importance as it is the gating item for the Article 9 process" and requesting that Pandya's counsel "advise as to whether that is underway?"); *see also* PX142 (Internal Pizza Hut EM (dated Sept. 18, 2019) about conversation with Pandya wherein they "reinforced the urgency on getting the lien searches completed."); PX143 (similar EM from S. Crow (dated Sept. 19, 2019)); Trial Tr. (Day 1) at 153:14–157:7.

[FF170] Accordingly, the Franchisee Defendants were in breach of the Transfer Agreement and Pizza Hut had grounds for termination under Section 8. PX114 § 8(B)(3), (D)(3).

2. *Carrying Worker's Compensation Insurance*

[FF171] Under the Transfer Agreement, Pandya and the Franchisee Defendants were obligated to carry worker's compensation insurance. PX114 § 8(D)(2); Trial Tr. (Day 1) at 161:5–163:4.

[FF172] Yet, despite this obligation, Pandya never attained or produced the required worker's compensation insurance. *See* PX150 at 3 (Ltr from Pizza Hut to Pandya (dated Sept. 21, 2019)); PX171 at 2 (EM from S. Crow to Pandya (dated Oct. 1, 2019)); *see also* Trial Tr. (Day 1) at 204:16–206:11; Trial Tr. (Day 4) at 51:4–8. Pandya only provided a certificate for partial coverage of one Franchisee Defendant. *See* PX122 (EM from Pizza Hut's outside counsel to Pandya's counsel (dated Sept. 3, 2019)); *see also* Trial Tr. (Day 1) at 203:6–204:15. Such partial coverage did not satisfy in full the Franchisee Defendants' worker's compensation insurance coverage obligations.

***29 [FF173]** Further, the insurance policy Pandya produced did not cover the matters listed on Exhibit E to the Transfer Agreement, as contracted to in Section 8(D)(2). *See id.*

[FF174] The Court credits the evidence that demonstrates Pizza Hut's repeated requests to Pandya and the Franchisee Defendants on this issue, of whether they had the required worker's compensation insurance. *See, e.g.*, PX132 (EM from S. Crow to Pandya's counsel (dated Sept. 5, 2019) stating how "[w]e still need proof of continuous workers comp coverage for the pre-receivership period."); Trial Tr. (Day 1) at 153:14–157:7, 196:11–197:13.

[FF175] Accordingly, the Franchisee Defendants were in breach of the Transfer Agreement and Pizza Hut had grounds for termination under Section 8. PX114 § 8(D)(2).

3. *Certain Landlord & Lease Matters*

[FF176] Franchisee Defendants represented that there were "no overdue amounts (including lease payments) due and owing to any of the landlords under any real property leases" as of the effective date of the Transfer Agreement (August 21, 2019). PX114 § 12(D); Trial Tr. (Day 1) at 161:5–164:19. However, this was not the case. *See, e.g.*, Trial Tr. (Day 1) at 153:14–157:7; Trial Tr. (Day 4) at 29:2–13, 46:20-48:23.

[FF177] For example, on September 5, 2019, an email forwarded to Pandya related that a landlord—who transmitted the initial email—had not "receive[d] September's rent" at one of Franchisee Defendants' stores. PX131. Subsequently, on September 13, 2019, Pizza Hut became aware that one of Franchisee Defendants' open stores had been served with eviction papers due to 18 months' worth of unpaid rent. *See* PX142 at 3 (EM from D. Fitch (Pizza Hut territory coach) concerning information from Inga Humphrey, the qualified operator).

[FF178] Consequently, the Franchisee Defendants were in violation of Section 8(B) whereby "[a]ny of the representations or warranties of [the Franchisee Defendants] set forth in th[e Transfer] Agreement [were] untrue in any respect." PX114 § 8(B)(3). Pizza Hut thus had immediate termination rights for this breach by the Franchisee Defendants.

C. Termination

[FF179] On September 20, 2019, legal counsel for Pizza Hut emailed Pandya and counsel a notice of breach describing

various operational and contractual failures in violation of the Transfer Agreement. PX150 (EM from S. Crow (dated Sept. 21, 2019)); Trial Tr. (Day 1) at 198:14–200:7. Specifically, Pizza Hut's counsel flagged how Franchisee Defendants had "failed to take action with regard to the following" violations:

- (1) Section 5(A) lien searches;
- (2) Section 5(B) lease assignments;
- (3) Section 8(D)(2) worker's compensation cases and insurance;
- (4) Section 12 representations and warranties that there are
  - (i) "no federal, state or other tax liens on any of the Transferred Assets and
  - (ii) "no defaults under any of the leases for the [Pizza Hut] stores" and "no overdue amounts (including lease payments) due and owing to any of the landlords under any real property leases."

PX150 at 4. Counsel for Pizza Hut noted that Pizza Hut would terminate the Transfer Agreement unless substantial progress was made. *Id.*

[FF180] Consequently, due to these noticed breaches—amongst other inabilities to perform (*see, e.g.*, Trial Tr. (Day 2) at 382:18–387:4, 382:23–383:12; Trial Tr. (Day 4) at 55:23–56:1 (describing deteriorating conditions of restaurants, failure to pay Inga Humphrey the qualified operator, which prompted her departure))—Pizza Hut terminated the Transfer Agreement pursuant to Section 8. *See* PX171 (EM from S. Crow to Pandya (dated Oct. 4, 2019)).

***30 [FF181]** At trial, Pandya agreed that Pizza Hut was within its rights to terminate pursuant to Section 8 of the Transfer Agreement. Pandya explained, in unrebutted and unchallenged testimony, that:

> Q. (BY MS. COLDWELL) And if you look at the title, it says, "Termination by PHLLC." Correct?
>
> A. [By Mr. Pandya] Correct.
>
> Q. And the first line says, "PHLLC may immediately terminate this agreement," and then it lists some of the conditions under which Pizza Hut could terminate the agreement. Correct?
>
> A. Correct.
>
> Q. In Section D of this termination section, you agreed if you do not provide certain items to Pizza Hut, Pizza Hut could terminate this agreement. Correct?
>
> A. Correct.

Trial Tr. (Day 4) at 49:1–11. Accordingly, Pizza Hut had both the means and ability to terminate the Transfer Agreement under Section 8—and on multiple grounds: for (1) lack of worker's compensation insurance, (2) existence of liens on transferred assets and (3) lease payment and confirmation failures. *See id.* at 49:12–20.

[FF182] Pandya had the full term of the Transfer Agreement to comply, but admittedly by his own testimony did not. *See id.* at 50:14–58:1 (describing failures to fulfill obligations under Section 8 of the Transfer Agreement).

[FF183] The Court determines Pizza Hut properly terminated the Transfer Agreement—effectively as of the expiration of the term of the contract—through application of Section 8. *See* Trial Tr. (Day 1) at 206:20–207:22; Trial Tr. (Day 2) at 346:10–347:2.

D. Indemnification

[FF184] The Transfer Agreement further provides for indemnity obligations on the part of the Franchisee Defendants. Pursuant to Section 2 ("Continued Operation of Open Pizza Hut Stores"): "Pandya hereby acknowledges and agrees to indemnify, defend and hold harmless [Pizza Hut], its affiliates, their officers and employees, and their respective successors and assigns, from and against all claims related to the operation of the [Pizza Hut] Stores after the expiration of such forbearance agreement." PX114 § 2.

[FF185] Section 9 of the Transfer Agreement further elaborates that:

> All liabilities (including operational liabilities) arising, relating to or occurring prior to the point of the transfer of any of the [Pizza Hut] Stores to Purchaser will not be transferred to, or assumed by, Purchaser. Further, Pandya acknowledges and agrees that any such liabilities will have been satisfied in full before any proposed transfer of assets or assignment of leases to the Purchaser. Pandya will indemnify, defend and hold harmless [Pizza Hut], its affiliates, their officers and employees, and their respective successors and assigns, from and against all claims related to the operation of the [Pizza Hut] Stores, whether before or

> after the Effective Date (including, without limitation, for all claims relating to workers compensation, employment, Contingent Liabilities and other liabilities).

Id. § 9 (Remaining Liabilities: Indemnity; Insurance).

[FF186] The Transfer Agreement then goes on to define "Contingent Liabilities" as:

> [A]ny and all claims or liabilities relating to (i) any real property lease assigned to Purchaser to the extent such liability relates to the period on or before the date such lease was assigned to Purchaser (e.g., any contingent lease liability, including any past due amounts, costs to cure defaults, etc.), (ii) any Closed Store (including, without limitation, and at [Pizza Hut]'s election, any claims or liabilities asserted against [Pizza Hut] for contingent lease liability or liabilities asserted against Purchaser or expenses necessary to complete the required de-identification of the Closed Stores), (iii) any workers compensation, employment or similar claims relating to the [Pizza Hut] Stores or any of their employees (including, without limitation, any claims arising under worker's compensation laws for which Pandya did not have appropriate worker's compensation insurance), (iv) any Liens (including any federal, state or other tax liens) alleged to exist or to apply to any of the Transferred Assets, or (v) any claims made against [Pizza Hut] or Purchaser in connection with the transactions contemplated by this Agreement (including, without limitation, any claims by vendors or other third parties).

***31** *Id.* Such contingent liabilities expanded on what was discussed above as indemnified and therefore owed obligations.

[FF187] The Court credits the testimony of Pandya on these indemnified matters at trial. Pandya explained, in unrebutted and unchallenged testimony, that:

> Q. [By Ms. Coldwell]: And that you or one of your entities was required to indemnify them for. Correct?
>
> A. [By Mr. Pandya]: Correct.
>
> ...
>
> Q. And you have never indemnified Pizza Hut for those lawsuits that are listed on Exhibit E to the [T]ransfer [A]greement. Correct?
>
> A. Correct.

Trial Tr. (Day 4) at 50:4–51:3.

[FF188] Accordingly, the Franchisee Defendants are responsible to indemnify the same matters as addressed previously and covered under the Franchise and Forbearance Agreements. *See* Trial Tr. (Day 1) at 164:20–165:24; *see also supra* §§ IV.E, V.A.4 (citing PX1). These obligations were reaffirmed in the Transfer Agreement. *See* PX114 § 4(C) ("all of Pandya's surviving obligations set forth in preexisting agreements ... will be unaffected by this agreement."). However, the Franchisee Defendants did not indemnify Pizza Hut, in violation of the parties' agreements. *See* Trial Tr. (Day 1) at 218:11–220:19.

E. De-identification

[FF189] The Transfer Agreement also provides for various modes of de-identification upon closure. Specifically, "Pandya must ensure each Closed Store is closed in accordance with [Pizza Hut]'s requirements and fully de-identified within 30 days of the date such store is closed to the public." PX114 § 4(B).

[FF190] And, pursuant to Section 7(A): "[i]f the contemplated sale did not occur under the Transfer Agreement the Franchisee Defendants also agreed to immediately close and de-identify the remaining Restaurants." *Id.* § 7(A). The de-identification was agreed to be done in accordance with Pizza Hut's "Restaurant De-Identification Process" found in Exhibit C to the Transfer Agreement. *Id.*, Ex. C.

[FF191] The Court determines that Franchisee Defendants did not properly de-identify their former Pizza Hut stores within 30 days of closure on October 7, 2019, pursuant to Section 4(B) and the procedures outlined in Exhibit C. *See id.*

[FF192] Pizza Hut's protected trademarks and trade dress were on display at the following restaurant locations (as identified by restaurant number, found in PX114, Ex. A) as of March 30, 2021: 027012, 027022, 28208, 028209, 031013, 028198, 028199, 028212, 028559, 029549, 027015, 027026, 028211, 028420, 032596, 028202, 028213, 028214, 031593, 028195, 028201 and 028216. *See* PX183 (Third party auditor inspection materials, documenting with photographs restaurant violations); *see also* Trial Tr. (Day 1) at 215:10–218:10.

[FF193] In some of these restaurant locations, Pandya operated different concepts—for instance, a Boston Market

—while using Pizza Hut's trademarks and trade dress. *See* PX183 at 3–4; *see also* Trial Tr. (Day 1) at 216:2–23, 218:1–6.

[FF194] Specifically, Pizza Hut's trademarked cupola roof, protected interior décor, and distinctive red elements were displayed on numerous currently operating, former-Pizza Hut restaurants. *See* PX183 at 7–8.

[FF195] Pizza Hut has incurred at least $16,700 to de-identify specific former restaurants (*see* Trial Tr. (Day 1) at 214:25–215:1), and the Franchisee Defendants have failed to reimburse these costs in violation of their obligations under the Franchise Agreements. *See* PX15 § 19.1 (Use of Pizza Hut Marks and Systems); *see supra* § IV.A.4.c.

F. Expiration

***32 [FF196]** The parties stipulated that "Pizza Hut terminated the Transfer Agreement as of October 3, 2019, on October 4, 2019." Docket No. 350 at 35. As noted above (*supra* § VI.C), Pizza Hut terminated the Transfer Agreement pursuant to Section 8. This entailed that the Transfer Agreement terminated effectively as of its term expiration. *See* Trial Tr. (Day 1) at 128:18–23; Trial Tr. (Day 2) at 346:10–347:2. For this reason, the Franchisee Defendants' argument that Pizza Hut belatedly terminated the Transfer Agreement is unavailing. *See* Docket No. 344 ¶ 73.

VII. Fraud & Commercially Reasonable Efforts

[FF197] Franchisee Defendants allege that the Transfer Agreement was a fraud perpetrated by Pizza Hut "for the purpose of obtaining a release in advance of filing this litigation." Docket No. 344 ¶ 75. In effect, Franchisee Defendants maintain that Pizza Hut never intended to perform under the Transfer Agreement, let alone take commercially reasonable efforts to fulfill their obligations to sell the restaurants. *See id.* ¶ 50; PX114 § 6 ("[Pizza Hut] agrees to use commercially reasonable efforts to identify a Purchaser willing to (i) enter into the transfer and assignment transactions contemplated by this Agreement and (ii) make an opening bid at any Article 9 Sale.").

[FF198] However, the Court determines that the record evidence reasonably supports an inference that Pizza Hut took commercially reasonable efforts to fulfill its obligations under the Transfer Agreement.

[FF199] First, Pizza Hut identified Mr. Ramnik Chopra and Mr. Sanjay Gupta as potential purchasers of the restaurants. *See* PX109 (EMs between C. Short and E. Garza (dated Aug. 19, 2019)); PX55 (EMs between R. Chopra and Pizza Hut (dated Aug. 19, 2019)); *see also* Trial Tr. (Day 1) at 184:11–20. Pizza Hut had previously vetted both Chopra and Gupta extensively in connection with the Forbearance Agreement. *See* PX64 (Ramnik Ltr of Intent (dated Apr. 2, 2019)); PX74 (Gupta Franchise Application (dated May 22, 2019)); *see also* Trial Tr. (Day 1) at 120:10–15, 124:20–25, 136:1–9, 138:2–10. While the purchase was not fulfilled in that timeframe, Chopra and Gupta remained interested in purchasing the restaurants going forward. *See* PX55; PX109; Trial Tr. (Day 1) at 184:13–185:12; Trial Tr. (Day 2) at 444:3–18.

[FF200] Pizza Hut determined that both individuals were qualified candidates, and importantly could purchase the stores on a short time frame—due to their familiarity with the matter—in line with the abbreviated term of the Transfer Agreement. *See* Trial Tr. (Day 1) at 185:13–23; Trial Tr. (Day 2) at 295:14–296:9, 434:17–25, 458:1–10; PX109.

[FF201] This determination was supported by ample evidence in the record. For example, Chopra's bank transmitted a letter, later provided to Pizza Hut, stating it would be "pleased to consider entering into a financing transaction" with him for over $8,775,000. PX55 at 2–4.

[FF202] The Court credits Gupta's sworn testimony that he had sufficient, liquid funds and thus was capable of entering into the transaction underlying the Transfer Agreement. *See* S. Gupta Dep. (Dec. 20, 2021) at 201:14–202:5; *see also* Trial Tr. (Day 2) at 301:1–5, 426:1–427:3, 449:4–8. In fact, Gupta is the current Pizza Hut system restaurant franchisee in Philadelphia. *See id.* at 461:10–19.

[FF203] Accordingly, the Court determines that it made sense for Pizza Hut to focus on these two purchasers, as opposed to other potential purchasers, considering the troubled sale history and the institutional knowledge in-place.

[FF204] In addition, Pandya himself had previously indicated Chopra and Gupta were his preferred purchasers, albeit at higher prices. *See* PX67 (Text message from J. Pandya to C. Short encouraging Pizza Hut to "try to approve Ramnik or Sanjay ASAP as they both live in this markets and have experience" (dated Apr. 16, 2019)); PX64 (signed Ltr of Intent (dated Apr. 7, 2019); *see also* Trial Tr. (Day 2) at 423:11–424:19.

***33 [FF205]** The Court also credits the substantial other evidence that Pizza Hut took commercially reasonable efforts to effectuate the Transfer Agreement (*see* Trial Tr. (Day 2) at 443:16–447:15):

[FF206] From the start, "Pizza Hut representatives met with Sanjay Gupta and Ramnik Chopra in Pennsylvania on August 20, 2019." Docket No. 350 at 34 (parties' stipulations and uncontested facts).

[FF207] Subsequently, on August 22, 2019—days after the Transfer Agreement came into effect—Pizza Hut Sr. Director/ V.P. of Franchise Business Development Charlie Short began coordinating a visit with Chopra to Texas to "go through the list of stores that will be transferred to them" and "the rationale as to why we think these stores should remain open." PX119 at 1 (EM from C. Short to Pizza Hut and Yum! executives); Trial Tr. (Day 2) at 444:19–445:8. Short goes on to state that "[w]e need to get a deal worked out with them ASAP so we can begin the transfer work." *Id.* This urgency evidences sincerity on the part of Pizza Hut. Indeed, Crow viewed Pizza Hut's "primary obligation to bring a buyer to the table who was ready and willing to enter into the transaction." Trial Tr. (Day 2) at 351:23–352:6.

[FF208] The parties, including Chopra and later Gupta (PX127) as well, were engaged in email and telephone negotiations concerning the deal. The parties also mulled over the needed documentation to make the deal a reality under the Transfer Agreement. *See id.*

[FF209] These potential purchasers were eminently qualified as well. Trial Tr. (Day 2) at 447:1–15. For example, Gupta's Pizza Hut franchisee application included his management of 28 Dunkin Donuts outposts. *See* PX74 at 1–2, 8. Chopra's Operator Resume described his substantial operational "experience in both corporate and franchised environments." PX55 at 7–10. These materials are indicative of the seriousness of both potential purchasers.

[FF210] Between August 28 and September 3, 2019, Short and Chopra had a robust back-and-forth negotiating potential offers. *See* PX121 (EM traffic between the parties); *see also* PX128 (same). After Chopra's initial offer was labeled "disappointing" by Pizza Hut for being below $3 million, Chopra responded with the following offer:

Full disclosure on my agreed upon deal with the receiver.

The purchase price of $3.5 million included the following:

1. Ff&e for all 53 stores (including the 10 closed ones)
2. Ability to close up to 12 stores (two less than currently planned).
3. Six liquor licenses that were owned by the entities (total value of $1 million)
4. Real property on franklin mills store ($500k value).

My offer to you is exactly the same excluding the license and real property. *Id.* at 1.

[FF211] Ultimately, the parties reached a "conceptual alignment of an agreed upon price for the Pandya stores." PX140 at 2 (EM from C. Short to Pizza Hut (dated Sept. 15, 2019)); Trial Tr. (Day 2) at 455:24–457:14. The Court finds that the aforementioned email traffic, amongst many other communications, demonstrates robust negotiations (with serious offers) between the interested parties. In effect, on September 15, 2019, Pizza Hut had identified a purchaser willing to close the transaction. *See id.* at 351:9–13.

***34 [FF212]** Indeed, these negotiations continued and extended into discussions over potential development incentives. *See* Trial Tr. (Day 2) at 454:17–456:10.

[FF213] Ultimately, on September 20, 2019, Pizza Hut approved Chopra as a franchisee candidate. *See* DX87 (Franchisee Candidate Approval Letter); Docket No. 201 ¶ 28 (Franchisee Defendants' counterclaims); Trial Tr. (Day 1) at 186:9–187:12. Gupta was subsequently approved as well. *See* PX149 at 1–2. By this time, Chopra and Gupta were contemplating jointly purchasing the Pizza Hut restaurants. *See* Trial Tr. (Day 1) at 187:8–18.

[FF214] To that effect, Pizza Hut discussed Chopra and Gupta entering into non-disclosure agreements with Pandya. *See* Trial Tr. (Day 2) at 193:25–195:2. Pizza Hut also discussed lease agreements with Chopra and Gupta, to enable them to negotiate with landlords on these matters. *See* Trial Tr. (Day 1) at 186:9–24.

[FF215] Later, on September 30, 2019, the parties exchanged initial drafts of the asset purchase agreement, wherein a purchase price of $2 million was offered for the Pizza Hut restaurants. *See* Trial Tr. (Day 1) at 188:19–21, 195:6–18; Trial Tr. (Day 2) at 453:16–454:16; *see also* PX168 §

2.6 ("Purchase Price"); Docket No. 201 ¶ 28 (Franchisee Defendants' counterclaims).

[FF216] Chopra and Gupta were also provided a draft of the final franchise agreement to effectuate the transfer. Trial Tr. (Day 2) at 322:7–9.

[FF217] For his part, the Court credits the testimony and record evidence that Ramnik Chopra viewed his role as a partner in an entity to be formed with Gupta—not as a broker. *See* Trial Tr. (Day 1) at 185:24–186:8; Trial Tr. (Day 2) at 448:24–449:15.

[FF218] In addition, the Court notes that it was the Franchisee Defendants' counsel who reached out initially to Pizza Hut on what would ultimately evolve into the Transfer Agreement. *See* DX2 (EM summarizing call between parties (dated July 29, 2019)); PX96 (EM proposal (dated Aug. 16, 2019) suggesting terms such as an Article 9 sale provision and the mutual release concept); *see also* Trial Tr. (Day 1) at 147:14–150:1; Trial Tr. (Day 2) at 334:2–12. Through their respective counsel, the parties had extensive back and forth negotiations. *See id.* at 150:20–24, 151:3–152:3; PX98 (EM proposal (dated Aug. 17, 2019)); PX111 (EM from J. Pandya (dated Aug. 20, 2019) attaching draft agreement with Pandya's handwritten comments). Pizza Hut even made several concessions to Pandya during these negotiations and accepted some of his proposals. *See* Trial Tr. (Day 1) at 151:8–153:13, 176:8–25; Trial Tr. (Day 4) at 16:24–17:14.

[FF219] For all of these reasons, it belies logic and Pizza Hut's actions as a reasonably prudent company to spend this much time, effort and funds to rid itself of a franchisee in hopes of an (uncertain) future payout. And, no "gap-filling" release was needed as the parties had already agreed to one in the General Release. *See* PX114, Ex. D; *infra* § IX.

[FF220] As to the Franchisee Defendants' characterization of restaurant closure as a threat by Pizza Hut to induce them to sign the Transfer Agreement, the Court determines that the record evidence points away from that inference. Upon termination, the Franchisee Defendants no longer had a right to continue operating Pizza Hut restaurants. *See* PX114 § 2 ("Continue[ ] Operation of Open [Pizza Hut] Stores"). In fact, the Franchisee Defendants were operating the restaurants without a license or an approved operator. *Id.;* Trial Tr. (Day 1) at 140:2–5. Therefore, there could not be a "threat" by Pizza Hut to shut down the stores (to induce Pandya into signing the Transfer Agreement) when this was a factual statement concerning store closure.

***35 [FF221]** The Court further determines that in view of two failed prior agreements and millions of dollars owed by Franchisee Defendants, it was reasonable—not an indication of fraud—for Pizza Hut to prepare for potential litigation between the parties. *See, e.g.*, Trial Tr. (Day 1) at 139:24–141:15, 236:4–20; Trial Tr. (Day 2) at 339:8–16.

[FF222] For all of the reasons discussed, the Court determines that Pizza Hut's efforts behind the Transfer Agreement were commercially reasonable and not fraudulent.

VIII. Defamation

[FF223] Franchisee Defendants make two allegations concerning defamatory statements by Pizza Hut. The first concerns an emailed statement prior to the enactment of the Transfer Agreement.

[FF224] Franchisee Defendants contend that Pizza Hut was discouraging any potential purchaser from working directly with Pandya to purchase the stores, by telling Chopra "[Pandya] does not [have] the right to operate the stores and we can have the stores closed immediately at any time." Docket No. 344 ¶ 40 (citing DX84 (EM from C. Short to R. Chopra (dated Aug. 12, 2019))).

[FF225] However, Short's emailed statement is grounded in fact. Sections 19.1 and 19.2 of the Franchise Agreements describe how "all rights of Franchisee under this Agreement, will immediately terminate upon termination of this Agreement." *See* PX15 § 19.1–2; *see also* Trial Tr. (Day 1) at 111:15–23. Further, pursuant to Section 2 of the Transfer Agreement, Pizza Hut provided Franchisee Defendants a limited license—wherein they did not have one previously—to "Continue[ ] Operation of Open [Pizza Hut] Stores." PX114 § 2.

[FF226] These provisions entail that prior to the Transfer Agreement, and subsequent to the termination of the Forbearance Agreement, the Franchisee Defendants were operating without a license and without a "right to operate" Pizza Hut's restaurants. *See id.* ("[Pizza Hut]" hereby grants a limited, non-exclusive, non-sublicensable, non-transferrable license ... for the sole purpose of operating the Open [Pizza Hut] Stores as Pizza Hut-branded stores."); *see also* Trial Tr. (Day 1) at 140:2–5. Accordingly, Short's email to Chopra reasonably supports an inference that the statement is factual

and not defamatory. The email was also transmitted before the Transfer Agreement was in effect. Consequently, the General Release serves to bar this action for alleged defamation. *See* PX114, Ex. D; *see also infra* § IX.

[FF227] Second, Franchisee Defendants contend that Pizza Hut discouraged any potential purchaser from negotiating directly with Pandya, by telling Chopra to "[p]lease recognize that [Pizza Hut's] involvement and partnership has now created a situation that has a far better chance of closing than [Chopra] individually trying to negotiate with [Pandya] or the receiver." Docket No. 344 ¶ 68 (citing DX152 at 1 (EM from C. Short to R. Chopra (dated Aug. 28, 2019))).

[FF228] However, while this statement was also grounded in fact—as Pizza Hut had sole discretion to approve a buyer. *See* PX114 § 5 ("Pandya will cooperate fully to effectuate a transfer of the Open [Pizza Hut] stores to a buyer approved by [Pizza Hut] in its sole discretion."); *see also id.* § 6 ("Pandya will have no approval rights over the identity of the Purchaser or the purchase price, if any. [Pizza Hut] agrees to use commercially reasonable efforts to identify a Purchaser[.]").

IX. General Release

***36 [FF229]** While fraud is addressed above (*supra* § VII), in any event, the General Release negotiated between the parties further disallows the Franchisee Defendants' counterclaims for fraud, tortious interference with prospective business relations and defamation prior to the Transfer Agreement going into effect, as well as exemplary, special and consequential damages. *See* PX114, Ex. D (General Release Form).

[FF230] The General Release attached to the Transfer Agreement covers "any and all actions, causes of action ... known or unknown, suspected or unsuspected" that any Franchisee Defendant had "at any time [before the release] ... arising out of or relating to ... the offer or sale of the Pizza Hut franchise opportunity ... [and] any other agreement between [Defendants] and [Pizza Hut]." *Id.*

[FF231] The General Release was made knowingly and voluntarily with extensive negotiations and all parties represented by counsel. *See* Docket No. 317 at 22 (citing *Bombardier Aero. Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 232 (Tex. 2019)); *see also* Trial Tr. (Day 1) at 127:1–15, 173:22–175:4.

[FF232] Indeed, Franchisee Defendants acknowledged in the release that they "had a reasonable opportunity to consult with" counsel and the release was executed "voluntarily" without reliance on "any representation or statement made by" Pizza Hut "with regard to the subject matter, basis, or effect of this Release." PX114, Ex. D. This functions as an admission by Franchisee Defendants that they have not, and do not allege, any misrepresentations made with respect to the General Release itself. *See id.*

CONCLUSIONS OF LAW

X. Jurisdiction

[CL1] This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. §§ 1331, 1332, 1338 and 1367. Pizza Hut's Lanham Act claims arising under 15 U.S.C. §§ 1114 and 1125 provide federal question jurisdiction. And diversity jurisdiction exists because the amount in controversy exceeds $75,000 and diversity of citizenship exists between the parties. *See supra* § I.

[CL2] The Court has personal jurisdiction over Pizza Hut based on its filing of this lawsuit in this District and because it is headquartered in this District. *Id.* Further, the parties stipulated that the Court has personal jurisdiction over Pizza Hut, Franchisee Defendants and Intervenor Ronak Capital. Docket No. 350 at 33 (parties' stipulations and uncontested facts).

[CL3] The parties have further consented to the jurisdiction of the Court by contracting with Pizza Hut. *See* PX15 (Franchise Agreement), PX18–19 (same); PX32 (Forbearance Agreement); PX114 (Transfer Agreement).

[CL4] The parties further stipulated that venue is proper pursuant to 28 U.S.C. § 1391(b)(2). Docket No. 350 at 33.

XI. Breach of Contract (Franchise Agreements and Guaranties)

A. Legal Standard

[CL5] To establish its breach of contract claim, Pizza Hut must demonstrate that (1) a valid contract exists; (2) it performed or tendered performance; (3) Franchisee Defendants breached the contract; and (4) Pizza Hut sustained damages as a result of Franchisee Defendants' breach. *See, e.g., Mack Fin. Servs. v. Boyett Constrs., L.L.C.*, No. 1:09-CV-297, 2011 WL 13196434, at *3 (E.D. Tex. Jan. 14, 2011);

Cavendish v. Atashi Town Homes, LLC, No. 06-14-00023-CV, 2014 WL 7140309, at *——, 2014 Tex. App. LEXIS 13381, at *10 (Tex. App.—Texarkana [6th Dist.] Dec. 16, 2014, no pet.).

[CL6] Pizza Hut "must prove each element" of its breach of contract claim "by a preponderance of the evidence." *Wilkins v. Chesapeake Expl. Ltd. P'ship*, No. 9:09-CV-128, 2011 WL 13143508, at *10, 2011 U.S. Dist. LEXIS 107060, at *9 (E.D. Tex. Jan. 7, 2011) (citing *Wood Care Ctrs., Inc. v. Evangel Temple Assembly of God of Wichita Falls, Tex.*, 307 S.W.3d 816, 823–24 (Tex. App.—Fort Worth [2d Dist.] 2010, pet. filed)).

B. Analysis

***37** **[CL7]** For the following reasons, the Court determines that Pizza Hut has established its breach of contract claim as to the three Franchise Agreements and the Guaranties.

1. *Valid contract*

[CL8] The Franchise Agreements are valid, enforceable contracts between Pizza Hut and the Franchisee Defendants. *See* FF25; Trial Tr. (Day 4) at 15:1–3; Docket No. 350 at 34 (parties' stipulations and uncontested facts); PX15 (Ronak Foods Franchise Agreement, in effect November 8, 2010); PX18 (Pandya Restaurants Franchise Agreement, in effect September 15, 2011); PX19 (JNP Foods Franchise Agreement, in effect April 30, 2012). Pizza Hut properly terminated these agreements on October 15, 2018. *See id.*; *see also* PX33–34 (Notices of Termination).[7]

[CL9] In addition, the Ronak Foods Guaranty, JNP Foods Guaranty and Pandya Restaurants Guaranty are valid and enforceable contracts between Pizza Hut and Pandya. *See* FF71; Docket No. 350 at 34 (parties' stipulations and uncontested facts); PX15, App'x E; PX18, App'x E; PX19, App'x E. Pandya guaranteed the "complete performance of each of the terms and conditions" of the Franchise Agreements. PX15, App'x E ¶ 2. Further, the Guaranties are "continuing, absolute, and unconditional." *Id.* ¶ 4.

2. *Performance tendered*

[CL10] Pizza Hut granted the Franchisee Defendants a 20-year non-exclusive license to operate—and utilize associated trademarks and trade dress with—Pizza Hut restaurants in the Philadelphia-area market. FF24; FF37; PX15; PX18; PX19. Franchisee Defendants agreed in exchange to: (1) comply with Pizza Hut's Brand Standards; (2) pay Monthly Service Fees equivalent to a percentage of monthly gross sales; (3) pay Advertising Fees each month; (4) indemnify Pizza Hut on certain matters;[8] and (5) de-identify the Pizza Hut restaurants in the event of closure, amongst other provisions. *See id.*

[CL11] Further, the Transformation Amendment (agreed to in May 2017) imposed a Digital Innovation Fee ("Digico") obligation on Franchisee Defendants per digital transaction in exchange for a serious technical investment by Pizza Hut. *See* FF65; FF67; PX24 §§ 4, 6. The monthly Advertising Fees were increased as well pursuant to this amendment. *Id.*

[CL12] Pandya signed a Letter of Acknowledgment that Pizza Hut performed or tendered performance on all its obligations under the Franchisee Agreements and Guaranties. *See* PX31; *see also* Trial Tr. (Day 1) at 101:11–103:3. Any performance that did not occur was excused. *See* PX31 at 5 ("You agree [Pizza Hut] has met its obligations under all relevant Franchise Agreements.").

3. *Breach*

[CL13] The Franchisee Defendants breached the Franchise Agreements and Guaranties in several respects. First, the Franchisee Defendants did not adhere to—and failed to comply with—Pizza Hut's Brand Standards. *See* FF78; FF81 (citing *e.g.*, PX6 at 34 (for example, Franchisee Defendants' utilizing "unapproved Kitchen Management System")).

***38** **[CL14]** Second, the Franchisee Defendants did not pay (for a substantial period of time) the Monthly Service Fees, Advertising Fees, Digico Fees and Other Fees that it agreed to pay, and owed to, Pizza Hut. FF80.

[CL15] Third, the Franchisee Defendants failed to indemnify Pizza Hut. *See* FF92; PX15 § 15.2; PX1 (Indemnification tab).

[CL16] In addition, Pandya breached the Guaranties. First, he did not cure the Franchisee Defendants' defaults that arose under the Franchise Agreements. *See* FF91; PX15, App'x E ¶ 4; PX32 § 7.1; PX6 at 82; *see also* PX31 at 5 (Ltr of Acknowledgment); *see also* Trial Tr. (Day 1) at 101:11–104:13. Second, he failed to indemnify Pizza Hut. *See* FF72–FF74; FF92; PX15, App'x E; *id.* § 15.2; PX1 (Indemnification tab).

[CL17] For these reasons, Pizza Hut has established breach.

4. *Damages & royalties*

[CL18] For all the reasons set forth above, and due to Franchisee Defendants' breaches of the Franchise Agreements and Guaranties, Pizza Hut sustained damages.

[CL19] The Franchisee Defendants owe the following amounts in unpaid fees, including the Monthly Service Fees, Advertising Fees, Digico Fees and Other Fees: (1) JNP Foods - $2,389,881; (2) Ronak Foods - $1,774,912; and (3) Pandya Restaurants - $201,647. *See* FF46; PX2 (Compilation spreadsheet of damages, fees); *id.* at PHLLC AR Balances Update, IPH AH Balances and PHLLC AR Balances tabs (providing source data for fees); *see also* Trial Tr. (Day 2) at 465:5–470:16; Trial Tr. (Day 3) at 589:21–591:10.

[CL20] The Franchisee Defendants owe the following amounts in unpaid contractual interest that has accumulated: (1) JNP Foods - $731,270; (2) Ronak Foods - $529,852; and (3) Pandya Restaurants - $57,850. *See id.*; *see also* Trial Tr. (Day 2) at 470:17–471:3.

[CL21] Pandya is liable for the total of these fees: $4,366,440, as well as $1,318,972, in total contractual interest. FF70–FF74; PX15, App'x E; Trial Tr. (Day 4) at 17:15–18:6.

[CL22] Further, the Franchisee Defendants owe the following amounts in indemnity fees: (1) JNP Foods - $170,277.62; (2) Ronak Foods - $291,838.25; and (3) Pandya Restaurants - $30,862.84. *See* FF92; PX1 (Indemnification tab); *see also* Trial Tr. (Day 1) at 220:12–225:20; Trial Tr. (Day 3) at 595:19–596:25. These fees represent the attorneys' fees and associated costs with the assorted legal matters which Franchisee Defendants agreed to indemnify Pizza Hut. *See id.*

[CL23] Pandya is liable for the total of these indemnity fees: $464,174.48. *See* FF70–FF74; PX15, App'x E.

[CL24] The Franchisee Defendants are also liable for "all fees and expenses of a third party manager/operator" (Inga Humphrey) which Pizza Hut had previously covered in the amount of $11,921. *See* PX114 § 1; *see also* Trial Tr. (Day 2) at 471:4–17; Trial Tr. (Day 4) at 55:6–56:6.

[CL25] For the reasons stated above, these fees are not limited to $1.6 million under the Forbearance Agreement (as the Franchisee Defendants maintain). The Forbearance Agreement in Schedule B states that these fees are an "Estimated Indebtedness to Franchisor and/or Designee as of October 15, 2018 only." PX32 at 17. Schedule B clarifies that: "Franchisee remains responsible for all amounts that have come or shall come due." *Id.* Finally, Schedule B indicates that "[l]ate charges" (as is the case here) "will be recalculated when payment is received." *Id.* Thus, the fees owed by the Franchisee Defendants are not limited to $1.6 million. FF105–FF114.

***39 [CL26]** Further, Pizza Hut has standing to recover these damages, including the monthly Advertising Fees. FF49–FF53.

[CL27] The Franchise Agreements specify that the Advertising Fees are due to Pizza Hut, if the fees are not paid to IPHFHA, and are "credited, dollar for dollar, toward Franchisee's national advertising obligations set forth in Section 7.1.A." *See* FF50–FF51; PX15 § 7.1.

[CL28] The Court determines that based on this crediting operation in the Franchise Agreement, Pizza Hut has standing to recover the Advertising Fees as damages. If a Franchisee Defendant fails to pay any of the fees it owes to IPHFHA, then that Franchisee Defendant would not get a credit to offset its payment obligations to Pizza Hut—and then Pizza Hut would be owed the amount due. *See* PX15 § 7.1(A)–(B).

[CL29] Accordingly, Pizza Hut has established that the Franchisee Defendants breached the three Franchise Agreements and associated Guaranties. *Mack Fin. Servs.*, 2011 WL 13196434, at *3.

XII. Breach of Contract (Forbearance Agreement)

A. Legal Standard

[CL30] To establish its breach of contract claim, Pizza Hut must demonstrate that (1) a valid contract exists; (2) it performed or tendered performance; (3) Franchisee Defendants breached the contract; and (4) Pizza Hut sustained damages as a result of Franchisee Defendants' breach. *See, e.g.*, *Piney Woods Er III, LLC v. Blue Cross & Blue Shield of Tex.*, No. 5:20-CV-00041, 2020 WL 13042506, at * ——— – ———, 2020 U.S. Dist. LEXIS 262853, at *23–24 (E.D. Tex. Oct. 2, 2020); *Ho v. Benco Mach., LLC*, No. 06-20-00061-CV, 2020 WL 7268586, at *———, 2020 Tex. App. LEXIS 9731 at *11 (Tex. App.—Texarkana [6th Dist.] Dec. 11, 2020, no pet.).

[CL31] Pizza Hut must establish its breach of contract claim by a preponderance of the evidence. *Stellar Restoration Servs., LLC v. Total Yard Care, Inc.*, No. 4:19-cv-470, 2019

WL 4169189, at *——, 2019 U.S. Dist. LEXIS 150517 at *12 (E.D. Tex. Aug. 12, 2019).

B. Analysis

[CL32] For the following reasons, the Court determines that Pizza Hut has established its breach of contract claim.

1. *Valid contract*

[CL33] The Forbearance Agreement is a valid, enforceable contract between Pizza Hut and the Franchisee Defendants. FF94; Docket No. 350 at 34 (parties' stipulations and uncontested facts); PX32 (effective October 15, 2018).

2. *Performance tendered*

[CL34] Pizza Hut performed or tendered performance of its obligations pursuant to the Forbearance Agreement or it was excused. *See* FF96 (noting how Pizza Hut forbore "from enforcing the Terminations and exercising its remedies under the Guaranties or commencing any judicial proceedings to enforce the Terminations (to the extent applicable) or against the Guarantor to collect amounts due under the Guaranties") (quoting PX32 § 6.1). Pizza Hut also "extend[ed] a license to Mr. Pandya to continue to operate after the termination of his stores[.]" Trial Tr. (Day 1) at 114:5–13 (quoting Lauren Leahy (Pizza Hut Chief Customer & Legal Officer)); *id.* at 139:15–23.

3. *Breach*

[CL35] The Franchisee Defendants breached the Forbearance Agreement in several respects. First, Franchisee Defendants failed to comply with Pizza Hut's Brand Standards and defaulted on all manner of their obligations. *See* FF122–FF126 (citing PX4, noting food safety failures, cleanliness failures, pest control issues, hospitality issues and failure to upgrade assets).

***40 [CL36]** Second, the Franchisee Defendants—for a substantial period of time—did not pay the Monthly Service Fees, Advertising Fees, Digico Fees and Other Fees that it agreed to pay, and owed to, Pizza Hut. FF123–FF124 (citing PX4, noting failure to pay required fees).

[CL37] Third, the Franchisee Defendants failed to indemnify Pizza Hut. *See* FF116–FF117; *see also* Trial Tr. (Day 2) at 422:21–24.

[CL38] Fourth, the Franchisee Defendants did not "timely perform tasks necessary to complete a sale" in violation of §§ 6.2(g)–(i). For example:

- Franchisee Defendants did not enter into a letter of intent with a purchaser by December 21, 2018.
- The Franchisee Defendants also did not enter into a binding written asset purchase agreement by January 28, 2019.
- The Franchisee Defendants additionally did not close the sale by March 2, 2019.

See FF129–FF131.

[CL39] For these reasons, Pizza Hut has established breach.

4. *Damages & royalties*

[CL40] For all the reasons set forth above concerning Franchise Agreements, and due to Franchisee Defendants' breaches of the Forbearance Agreement, Pizza Hut sustained damages. *See* PX2 (Compilation spreadsheet of damages, fees).

[CL41] These damages are for the same amount as indicated in the initial Franchise Agreements damages section. CL18–CL24. These fees include Monthly Service Fees, Advertising Fees, Digico Fees and Other Fees. *See id.; see also* PX2.

[CL42] As noted, Pandya was under a continuing obligation to cover and pay for these fees. PX15, App'x E ¶ 4.

[CL43] Accordingly, Pizza Hut has established that the Franchisee Defendants breached the Forbearance Agreement. *Benco Mach., LLC*, 2020 Tex. App. LEXIS 9731, at *11.

XIII. Breach of Contract (Transfer Agreement)

A. Legal Standard

[CL44] To establish its breach of contract claim, Pizza Hut must demonstrate that (1) a valid contract exists; (2) it performed or tendered performance; (3) Franchisee Defendants breached the contract; and (4) Pizza Hut sustained damages as a result of Franchisee Defendants' breach. *See, e.g., Nokia of Am. Corp. v. Oyster Optics, LLC*, No. 2:18-CV-00391, 2021 WL 465428, at *——, 2021 U.S. Dist. LEXIS 24087 at *7 (E.D. Tex. Feb. 3, 2021); *CamargoCopeland Architects, L.L.P. v. CRT Signature Place, L.P.*, No. 06-13-00079-CV, 2013 WL 6535947, at *——,

2013 Tex. App. LEXIS 14905 at *3 (Tex. App.—Texarkana [6th Dist.] Dec. 11, 2013, no pet.)

[CL45] Pizza Hut must establish its breach of contract claim by a preponderance of the evidence. *Luv N' Care, Ltd. v. Royal King Infant Prods. Co.*, No. 2:10-CV-461, 2016 U.S. Dist. LEXIS 10462, at *22 (E.D. Tex. Jan. 28, 2016).

B. Analysis

[CL46] For the following reasons, the Court determines that Pizza Hut has established its breach of contract claim.

1. *Valid contract*

[CL47] "In Texas, 'a binding contract requires: (1) an offer; (2) an acceptance in strict compliance with the terms of the offer; (3) a meeting of the minds; (4) each party's consent to the terms; and (5) execution and delivery of the contract with intent that it be mutual and binding.' " *Kamel v. Ave. Insights & Analytics Llc*, No. 6:18-CV-422, 2020 U.S. Dist. LEXIS 147391, at *7 (E.D. Tex. May 5, 2020) (quoting *Huckaba v. Ref-Chem, L.P.*, 892 F.3d 686, 689 (5th Cir. 2018)). In addition, "consideration is a fundamental element of any valid contract." *Id.* (quoting *In re Capco Energy, Inc.*, 669 F.3d 274, 279–80 (5th Cir. 2012)).

***41** **[CL48]** Here, the Transfer Agreement is a valid, enforceable contract between Pizza Hut, the Franchisee Defendants and Intervenor Ronak Capital. *See* FF135–FF137; PX114 (effective August 21, 2019); Docket No. 111 (Complaint in Intervention of Ronak Capital).

[CL49] The parties extensively negotiated the Transfer Agreement (with representation by counsel), Pizza Hut made an offer—with reasonable consideration provided for (*see* PX114 § 7 (Consideration))—and Pandya accepted on behalf of the Franchisee Defendants. *See* FF135–FF136; *see also Bombardier Aero. Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 232 (Tex. 2019); *Powell v. Bank of Am., N.A.*, No. 4:12-CV-512, 2014 U.S. Dist. LEXIS 7270, at *10 (E.D. Tex. Jan. 21, 2014).

[CL50] Pandya reviewed, initialed and signed the Transfer Agreement. FF136. The terms were sufficiently definite, and the Court has determined that fraud was not at issue. *See* FF197–FF222; *K. Griff Investigations, Inc. v. Cronin*, 633 S.W.3d 81, 89 (Tex. App.—Houston [14th Dist.] Aug. 17, 2021).

[CL51] The Court determines that Pizza Hut terminated the Transfer Agreement pursuant to Section 8 of the agreement effective as of its expiration on October 3, 2019. *See* FF196.

2. *Performance tendered*

[CL52] Pizza Hut performed or tendered performance of its obligations pursuant to the Transfer Agreement. *See* FF198–FF216 (describing the commercially reasonable efforts Pizza Hut took); Trial Tr. (Day 1) at 126:14–17, 166:1–13, 182:25–186:24.

3. *Breach*

[CL53] The Court determines that the Franchisee Defendants breached the Transfer Agreement in several respects. *See* Trial Tr. (Day 1) at 198:6–206:6. First, the Franchisee Defendants failed to comply with Pizza Hut's Brand Standards. *See* FF180.

[CL54] Second, Franchisee Defendants failed to indemnify Pizza Hut. *See* FF188; PX1 (indemnity and fees compilation spreadsheet)).

[CL55] Third, Franchisee Defendants failed to make payment on all lease payments for the various Pizza Hut restaurants, in violation of Section 8. *See* FF176–FF179; PX114 § 8(B); *see also id.* § 12(D).

[CL56] Fourth, the Franchisee Defendants did not provide releases and written confirmations from each landlord for the various Pizza Hut restaurant leases wherein Pizza Hut could have contingent liability, in violation of Section 8. *See* FF179; PX114 § 8(D)(1)–(2).

[CL57] Fifth, the Franchisee Defendants—related to the proposed UCC Article 9 sale—did not provide notice to all potential lienholders or run lien searches to identify such lienholders, in violation of Section 8. *See* FF166–FF170; FF179; PX114 § 8(B); *see also id.* § 8(B)(1).

[CL58] Sixth, the Franchisee Defendants failed to show that the Pizza Hut restaurants' assets were being transferred without any liens on them, including tax liens, in violation of Section 8. *See* FF166–FF170; PX114 § 8(B); *see also id.* § 12(C).

[CL59] Seventh, the Franchisee Defendants failed to have worker's compensation insurance and evidence such

insurance to Pizza Hut, in violation of Section 8. *See* FF171–FF175; PX114 § 8(D)(2).

[CL60] For these reasons, amongst other issues, the Court determines that Pizza Hut has established breach. Franchisee Defendants' performance was not excused or prevented in any respect by Pizza Hut.

4. *Damages*

[CL61] For all the reasons set forth above, concerning the Franchise and Forbearance Agreements, and due to Franchisee Defendants' breaches of the Transfer Agreement, Pizza Hut sustained damages. *See* PX2 (Compilation spreadsheet of damages, fees).

***42 [CL62]** These damages are for the same amount as indicated in the initial Franchise Agreements damages section. CL18–CL24. These fees include Monthly Service Fees, Advertising Fees, Digico Fees and Other Fees. *Id.*

[CL63] As noted, Pandya was under a continuing obligation to cover and pay for these fees. PX15, App'x E ¶ 4.

[CL64] Accordingly, the Court determines that Pizza Hut has established that the Franchisee Defendants (including Intervenor Ronak Capital) breached the Transfer Agreement. *CamargoCopeland Architects*, 2013 Tex. App. LEXIS 14905, at *3.

XIV. De-identification

A. Legal Standard

[CL65] The de-identification provisions are contained in the Franchise and Transfer Agreements agreed upon by the parties. *See* PX15 § 10.4; PX114 §§ 7–8. Accordingly, the Court will utilize the breach of contract framework to determine if Franchisee Defendants must de-identify the identified Pizza Hut restaurants. *Good Shepherd Hosp., Inc. v. Select Specialty Hosp. - Longview, Inc.*, 563 S.W.3d 923, 928–29 (Tex. App.—Texarkana [6th Dist.] Oct. 11, 2018).

B. Analysis

1. *Valid contract*

[CL66] As noted above, the Franchise and Transfer Agreements are valid, enforceable contracts. *See* CL8; CL48.

[CL67] Pursuant to the Franchise Agreement, Franchisee Defendants agreed to immediately stop using the Pizza Hut trademarks and trade dress once the agreement was terminated. *See* PX15 §§ 10.4, 19.1; PX18–19 (same).

[CL68] And if the Franchisee Defendants did not perform the de-identification, Pizza Hut would do so at the expense of the Franchisee Defendants. *See id.* § 10.4.

[CL69] Similarly, in the Transfer Agreement, the Franchisee Defendants agreed to de-identify any Pizza Hut restaurant closed within 30 days of closure. PX114 § 4(B). And if the sale of the restaurants did not occur under the Transfer Agreement, the Franchisee Defendants had to de-identify and shutter the remaining restaurants. *Id.* § 7(A); *see also id.*, Ex. C (listing de-identification process guidelines).

2. *Performance tendered*

[CL70] As noted above, Pizza Hut performed or tendered performance on all of its obligations under both the Franchise Agreements and the Transfer Agreement. *See* CL10–CL12; CL52.

3. *Breach*

[CL71] The Franchisee Defendants breached the Franchise and Transfer Agreements by not de-identifying the following Pizza Hut Restaurants, as identified by store number, by March 30, 2021: 027012, 027022, 28208, 028209, 031013, 028198, 028199, 028212, 028559, 029549, 027015, 027026, 028211, 028420, 032596, 028202, 028213, 028214, 031593, 028195, 028201, 028216. *See* FF192.

4. *Damages*

[CL72] Pizza Hut sustained total damages of $16,700 for expenses associated with de-identification as a result of the Franchisee Defendants' breaches of the Franchise Agreements and the Transfer Agreement. *See* Trial Tr. (Day 1) at 214:25–218:8. Pandya is liable for the total de-identification damages of $16,700 pursuant to the Guaranties. PX15, App'x E ¶ 4.

[CL73] Accordingly, the Court determines that the Franchisee Defendants breached their obligations to de-identify the restaurants in question. *Good Shepherd Hosp.*, 563 S.W.3d at 928–29.

[CL74] Further, the Franchise Agreements provide that "[Pizza Hut] will ... be entitled to an injunction restraining Franchisee from committing or continuing to commit any breach[.]" *Id.* §§ 19.1, 20.4. For the same reasons discussed below concerning Pizza Hut's rights under the Lanham Act (*infra* CL93–CL100), the Court likewise determines that Pizza Hut is contractually entitled to an injunction that the Franchisee Defendants must perform their de-identification obligations in accordance with Section 7(A) and Exhibit C to the Transfer Agreement. *See* PX114 §§ 7–8, Ex. C.

XV. Trademark & Trade Dress Infringement

A. Legal Standard

***43 [CL75]** A claim of trademark and trade dress infringement under 15 U.S.C. § 1114(1)(a) is established by: (1) plaintiff possesses a legally protectable trademark and/or trade dress; (2) defendants' use of the trademark and/or trade dress "creates a likelihood of confusion as to affiliation, sponsorship, or source" of defendants' products or services. *Viacom Int'l, Inc. v. IJR Capital Invs., L.L.C.*, 891 F.3d 178, 185–92 (5th Cir. 2018); *YETI Coolers, LLC v. JDS Indus., Inc.*, 300 F. Supp. 3d 899, 907 (W.D. Tex. 2018) (applying same standard and test to plaintiff's trade dress infringement claim).

[CL76] Pizza Hut has the burden of establishing trademark infringement by a preponderance of the evidence. *True Believers Ink 2, Corp. v. Russell Brands, LLC*, No. 4:18-CV-00432, 2020 WL 2113600, at *——, 2020 U.S. Dist. LEXIS 77689 at *10 (E.D. Tex. May 4, 2020).

[CL77] To be protectable under the Lanham Act:

> A mark [must] be distinctive in one of two ways: (1) the mark is inherently distinctive because its intrinsic nature serves to identify a particular source (i.e., the mark is fanciful, arbitrary, or suggestive), or (2) the mark has acquired distinctiveness through the development of secondary meaning (i.e., descriptive marks).

Amy's Ice Creams, Inc. v. Amy's Kitchen, Inc., 60 F. Supp. 3d 738, 747 (W.D. Tex. Oct. 8, 2014).

[CL78] Pizza Hut's registration of its marks with the USPTO "is prima facie evidence that the marks are inherently distinctive." *Nola Spice Designs, L.L.C. v. Haydel Enters.*, 783 F.3d 527, 537 (5th Cir. 2015) (citing 15 U.S.C. § 1057(b) ("[R]egistration of a mark on the principal register is prima facie evidence of the mark's validity")); *see* FF39; FF42. The Franchisee Defendants may rebut this presumption by "demonstrating that the mark[s are] not inherently distinctive." *Amazing Spaces, Inc. v. Metro Mini Storage*, 608 F.3d 225, 237 (5th Cir. 2010). Apart from these protections, such registration is also "prima facie evidence of the registrant's exclusive right to use the mark in commerce." *Elvis Presley Enters. v. Capece*, 141 F.3d 188, 194 (5th Cir. 1998) (citing 15 U.S.C. § 1115(a)).

[CL79] As to trade dress:

> Ordinary geometric shapes ... are regarded as nondistinctive and protectable only upon proof of secondary meaning.... However, uncommon or unusual shapes and symbols ... can be regarded as inherently distinctive ... The issue is whether this shape is so unusual for this type of goods or services that its distinctiveness can be assumed.

1 MCCARTHY ON TRADEMARKS § 7:33, at 7-88.1-89; *Amazing Spaces*, 608 F.3d at 243.

[CL80] Secondary meaning does not need to be stablished if the trade dress is determined to be inherently distinctive. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 773–74, 112 S.Ct. 2753, 120 L.Ed.2d 615 (1993). Trade dress is "inherently distinctive if its intrinsic nature serves to identify a particular source." *Wal-mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 211, 120 S.Ct. 1339, 146 L.Ed.2d 182 (2000). Further, a restaurant's motif is protectable trade dress under the Lanham Act. *Two Pesos*, 505 U.S. at 775–76, 112 S.Ct. 2753.

B. Analysis

[CL81] Pizza Hut's trademarks are legally protectable—as registered with the USPTO—and are otherwise inherently distinctive. FF39–FF41.

[CL82] The Court determines that Pizza Hut's trade dress is likewise inherently distinctive. Pizza Hut's trade dress intrinsically identifies the source of Pizza Hut's goods and services. *Wal-mart Stores*, 529 U.S. at 211, 120 S.Ct. 1339. And Pizza Hut's trade dress is not functional. *Id.* Accordingly, Pizza Hut's trade dress is legally protectable.

***44 [CL83]** Likelihood of confusion can exist where the defendant is using the exact same mark as the plaintiff. *See Paulsson Geophysical Servs. v. Sigmar*, 529 F.3d 393, 310–11 (5th Cir. 2008).

[CL84] Here, Franchisee Defendants have not challenged that these marks used between the parties at the restaurants are identical in all respects.

[CL85] "Franchisee[ ] [Defendants'] and Plaintiff['s] marks are not only identical ... Franchisee[ ] [Defendants'] are presumably holding themselves out as a [Pizza Hut] franchise." *Petro Franchise Sys., LLC v. All Am. Props., Inc.*, 607 F. Supp. 2d 781, 788–89 (W.D. Tex. 2009) (holding "that consumer confusion is likely to be established.").

[CL86] Accordingly, the Court determines that Franchisee Defendants' use of Pizza Hut's exact trademarks establishes a likelihood of confusion. *See id.*; *see also Am. Pac. Indus. v. Yerrou*, No. 3:20-CV-273, 2021 WL 1738983, 2021 U.S. Dist. LEXIS 83862 (S.D. Miss. May 3, 2021) (granting judgment on the pleadings for trademark infringement claim where infringer "sold tires bearing the[ ] exact [same] registered trademarks"); *Dallas Cowboys Football Club, Ltd. v. Am.'s Team Props.*, 616 F. Supp. 2d 622, 639 (N.D. Tex. 2009) (likelihood of confusion exists when both parties used "the words 'America's Team,' and the same overall color scheme"); *cf. Microsoft Corp. v. Software Wholesale Club, Inc.*, 129 F. Supp. 2d 995, 1007 n.11 (S.D. Tex. 2000) ("Generally, a likelihood of confusion analysis involves a factual inquiry into several different factors. However, in the case of a counterfeit mark, likelihood of confusion is clear.").[9]

[CL87] Similarly for Pizza Hut's trade dress, Franchisee Defendants are continuing to utilize aspects of the same approximate Pizza Hut trade dress.

[CL88] To assess "whether a plaintiff has made a showing of likelihood of confusion" as to the parties trade dress, the Fifth Circuit utilizes the following "eight non-exhaustive factors" (often labeled the "digits of confusion"):

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

BioTE Med., LLC v. Jacobsen, 406 F. Supp. 3d 575, 584 (E.D. Tex. 2019).

[CL89] Utilizing the digits-of-confusion framework: factors 1 (type of mark allegedly infringed) and 2 (similarity between the two marks) weigh heavily towards Pizza Hut. As indicated, the trademarks and trade dress are verbatim the same and the stores are functionally old re-purposed Pizza Hut restaurants. As to factors 3 (similarity of the products or services) and 4 (identity of the retail outlets and purchasers), Franchisee Defendants have similar fast food concept restaurants (*e.g.*, Boston Market) in the same locations with the same customers. *See* FF193. Therefore factors 3 and 4 also weigh in Pizza Hut's favor. Factor 6 (Franchisee Defendants' intent) likewise tips towards Pizza Hut as it has made several demands of Franchisee Defendants to remove the offending trade dress (*see, e.g.*, FF81–FF83; FF189–FF191; FF195). There is scant evidence of actual confusion in the record or the degree of care exercised by potential purchasers, so factors 7 and 8 remain neutral. *See generally* Trial Tr. (Day 1).

***45 [CL90]** Overall, six of eight of the "digits of confusion" weigh in Pizza Hut's favor. Accordingly, the Court determines that the Franchisee Defendants infringed upon Pizza Hut's trade dress and trademarks in violation of 15 U.S.C. § 1114(1)(a). *YETI Coolers*, 300 F. Supp. 3d at 907.

XVI. False Designation of Origin

A. Legal Standard

[CL91] Pursuant to 15 U.S.C. § 1125(a)(1)(A), "[t]he elements of trademark infringement and false designation of origin are identical, and the same evidence will establish both claims." *Lowe v. Eltan*, No. 9:05-CV-38, 2015 U.S. Dist. LEXIS 37667, at *17 (E.D. Tex. Mar. 1, 2015) (citing *Philip Morris USA Inc. v. Lee*, 547 F. Supp. 2d 667, 674 (W.D. Tex. 2008)). Further, a likelihood of confusion analysis is also utilized in the Section 1125(a) context to determine liability. *See Taco Cabana*, 505 U.S. at 780, 112 S.Ct. 2753.

B. Analysis

[CL92] For the same reason as above—wherein the Court determines that Pizza Hut has satisfied the elements of its 15 U.S.C. § 1114 claim as to its trademarks and trade dress in question—the Court also concludes that Pizza Hut has established the elements of its Section 1125 claim with respect to its trademarks and trade dress. CL75–CL90.

XVII. Permanent Injunction – Trademark

A. Legal Standard

[CL93] Pizza Hut requests a permanent injunction, to stop use by Franchisee Defendants of the Pizza Hut trademarks and trade dress, based on the foregoing. "Under the *eBay* factors[,]" which are utilized to determine whether a permanent injunction is warranted:

> A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Tinnus Enters., LLC v. Telebrands Corp., 369 F. Supp. 3d 704, 742 (E.D. Tex. Mar. 15, 2019) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006)).

B. Analysis

1. *Irreparable harm*

[CL94] Pursuant to 15 U.S.C. § 1116(a), "[a] plaintiff ... shall be entitled to a rebuttable presumption of irreparable harm upon a finding of a violation." Based on the above determinations (of trademark infringement and false designation of origin violations), Pizza Hut is entitled to this presumption of irreparable harm. *See* CL90; CL92.

[CL95] Further, "[w]hen a likelihood of confusion exists, the plaintiff's lack of control over the quality of the defendant's goods or services constitutes an immediate and irreparable injury, regardless of the actual quality of those goods or services." *Capital One Fin. Corp. v. Fountain*, 4:10-CV-683, 2011 U.S. Dist. LEXIS 170396, at *18–19 (E.D. Tex. Feb. 11, 2011) (quoting *Quantum Fitness Corp. v. Quantum Lifestyle Ctrs., L.L.C.*, 83 F. Supp. 2d 810, 831 (S.D. Tex. 1999)).

[CL96] Accordingly, the first factor is established. *Nat'l Urban League, Inc. v. Urban League of Greater Dallas & N. Cent. Tex., Inc.*, No. 3:15-CV-3617, 2017 WL 4351301 at *19 (N.D. Tex. Sept. 29, 2017) ("[T]he Court has previously found that a terminated franchisee's continued use of the franchisor's service marks suffices to establish irreparable injury.") (citing *7-Eleven Inc. v. Puerto Rico-7 Inc.*, No. 3:08-CV-0140, 2009 U.S. Dist. LEXIS 115064 at *9 (N.D. Tex. Dec. 9, 2009)).

2. *Inadequate remedies at law*

***46** **[CL97]** The Court further determines that the present remedies available at law are not adequate to compensate Pizza Hut for its injury. In particular, Pizza Hut's "[l]oss of control" of the unauthorized use of its trademarks and trade dress is indicative of this second factor. *Stewart Title Guar. Co. v. Stewart Title Latin Am., Inc.*, No. 4:12-CV-03269, 2017 WL 1078759, at *——, 2017 U.S. Dist. LEXIS 41871 at *36 (S.D. Tex. Mar. 21, 2017).

3. *Balance of hardships*

[CL98] As to the third factor, "[c]ourts have held that ... the 'balance of hardships,' favors entry of a permanent injunction where the plaintiff will suffer irreparable harm and the defendant's only hardship is complying with federal trademark law." *Dickey's Barbecue Pit, Inc. v. Neighbors*, No. 4:14-CV-484, 2015 WL 11199080, at *—— – ——, 2015 U.S. Dist. LEXIS 179917, at *17–18 (E.D. Tex. Sept. 18, 2015) (citing *Coach Inc. v. Couture*, No. SA-10-CV-601, 2012 U.S. Dist. LEXIS 6364, at *12 (W.D. Tex. Jan. 19, 2012)).

4. *Public interest*

[CL99] As to the fourth factor, "courts have held that protecting trademark rights serves the public interest by allowing consumers to distinguish between various competing products." *Id.* at *18 (citing *Mary Kay, Inc. v. Weber*, 661 F. Supp. 2d 632, 640 (N.D. Tex. 2009)). Pizza Hut should "be able to protect its public image" because that "serves the public interest" and "insures that the owner of a trademark reaps the benefits of the goodwill of his business." *Mary Kay*, 661 F. Supp. 2d at 640–41.

[CL100] Accordingly, Pizza Hut is entitled to a permanent injunction. *eBay*, 547 U.S. at 391, 126 S.Ct. 1837. Franchisee Defendants and their respective constituent members are permanently enjoined from utilizing any Pizza Hut trademark or trade dress in relation to any goods or services offered or provided by the Franchisee Defendants.

XVIII. Fraud/Fraudulent Inducement Counterclaim

A. General Release

[CL101] On August 21, 2019, the Franchisee Defendants executed a General Release attached to the Transfer Agreement. PX114, Ex. D. The General Release covers "any and all causes of action ... known or unknown, suspected or unsuspected" "at any time [before the release] ... arising out

of or relating to ... the offer or sale of the Pizza Hut franchise opportunity ... [or] any other agreement between [Franchisee Defendants] and [Pizza Hut].” *Id.*

[CL102] After assessing the record evidence and contractual provisions, the Court determines that the General Release is valid and enforceable. FF229–FF232; *Bombardier Aero. Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 232 (Tex. 2019). Further, the General Release functions to bar certain of the Franchisee Defendants' counterclaims during the period the Transfer Agreement was in effect.

[CL103] “A release extinguishes a claim or cause of action and is an absolute bar to any right of action on the released matter.” *Tex. Capital Bank N.A. v. Zeidman*, 779 Fed. Appx. 211, 216 (5th Cir. 2019) (citing *D.R. Horton-Tex., Ltd. v. Savannah Props. Assocs., L.P.*, 416 S.W.3d 217, 226 (Tex. App.—Fort Worth [2d Dist.] 2013, no pet.))

[CL104] “[A] [G]eneral [R]elease that is not limited to a specific cause of action or occurrence, and broadly releases all claims and causes of action between two parties, is valid and enforceable.” *Southmark Corp. v. FDIC*, No. 96-11578, 142 F.3d 1279, 1998 U.S. App. LEXIS 40474 at *11 (5th Cir. Apr. 20, 1998).

***47 [CL105]** Pandya, on behalf of the Franchisee Defendants, read, understood and signed onto the General Release both knowingly and voluntarily. *See* FF231–FF232; *see also* Docket No. 317 at 22 (“In *Bombardier*, as here, ‘sophisticated entities represented by attorneys in an arms-length transaction—bargained for the limitation-of liability clauses to bar punitive damages.’ ”) (quoting *Bombardier Aero. Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 232 (Tex. 2019)).

[CL106] All parties were represented by counsel and the Franchisee Defendants did not rely on any representation by Pizza Hut regarding the subject matter, basis or effect of the General Release. *See id.*; PX114, Ex. D at 28; *see also* Trial Tr. (Day 1) at 151:3–7; Docket No. 217 at 10 (“But Defendants' fraud claim does not rely on misrepresentations made with respect to the Release itself.”).

[CL107] The negotiations over the General Release were decidedly made at arm's length. *See* FF229; FF231–FF232; *see also* Trial Tr. (Day 1) at 148:16–153:13. And Pandya is a sophisticated and successful businessman. *See* Trial Tr. (Day 3) at 643:3–7; Trial Tr. (Day 4) at 6:6–10:20; *see also* Docket No. 201 ¶¶ 7–8; Docket No. 317 at 9–10, 22.

[CL108] Consequently, the General Release is valid and enforceable and operates here to bar Franchisee Defendants' counterclaims for: (1) fraud/fraudulent inducement; (2) tortious interference with prospective business relations; and (3) defamation that occurred before the period the Transfer Agreement was in effect.

B. Fraud/Fraudulent Inducement-Specific Matters

[CL109] While the General Release independently bars the Franchisee Defendants' fraud/fraudulent inducement counterclaims, the Court addresses them to the extent necessary here to clarify this issue.

[CL110] The Franchisee Defendants have alleged that Pizza Hut misrepresented its intent to perform pursuant to the Transfer Agreement and thus the agreement was fraudulent. Docket No. 344 ¶ 75. However, the Court's determinations establish that Pizza Hut both intended to and did perform under the Transfer Agreement. *See* FF197–FF222. The evidence reasonably supports an inference that points to a lack of fraud. The Court determines that Pizza Hut did not make—and the Franchisee Defendants have failed to establish—any misrepresentations about the Transfer Agreement or its own performance underlying it.

1. *Legal standard*

[CL111] To establish their fraud counterclaim, Franchisee Defendants are required to demonstrate: (1) a false material misrepresentation by Pizza Hut; (2) Pizza Hut knew the misrepresentation was false; (3) Pizza Hut sought to induce the Franchisee Defendants to act on the misrepresentation; and (4) Franchisee Defendants actually and justifiably relied on the misrepresentation to their detriment. *Whittington v. Mobiloil Fed. Credit Union*, No. 1:16-CV-482, 2018 WL 6582824, 2018 U.S. Dist. LEXIS 224121 (E.D. Tex. Oct. 26, 2018).

[CL112] To establish their fraudulent inducement counterclaim, Franchisee Defendants are further required to demonstrate that: (5) “misrepresentation is a false promise of future performance made with a present intent not to perform,” in the “context of a contract.” *Crane v. Rave Rest. Grp., Inc.*, 552 F. Supp. 3d 692, 707 (E.D. Tex. 2021).

2. *Analysis*

[CL113] The Franchisee Defendants alleged that the Transfer Agreement itself was a fraud perpetrated on them by Pizza Hut. Docket No. 344 ¶ 75.

***48 [CL114]** Thus, to prevail on their fraud counterclaims, the Franchisee Defendants effectively had to have demonstrated that Pizza Hut never intended to perform under the Transfer Agreements. *See Kevin M. Ehringer Enters. v. McData Servs. Corp.*, 646 F.3d 321, 325–26 (5th Cir. 2011).

[CL115] Yet, the factual record and Pizza Hut's many actions belie this determination and any inference of fraud. *See* FF197–FF222.

[CL116] Pizza Hut's intent to perform "may be inferred from [its] subsequent acts[,]" after agreeing to the Transfer Agreement, showing performance. *See Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 434 (Tex. 1986).

[CL117] The Court further notes that "mere failure to perform contractual obligations as promised does not constitute fraud." *Ehringer Enters.*, 646 F.3d at 325 (citing *Spoljaric*, 708 S.W.2d at 435).

[CL118] Rather, Pizza Hut did actually perform under the Transfer Agreement. *See* FF197–FF216 (describing the commercially reasonable efforts Pizza Hut took). As the Court described above, Pizza Hut undertook commercially reasonable efforts to effectuate a sale of the restaurants. *See id.*

[CL119] For example, Pizza Hut identified and negotiated with a potential purchaser who offered $2 million to effectuate a sale of the Pizza Hut restaurants, pursuant to Section 6 of the Transfer Agreement. *See* FF211; FF215.

[CL120] Further, Pizza Hut did due diligence work—ranging from meetings to status calls, task allocation and following up with counsel—on multiple potential purchasers of the restaurants and worked to approve these individuals as franchisees. FF206–FF216.

[CL121] These actions are enough to defeat any inference of fraud; Pizza Hut was not conducting itself in a manner remotely suggestive of fraud. *Ehringer Enters.*, 646 F.3d at 325 . **[CL122]** In view of the General Release, and for the independent reason that Pizza Hut made no material misrepresentation as to the Transfer Agreement, the Franchisee Defendants' fraud/fraudulent inducement counterclaims are unavailing.

XIX. Tortious Interference with Prospective Business Relations Counterclaim

[CL123] As determined above, the General Release is valid and enforceable. *See* CL104; CL108. Consequently, the General Release operates to bar Franchisee Defendants' tortious interference with prospective business relations counterclaim. *Bombardier Aero. Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 232 (Tex. 2019).

XX. Defamation Counterclaim

[CL124] Franchisee Defendants allege that Pizza Hut made two false, defamatory statements. First: Pizza Hut discouraged any potential purchasers from working directly with Pandya to purchase the stores such as by telling Chopra "[Pandya] does not [have] the right to operate the stores and we can have the stores closed immediately at any time." Docket No. 344 ¶ 40 (citing DX84 (EM from C. Short to R. Chopra (dated Aug. 12, 2019))). Second: Pizza Hut discouraged any potential purchasers from negotiating directly with Pandya such as by telling Chopra to "[p]lease recognize that [Pizza Hut's] involvement and partnership has now created a situation that has a far better chance of closing than [Mr. Chopra] individually trying to negotiate with [Mr. Pandya] or the receiver." Docket No. 344 ¶ 68 (citing DX152 (EM from C. Short to R. Chopra (dated Aug. 28, 2019))).

A. Legal Standard

***49 [CL125]** As to the second allegedly false, defamatory statement (DX152): the Court determines that the Franchisee Defendants have failed to prove defamation. To establish a claim for defamation, Franchisee Defendants must demonstrate that Pizza Hut "(1) ... published a false statement; (2) that defamed the [Franchisee Defendants]; (3) with the requisite degree of fault regarding the truth of the statement (negligence if the plaintiff is a private individual); and (4) damages, unless the statement constitutes defamation per se." *Warren v. Fannie Mae*, 932 F.3d 378 (5th Cir. 2019) (citing *Bedford v. Spassoff*, 520 S.W.3d 901, 904 (Tex. 2017)). Importantly, "[t]he truth of a statement is an absolute defense to a claim for defamation." *Butowsky v. Folkenflik*, No. 4:18-CV-442, 2019 U.S. Dist. LEXIS 104297, at *32–33 (E.D. Tex. Apr. 17, 2019); *see also* TEX. CIV. PRAC. & REM. CODE § 73.005(a) (noting that truth is a defense to a claim for defamation).

B. Analysis

[CL126] Here, Pizza Hut was making a statement grounded in fact. Trial Tr. (Day 2) at 452:5–453:15. At the time the emailed statement was made by Short (August 28, 2019), the Transfer Agreement was in effect. *See* PX114 at 28 (effective as of August 21, 2019). Sections 5 and 6 of the Transfer Agreement provided that Pizza Hut had the "sole discretion" to select a purchaser for the restaurants. *See id.* §§ 5–6. Therefore, Pizza Hut's involvement in the potential deal necessarily meant that it had a "better chance of closing." This emailed statement is not defamatory, but rather is truthful.

[CL127] Franchisee Defendants' defamation counterclaim also fails because the statement in question does not rise to the level that would expose them to contempt or hatred. *See Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 637–38 (Tex. 2018); *see also* TEX. CIV. PRAC. & REM. CODE § 73.001. Such a statement does not entail any form of actionable reputational or material harm to Franchisee Defendants, nor did Franchisee Defendants prove such at trial. *See id.*; *see also* Trial Tr. (Day 2) at 440:12–441:2. Lastly, there is no evidence in the record that Pizza Hut acted negligently or purposefully regarding the truth of such statement.

[CL128] As to the first allegedly false, defamatory statement (DX84): as determined above, the General Release is valid and enforceable. CL102. Consequently, the General Release operates to bar Franchisee Defendants' defamation counterclaim before the term of the Transfer Agreement. *Id.*; PX114, Ex. D.

[CL129] Accordingly, Franchisee Defendants' counterclaim fails as to both allegedly defamatory statements.

XXI. Breach of the Transfer Agreement Counterclaim

A. Legal Standard

[CL130] The Franchisee Defendants also contend that Pizza Hut breached the Transfer Agreement. To establish breach, the Franchisee Defendants must establish: (1) the Transfer Agreement is a valid and enforceable contract; (2) Pizza Hut failed to perform or tender performance; (3) Pizza Hut breached the Transfer Agreement; and (4) the Franchisee Defendants suffered damages as a result. *Pizza Inn v. Odetallah*, No. 4:19-CV-856, 2020 WL 4677685, at *——, 2020 U.S. Dist. LEXIS 147293 at *5 (E.D. Tex. May 14, 2020).

[CL131] Franchisee Defendants must establish their breach of contract claim by a preponderance of the evidence. *Shiloh Enters. v. Cleveland Imaging & Surgical Hosp.*, No. 1:07-CV-588, 2007 WL 9724995, at *——, 2007 U.S. Dist. LEXIS 117350 at *3 (E.D. Tex. Dec. 13, 2007).

B. Analysis

[CL132] The Court determines that the Franchisee Defendants cannot establish their breach counterclaim based on the foregoing.

1. *Valid contract*

[CL133] First, the Transfer Agreement is a valid, enforceable contract, as noted above. *See* CL48. Further, Pizza Hut terminated the Transfer Agreement pursuant to Section 8 as of October 3, 2019. *See* CL51.

2. *Performance*

***50 [CL134]** Second, as determined above, the Franchisee Defendants—rather than Pizza Hut—were the parties that failed to perform or tender performance of multiple obligations. *See* CL53–CL59 (noting, for example, the presence of disallowed tax liens, existence of lease defaults, and lack of worker's compensation insurance).

[CL135] Likewise, Ronak Capital did not perform or tender performance because it made material representations concerning tax liens on transferred assets and regarding whether lease defaults existed. *See id.*; *see also* PX114 §§ 8(B)(3), 8(D)(3), 12(C)–(D).

3. *Breach*

[CL136] Third, for all of the reasons discussed above, Pizza Hut did not breach because it did use commercially reasonable efforts to effectuate a sale of the restaurants. *See* CL118.

4. *Damages*

[CL137] Fourth and consequently, as Pizza Hut did not breach the Transfer Agreement, Franchisee Defendants and Ronak Capital cannot establish damages.

[CL138] In addition, as determined above, Pizza Hut terminated the Transfer Agreement under Section 8. *See* CL51. Section 8 states that, upon the occurrence of certain conditions, "Pizza Hut is not liable to Defendants or Ronak Capital for any damages whatsoever." PX114 § 8. This provision further and independently disallows Franchisee Defendants from establishing the damages element of their breach of the Transfer Agreement counterclaim.

[CL139] Accordingly, Franchisee Defendants counterclaim for breach of the Transfer Agreement fails.

XXII. Damages

A. Fees, royalties & expenses

[CL140] As determined above (*supra* CL21, CL24, CL72), Franchisee Defendants owe Pizza Hut the following in damages:

- Monthly Service Fees, Advertising Fees, Digital Innovation Fees and Other Fees – $4,366,440.00
- Contractual Interest on Above Fees – $1,318,972.00
- Costs to De-identify – $16,700.00
- Qualified Operator (Inga Humphrey) Fees – $11,921.00

[CL141] The Court determines that Pizza Hut has established and proven these damages and fees with reasonable certainty. *Goose Creek Consol. Ind. Sch. Dist. v. Jarrar's Plumbing, Inc.*, 74 S.W.3d 486, 496–97 (Tex. App.—Texarkana [6th Dist.] 2002, pet. denied).

[CL142] Pizza Hut has provided sufficient evidence and inputs underlying the fees owed, which are further supported by the provisions of the agreements themselves. *See* PX15 § 9 (Fees and Payment Schedule provisions); PX32 § 2.3; PX114 § 1; PX2 (damages, fees and royalties compilation spreadsheet).

[CL143] Accordingly, Pizza Hut's claim for an accounting is **DISMISSED-AS-MOOT**.

B. Indemnified obligations

[CL144] As determined above (*supra* CL23), Franchisee Defendants owe Pizza Hut the following in indemnified obligations:

- Attorneys' fees and associated costs with the assorted legal matters – $464,174.48 *See* PX1 (Indemnity and fees compilation spreadsheet; Indemnity tab); *see also* Trial Tr. (Day 3) at 595:7–596:4.

[CL145] In addition, the Court notes that the Franchisee Defendants are liable for the following three matters, until conclusion, which are presently ongoing:

- *McComsey v. Wilson*, No. 180700426 (Pa. Ct. C.P. filed Aug. 31, 2018)
- *Truett v. Pizza Hut of Am., Inc.*, No. 191204546 (Pa. Ct. C.P. filed Jan. 6, 2020)
- *Thompson v. Fofana*, No. 200701917 (Pa. Ct. C.P. filed July 28, 2020)

See id. (Indemnification; Itemized Invoices – Indemnification tabs); *see also* Trial Tr. (Day 1) at 220:5–6.

***51 [CL146]** The Court credits the extensive, reliable testimony and analysis conducted by David Harper—a partner with over 30 years of business litigation experience, extensive experience setting billing rates and prior expert witness experience—to determine that the indemnified matter fees are necessary and reasonable. Trial Tr. (Day 3) at 599:16–601:25.

[CL147] For example, Harper testified about: (1) the typicality of the rates for work in the jurisdictions where it was performed (*see id.* at 596:15–597:2), (2) the reasonableness of the rates and number of hours spent on various tasks (*id.* at 597:4–6, 610:2–14, 613:18–615:4), (3) how the hours worked were necessary to accomplish the work described in the billing invoices (*id.* at 597:7–9, 617:11–619:25) and (4) the novelty, difficulty and requisite skill needed for the legal work performed (*id.* at 617:11–618:5), amongst other considerations.

[CL148] Harper's testimony was supported by him (1) having looked at all of the pleadings and documentation in the indemnified matters, totaling hundreds of pages (*id.* at 603:4–13), (2) reviewing all of the invoices of the fees billed (*id.* at 603:4–604:1, 615:5–616:7), (3) interviewing with one attorney at every firm that worked on the indemnified matters (*id.* at 603:4–604:11, 610:2–14), (4) assessing Pennsylvania court awards, (5) reviewing settlement materials (*id.* at 610:15–611:11), (6) discerning the appropriateness of paralegal work and their time entries (*id.* at

611:15–612:4), (7) comparing rates and taking firm averages based on reputable databases such as Valeo Partners, National Law Journal 500 and Chambers rankings (*id.* at 612:5–17, 620:21–622:1) and (8) weighing the *Johnson* factors as utilized for fee awards in the Fifth Circuit (*id.* at 616:8–619:25). Accordingly, the indemnified matter fees are both necessary and reasonable.

C. Fees as Damages

[CL149] The Court determines that Pizza Hut is entitled to recover a subset of the fees as damages it has identified.

[CL150] Texas law recognizes that attorneys' fees can be a form of damages. "If the underlying suit concerns a claim for attorney's fees as an element of damages... then those fees may properly be included in a judge['s] ... compensatory damages award." *In re Nalle Plastics Family L.P.*, 406 S.W.3d 168, 174–75 (Tex. 2013) (citing *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 111 (Tex. 2009)).

[CL151] Such actual damages can be either direct or consequential. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 816 (Tex. 1997).

[CL152] "Direct damages are the necessary and usual result of the defendant's wrongful act; they flow naturally and necessarily from the wrong." *Id.* (citing *Southwind Aviation, Inc. v. Avendano*, 776 S.W.2d 734, 736 (Tex. App.—Corpus Christi [13th Dist.] 1989, pet. denied))

[CL153] By contrast, consequential damages "result naturally, but not necessarily from the acts complained of." *Haynes & Boone v. Bowser Bouldin, Ltd.*, 896 S.W.2d 179, 182 (Tex. 1995) (quoting *Henry S. Miller Co. v. Bynum*, 836 S.W.2d 160, 163 (Tex. 1992)).

[CL154] The Court previously determined that, as part of the Transfer Agreement, the parties waived consequential damages. *See* Docket No. 317 at 24–25 (granting Pizza Hut's motion to dismiss in part because Franchisee "Defendants have waived their ability to seek exemplary, special and consequential damages.") (citing *Bombardier Aero. Corp. v. SPEP Aircraft Holdings*, LLC, 572 S.W.3d 213 (Tex. 2019)).

***52 [CL155]** Specifically, Pizza Hut and the Franchisee Defendants agreed to "irrevocably waive, to the fullest extent permitted by law, any right to or claim for any punitive, exemplary, ... special, [or] consequential ... damages in any action or proceeding whatsoever between [the] parties." PX114 § 13.

[CL156] Therefore, Pizza Hut may not now seek attorneys' fees as damages that would be encompassed as consequential damages. *Id.*

[CL157] Pizza Hut is however entitled to attorneys' fees that are properly classified as direct damages. *Nalle Plastics*, 406 S.W.3d at 174–75.

[CL158] The following three attorneys' fees can fairly be characterized as direct damages that "flow naturally and necessarily from" the Franchisee Defendants' "wrongful act[s]" including breach of contract [and other conduct]. *Arthur Andersen*, 945 S.W.2d at 816.

[CL159] (1) Baker McKenzie - $466,588.91: This work concerned legal advice surrounding the Transfer Agreement, closure of stores and receivership issues. *See* PX1 (Attorneys' Fees as Damages tab); *see also* Trial Tr. (Day 1) at 224:3–14. The billable entries included giving "Pandya Advice (Transfer Ag., Store Closure, etc.)." PX1 (Itemized Invoices AFD tab). These attorneys' fees resulted from the Franchisee Defendants' breach of Section 18.1.A in the Franchise Agreements. *See* PX15 § 18.1.A (pertaining to financial performance; if Franchisee Defendants "is generally not paying its debts as those debts become due, or if Franchisee admits in writing its inability to pay its debts").

[CL160] (2) Dinsmore & Shohl - $8,520.00: Similarly, this legal work concerned the "[r]eceivership proceedings against Pandya entity." PX1 (Attorneys' Fees as Damages tab). For the same reasons as stated above, the Court determines these fees as damages are awardable. *See* Trial Tr. (Day 1) at 224:3–16.

[CL161] (3) Katten Munchin - $35,434.75: These attorneys' fees resulted from Franchisee Defendants' failure under Section 5(A) of the Transfer Agreement to complete various steps for the UCC Article 9 sale. *See* PX1 (Attorneys' Fees as Damages tab); Trial Tr. (Day 1) at 224:3–9; *see also* PX114 § 5(A) ("Pandya will effect such transfer of the Store Assets to Purchaser no later than the expiration of the Term by means of a sale that complies with all requirements applicable to a commercially reasonable disposition under UCC Article 9."). Accordingly, these fees naturally flowed from the Franchisee Defendants' breach of this core provision, as discussed *supra* CL57.

[CL162] The Court declines to award the following attorneys' fees as damages because they are consequential and thus not direct from Franchisee Defendants' actions:

[CL163] (1) Clark Hill - $222,622.50: These attorneys' fees resulted from "lease assignments" and real estate work related to the franchise sales. Without further details (for example, directly tying this work to Section 8 of the Transfer Agreement) such work does not have a direct tie-in stemming from the Franchisee Defendants' breach of contract and associated conduct. *See* PX1 (itemized invoice tab); *see also* Trial Tr. (Day 1) at 224:3–6.

[CL164] (2) Haynes & Boone - $25,648.20: These attorneys' fees pertain to "legal analysis re sale of stores." PX1 (itemized invoice tab). Without further detail included in these billing entries, the Court is unable to properly determine if these are direct damages. *See* Trial Tr. (Day 1) at 224:3–18.

***53 [CL165]** (3) Stites & Harbison - $7,135.50: These attorneys' fees relate to "Forbearance Agreement & Termination Notice." *See* PX1 (itemized invoice tab). Without further detail included in these billing entries, the Court is unable to properly determine if these are direct damages. *See* Trial Tr. (Day 1) at 224:3–20.

[CL166] Therefore, the recoverable total of these fees as damages is: $510,543.66. *See* Trial Tr. (Day 1) at 223:15–227:14; Trial Tr. (Day 3) at 596:5–25.

[CL167] For the same reasons described above (*infra* CL146–CL148), the Court credits the extensive, reliable testimony and analysis conducted by Harper to determine that the fees here are necessary and reasonable.

D. Future Royalties

[CL168] Pizza Hut requests substantial lost future royalties—in the amount of $16,948,956.00. *See* PX2 (Side by Side Comparison and Grand Summary tabs). Pizza Hut arrives at this figure by calculating total lost future royalties at $42,512,991.26, subtracting out $24,076,017.00 in mitigation and $2,375,102 in incentives that Pizza Hut paid to the new restaurant franchisee, then discounting all future amounts to net present value utilizing an 8-percent discount rate. *See id.*; *see also* Trial Tr. (Day 3) at 591:11–22.

[CL169] As a threshold issue for the Court to resolve, the parties acknowledge that state and federal courts in Texas have not explicitly determined—utilizing Texas law—whether a franchisor is able to receive lost future royalties from a franchisee when the franchisor is the party responsible for terminating the agreement. *See* Docket Nos. 384 at 1, 385 at 1 (parties' briefing). The parties also do not dispute that Pizza Hut, acting as franchisor, was the party here that terminated the agreements. Docket No. 350 at 34–35 (parties' stipulations and uncontested facts).

[CL170] Having surveyed the landscape on this discrete legal issue, the Court finds the reasoning presented in *Progressive Child Care* compelling. *See Progressive Child Care Sys., Inc. v. Kids 'R' Kids Intl, Inc.*, No. 2-07-127-CV, 2008 WL 4831339 (Tex. App.—Fort Worth [2d Dist.] Nov. 6, 2008) (pet. denied) (permitting lost future royalties). Akin to the principles underlying lost profits, parties should be entitled to the benefit of their bargain. A franchisor has a certain expectation of a benefit that it would reasonably have been expected to receive absent breach—under fundamental contractual principles. *See, e.g., Perales v. First Am. Bank Tex., SSB*, No. 1:00-CV-278-C, 2001 U.S. Dist. LEXIS 13977, at *18 (N.D. Tex. Sept. 7, 2001) ("[T]he aim of awarding damages for breach of contract is 'to place the injured party in the same economic position it would have been in had the contract not been breached.' ") (quoting *Marcus, Stowell & Beye v. Jefferson Inv. Corp.*, 797 F.2d 227, 231 (5th Cir. 1986)). Here, contract law provides that an injured party should be "put [ ] in a position equivalent to that in which it would have found itself if the franchise agreement had continued in effect for the full twenty-year term." *Progressive Child Care*, 2008 WL 4831339, at *3–4.

[CL171] However, the Court ultimately does not reach this issue as it cannot determine on this record the potential lost future royalties owed to Pizza Hut by Franchisee Defendants.

[CL172] "A proper measure of damages in a breach of contract case is the loss of contractual profit." *Interceramic, Inc. v. S. Orient R.R. Co.*, 999 S.W.2d 920, 928 (Tex. App.—Texarkana [6th Dist.] 1999, pet. denied). However, a party must "establish the amount of the loss by competent evidence with reasonable certainty." *Amigo Broad., LP v. Spanish Broad. Sys., Inc.*, 521 F.3d 472, 483 (5th Cir. 2008) (citing *Szczepanik v. First S. Trust Co.*, 883 S.W.2d 648, 649 (Tex. 1994)). "At a minimum, opinions or estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost profits may be ascertained." *Id.*

***54 [CL173]** In *Progressive Child Care*, franchisor's "forensic accountant and damages expert testified to prospective losses of royalty payments" that were "based on the two franchisee's business records, including enrollment records, cash receipts, account deposit records, check registers, income tax returns for the last five years, weekly revenue reports, sign-in sheets, tuition and income spreadsheets, and monthly royalty summaries." *Progressive Child Care*, 2008 WL 4831339, at *6. By contrast, Pizza Hut did not retain a formal expert, but offered the opinion of Short as a lay witness. *See generally* Trial Tr. (Day 2).

[CL174] Here, however, Short built a forecast (Trial Tr. (Day 3) at 552:15–553:19), with approximately 26 assumptions (*id.* at 564:15–565:9), that used unaudited figures in his calculations (*see id.* at 573:24–25, 587:2–588:4). Unlike, for example, the clarity found in calculating the Monthly Service Fees (*see* Trial Tr. (Day 2) at 465:20–467:3 (C. Short discussing PX2 and its inputs)), for future royalties Pizza Hut's support for its inputs is more tenuous and ultimately speculative. *See e.g.*, PX2 (Lost Payments Calculations tabs).

[CL175] Short testified that the lost future royalties were based on an estimation of "had those stores continued, what would the expected revenue for those stores [be] through the length of their Franchise Agreement." Trial Tr. (Day 2) at 463:12–23.

[CL176] Short further testified that his calculations are based on estimates of "the royalties and advertising, digital fees that we would have expected to collect" if the Franchisee Defendants had complied with their contractual obligations. *See* Trial Tr. (Day 2) at 472:12–473:11. Short testified as to his methodology that:

> [w]e basically took 2018 and 2019, we averaged those two together to get to our 2020 number. And then we layered on same stores sales growth of 5.9. And the reason why we chose 5.9 is during the year 2020, our system grew at 5.9 percent. And so we just used the system average on what we -- what we grew. And that became our starting point.
>
> So if you're on – you're on the Column I and the 495,000, again, that's an average of those two years, times the growth of 5.9 percent, that would get you to 495. And then we basically grew that 495 by 2 percent through the rest of the Franchise Agreement.
>
> And then we took the sales then for that whole time period, and we multiplied it times the 6 percent, which is the franchise royalty rate.

Id. at 475:5–19.

[CL177] The Court discerns several issues with this methodology. First, Pizza Hut does not provide a compelling reason why it took the average sales from 2018 and 2019 to generate the 2020 figure. While Pizza Hut attests that this maneuver accounts for the store closures and associated disorder in 2019, this does not erase the fact that taking the average between those years artificially erases the previous decline in sales and puts the Franchisee Defendants' future sales on an upwards trajectory.

[CL178] This issue is compounded by the second problem: Pizza Hut's utilization of a 5.9-percent initial growth rate for the Pizza Hut *system*, followed by a 2-percent inflation rate. *See* Trial Tr. (Day 3) at 571:20–572:8. While the Pizza Hut system may have been growing at such a healthy clip, the Franchisee Defendants' restaurants certainly were not, as demonstrated by the next issue with Pizza Hut's methodology.

[CL179] Third, it is incongruous for Pizza Hut to ask for lost future royalties based on its expected benefit of bargain when the record is replete with testimony that Franchisee Defendants' business was lackluster and its performance was "dead last." *See, e.g.*, Trial Tr. (Day 1) at 97:10–13 (Q. (Plaintiff's counsel): "During 2018, how did Mr. -- the franchise operations of Mr. Pandya's entities stack up against other franchisees in the Pizza Hut system?" A. (L. Leahy): "He was consistently dead last or very, very near dead last."); *id.* at 104:6–7 (A. (L. Leahy): "Well, there was an ongoing state of decline in his operations."); *id.*; at 115:4–14 (A. (L. Leahy): "Mr. Pandya had been at the bottom of the rack and stack for quite some time."); *id.* at 127:21–128:6 (A. (L. Leahy): "things at that point were in a state of free-fall."); Trial Tr. (Day 2) at 295:14–296:9 (A. (S. Crow): "this was a very special situation, and we had a melting ice cube with this portfolio."); *id.* at 387:8–18 (A. (D. Fitch): "not only in my 15 years at Pizza Hut but in my experience in the restaurant business, I've never seen anything this poorly run operationally[.]"); *id.* at 452:10–20 (A. (C. Short): "Because if you remember, this was a distressed situation, so we're trying to create some value so that somebody is willing to purchase these stores[.]"); *id.* at 499:6–16 (A. (C. Short): "the business was in a very fragile state[.]").

***55 [CL180]** In the face of declining performance month after month, and repeated placement at the bottom of the rack and stack, Pizza Hut's future royalties model belies the actual path the Franchisee Defendants' restaurants were on. Even applying an 8-percent discount rate and any mitigation efforts (*see id.* at 481:15–482:2), does not overcome the initial threshold issues detailed above.

[CL181] On this record, and for all of the reasons stated, the Court declines to award Pizza Hut lost future royalties.

E. Attorneys' Fees & Costs

[CL182] Pursuant to Section 20.5 of the Franchise Agreements, Pizza Hut is entitled as the "prevailing party" to recover attorneys' fees and costs associated with this matter. *See* PX15 § 20.5; PX19 § 20.5; PX18 § 20.5.

* * *

The statements above constitute the Court's findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. The Court finds that:

(1) Ronak Foods breached its Franchise Agreement with Pizza Hut;

(2) Pandya Restaurants breached its Franchise Agreement with Pizza Hut;

(3) JNP Foods breached its Franchise Agreement with Pizza Hut;

(4) Pandya individually breached the Guaranties with Pizza Hut;

(5) Franchisee Defendants breached the Forbearance Agreement with Pizza Hut;

(6) Franchisee Defendants, including intervenor Ronak Capital, breached the Transfer Agreement with Pizza Hut;

(7) Franchisee Defendants failed to de-identify certain restaurants and Pizza Hut is entitled to injunctive relief;

(8) Franchisee Defendants violated the Lanham Act and Pizza Hut is entitled to injunctive relief;

(9) Franchisee Defendants' counterclaims for fraud/fraudulent inducement, tortious interference with prospective business relations and one count of defamation are barred by the parties' General Release;

(10) Franchisee Defendants' counterclaim for breach of the Transfer Agreement fails;

(11) Franchisee Defendants' counterclaim for defamation on one count while the Transfer Agreement was in effect fails;

(12) Pizza Hut's request for an accounting is moot;

(13) Pizza Hut is entitled to recover damages, fees for indemnified matters and attorneys' fees as damages in part;

(14) Pizza Hut is not entitled to lost future royalties on this record;

(15) Pizza Hut is entitled to recover reasonable attorneys' fees and expenses;

(16) Pizza Hut is entitled to recover pre-and post-judgment interest and costs;

It is therefore **ORDERED** that Franchisee Defendants are liable to Pizza Hut as follows:

1. Pizza Hut is entitled to damages in the amount of $5,714,033.00 under each cause of action;

2. Pizza Hut is entitled to $464,174.48 in fees for indemnified matters, exclusive of the three ongoing matters described in CL145;

3. Pizza Hut is entitled to $510,543.66 in fees as damages; and

4. Pizza Hut is entitled to reasonable and necessary attorneys' fees, costs and expenses in an amount to be determined.

It is further

ORDERED that the Franchisee Defendants and their respective constituent members are permanently enjoined from utilizing any Pizza Hut trademark or trade dress in relation to any goods or services offered or provided by the Franchisee Defendants. It is further

ORDERED that Franchisee Defendants must perform their de-identification obligations in accordance with Section 7(A) and Exhibit C to the Transfer Agreement. It is further

ORDERED that Pizza Hut is entitled to prejudgment interest at a rate of 5-percent per year from March 27, 2019, the date the suit was filed, to the day preceding the date judgment is rendered. *See* TEX. FIN. CODE §§ 304.003(c)(2); *Int'l Turbine Servs. v. VASP Brazilian Airlines*, 278 F.3d 494, 500 (5th Cir. 2002). It is further

***56 ORDERED** that post-judgment interest shall accrue on the entire amount at a rate of 2.34-percent from the date this judgment is entered on the docket until paid. *See* 28 U.S.C. § 1961; *Boston Old Colony Ins. Co. v. Tiner Assocs., Inc.*, 288 F.3d 222, 234 (5th Cir. 2002) ("Under 28 U.S.C. § 1961(a), in diversity cases, post-judgment interest is calculated at the federal rate, while pre-judgment interest is calculated under state law."). It is further

ORDERED that Pizza Hut shall move for attorneys' fees, costs and expenses within 14 days of the entry of this order. *See* Fed. R. Civ. P. 54(d).

IT IS SO ORDERED.

All Citations

Slip Copy, 2022 WL 3544403

Footnotes

1 For this reason, Pandya individually and the franchisees collectively are referred to herein as the "Franchisee Defendants." *See* Trial Tr. (Day 3) at 639:11–21, 641:10–23.

2 Subsequently, Ronak Capital, LLC intervened in this matter on December 30, 2020 (Docket No. 109) and filed a complaint on January 4, 2021, against Pizza Hut for breach of contract concerning the Transfer Agreement. Docket No. 111. Pizza Hut answered on February 24, 2021. Docket No. 132. This is the only count intervenor Ronak Capital asserts against Pizza Hut; for this reason, all references to "Franchisee Defendants" outside of the Transfer Agreement breach claim are exclusive of Ronak Capital.

3 For purposes of economy and readability, the Court will treat Ronak Foods, Pandya Restaurants and JNP Foods' Franchise Agreements together as the parties have done. *See* Docket Nos. 252, 261. The terms of the three Franchise Agreements are substantively similar and most all provisions are repeated verbatim. *Compare* PX15 *with* PX18 *and* PX19; *see also* Trial Tr. (Day 1) at 65:16–19. For these reasons the Court will cite to PX15 for clarity and ease of reference in its findings of fact and conclusions of law.

4 The Transformation Amendment added a "Digico" fee as part of Pizza Hut's infusion of capital; this fee will be addressed below. *See infra* § IV.B.

5 The Franchisee Defendants also agreed to pay OCC fees ("overflow call center"). *See* Trial Tr. (Day 1) at 93:2–8; Trial Tr. (Day 2) at 469:1–470:16; *see also* PX2 (Pizza Hut AR Balance tab).

6 One additional indemnification obligation arose in the intervening years between agreements: *Taylor v. Ronak Foods LLC*, No. DSP-8026478-2 (Pa. Dep't of Lab. & Indus., Workers' Comp. Off. of Adj. filed Sept. 22, 2020) (worker's compensation).

7 Pizza Hut, LLC is the successor-in-interest to Pizza Hut, Inc. and is therefore a party that has standing to enforce the Franchise Agreements and Guaranties. *See* PX15 § 1.18; PX18 § 1.18; PX19 § 1.18.

8 Further confirmed in the Guaranties: "from any liability or expense (including reasonable attorneys' fees) sustained by reason of the failure of Franchisee to perform and comply with the terms and conditions of the [ ] Franchise Agreement." PX15, App'x E ¶ 2.

9 The Court also determines that the Franchisee Defendants' use of Pizza Hut's trademarks establishes a likelihood of confusion under the "digits of confusion" analysis, for the same reasons stated as to Pizza Hut's trade dress. *See* CL89–CL90.

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