EFiled: Oct 19 2012 03:29PM Filing ID 47160919
Case Number 485,2012

IN THE SUPREME COURT OF THE STATE OF DELAWARE

| BONANZA RESTAURANT COMPANY, |) | |
|-----------------------------|---|-------------------------------|
| |) | |
| Plaintiff Below, |) | |
| Appellant |) | NO. 485, 2012 |
| |) | |
| v. |) | ON APPEAL FROM SUPERIOR COURT |
| |) | OF THE STATE OF DELAWARE |
| ROBERT E. WINK, |) | IN AND FOR SUSSEX COUNTY |
| | } | C.A. No. S10C-10-018 RFS |
| Defendant Below, |) | |
| Appellee. |) | |

APPELLANT'S OPENING BRIEF

James D. Taylor, Jr.(#4009)
Jennifer M. Becnel-Guzzo (#4492)
SAUL EWING LLP
222 Delaware Avenue, Suite 1200
P.O. Box 1266
Wilmington, Delaware 19899
jtaylor@saul.com
jbecnel-guzzo@saul.com
Telephone: (302) 421-6800
Facsimile: (302) 421-6813

Eric W. Pinker (admitted pro hac vice)
Texas Bar No. 16016550
Richard A. Smith (admitted pro hac vice)
Texas Bar No. 24027990
LYNN TILLOTSON PINKER & COX, LLP

2100 Ross Avenue, Suite 2700 Dallas, Texas 75201 epinker@lynnllp.com rsmith@lynnllp.com
Telephone: 214-981-3800

Telephone: 214-981-3800 Facsimile: 214-981-3839

ATTORNEYS FOR PLAINTIFF-BELOW APPELLANT BONANZA RESTAURANT COMPANY

DATED: October 19, 2012

TABLE OF CONTENTS

| TABLE OF AU | THORITIES . | ii |
|-----------------------|-------------------------|--|
| NATURE OF P | ROCEEDINGS | \dots |
| SUMMARY OF | ARGUMENT | |
| STATEMENT O | F FACTS | 4 |
| ARGUMENT | | 8 |
| - | LIABILITY E | OR COURT ERRED BY RULING THAT WINK HAD NO FOR DAMAGES ATTRIBUTABLE TO FUTURE ROYALTIES THE FRANCHISE AGREEMENTS8 |
| i | A. Quest | ion Presented8 |
|] | B. Scope | of Review8 |
| (| C. Merit | s of Argument8 |
| | 1. | The Franchise Agreements Do Not Prohibit Bonanza From Recovering Damages for Loss of Future Royalties |
| | 2. | Applicable Law Permits the Recovery of Damages for Lost Future Royalties16 |
| | 3. | Wink Guaranteed All of the New Franchisees' Payment and Performance Obligations, Not Just the First Year |
| CONCLUSION . | | 21 |
| | | EXHIBITS |
| MEMORANDUM | OPINION (A _I | oril 17, 2012) Exhibit A |
| ORDER (Fina | l Judgment, | , August 6, 2012) Exhibit B |
| Meineke Car 423 F. | Care Ctrs App'x. 27 | ., Inc. v. RLB Holdings, LLC, 4 (4th Cir. 2011)Exhibit C |
| | | , Inc. v. Hallbeck, (E.D. Mo. 2011) Exhibit D |

TABLE OF AUTHORITIES

Cases

| Bowen v. Robinson, 227 S.W.3d 86 (Tex. App. 2006)17 |
|---|
| Burnett Ranches v. Cano Petroleum, Inc., 289 S.W.3d 862 (Tex. App. 2009)19 |
| Emmons v. Hartford Underwriters Ins. Co., 697 A.2d 742(Del. 1997)8 |
| Formosa Plastics Corp. v. Presidio Engineers & Contractors, Inc., 960 S.W.2d 41(Tex. 1998)17 |
| Frost Nat'l Bank v. L&F Distribs., Ltd., 165 S.W.3d 310(Tex. 2005)19 |
| Grabowski v. Mangler, 938 A.2d 637(Del. 2007)8 |
| Grohman v. Kahling, 318 S.W.3d 882(Tex. 2010)19 |
| Hardee's Food Systems, Inc. v. Hallbeck, 2011 WL 4407435 (E.D. Mo. 2011) |
| Meineke Car Care Ctrs., Inc. v. RLB Holdings, LLC, 423 F. App'x. 274 (4th Cir. 2011)11, 12, 13, 14, 15, 16 |
| Miga v. Jensen, 96 S.W.3d 207(Tex. 2002)17 |
| Qaddura v. Indo-European Foods, Inc., 141 S.W.3d 882 (Tex. App. 2004)16, 17 |
| Vincent v. Bank of Am., N.A., 109 S.W.3d 856 (Tex. App. 2003)19 |
| Treatises |
| Restatement (Second) of Contracts § 344(a) |

NATURE OF PROCEEDINGS

This case comes to the Supreme Court on appeal from a summary judgment ruling in a breach of contract action. The issue presented is virtually identical to two recent opinions from the federal courts, both of which affirmed a franchisor's right to recover damages for royalties owed under the franchise agreement after the franchisee's breach.

Defendant and Appellee Robert E. Wink operated four restaurants franchised from Plaintiff and Appellant Bonanza Restaurant Company ("Bonanza"). In November 2006, Wink assigned his interest in the restaurants. As a condition to consummating that assignment, Bonanza and Wink executed four Consent to Assignment Agreements in which Wink personally guaranteed the obligations of the substitute franchisees if they defaulted within one year. All four of the Bonanza restaurants closed, and all four of the new franchisees were terminated, in October 2007, thereby triggering Wink's guaranty. Wink, however, refused to pay. Bonanza thereafter filed suit, seeking approximately \$1.3 million in damages, including damages attributable to future royalty fees that the franchisees would have paid if they had not breached their agreements by closing the restaurants.

The parties filed cross-motions for summary judgment. Bonanza sought to establish Wink's breach of his guaranty obligations, while Wink raised his defenses of limitations and contractual waiver. In relevant part, Wink argued that Bonanza's claim for future royalties sought consequential damages, and that consequential damages were expressly waived under the terms of the franchise agreements. In

response to Bonanza's motion, Wink additionally argued that future royalties were not provided for by the parties' contract, and that Wink could not be liable for any future royalties that would have become due after the one-year term of his personal guaranty.

The Superior Court granted Wink's motion and denied Bonanza's. The court rejected Wink's limitations defense and concluded that the future royalties were direct damages, not consequential. Nevertheless, the court concluded that the franchise agreements only required payment of royalty fees that were due at the time of breach, not future royalties. Based on a stipulation of the parties, the court thereafter entered final judgment for Bonanza in the sum of \$2,120.90. This appeal followed.

SUMMARY OF ARGUMENT

The Superior Court erred in denying Bonanza's motion for summary judgment and instead granting summary judgment in favor of The court correctly determined that the future royalties sought by Bonanza were a type of direct damages recoverable under the parties' contracts. However, the court erred in ruling that the contracts did not permit recovery of damages for royalties payable to Bonanza after the time of the franchisees' breach. Under the franchise agreements, the franchisees were obligated to pay royalties to Bonanza for the entire term of the franchises, and those unpaid royalties are a form of lost profits that are recoverable under basic Furthermore, Wink quaranteed all of contract law. franchisees' payment and performance obligations, not just the first year of their payment and performance. The Supreme Court should therefore reverse the judgment of the Superior Court, render judgment that Wink breached his contracts with Bonanza by failing to pay the future royalties owed by the franchisees, and remand the case to the Superior Court to determine the amount of damages owed for the unfulfilled terms of the franchise agreements.

STATEMENT OF FACTS

The facts relevant to the determination of this appeal are undisputed. For many years, Defendant and Appellee Robert E. Wink was the franchisee of four Bonanza restaurants located in Delaware and Maryland. A611 at ¶ 7, A616 at \P 22, A619-20 at \P 36 & A623 at \P 50). Wink's restaurants performed very well, with sales in the top five percent of all Bonanza restaurants. Wink Depo. at 17. In 2006, Wink decided to retire, and therefore determined to sell the franchises to new owners. Wink Depo. at 24-27. To accomplish that transfer, on November 6, 2006, Bonanza and the new franchisees entered into four Franchise Agreements, which bound the replacement substitute franchisees to fulfill the unexpired terms of Wink's own franchise agreements. (A70, A206, A343 & A485); (A612 at ¶¶ 11-12, A616-17 at ¶¶ 25-26, A620 at ¶¶ 39-40 & A624 ¶¶ at 54-55); (see also A644). At the same time, and as a condition to the sale, Wink entered into four Consent to Assignment Agreements (the "Consent Agreements") with Bonanza, by which Bonanza agreed to allow Wink to transfer his franchises to the new franchisees. (A158, A294, A430 & A575); A612-14 at ¶¶ 13-15, A617 at ¶¶ 27-28, A621 at ¶¶ 41-42, A624-25 at ¶¶ 56-57); (see also A732).

The Franchise Agreements required the new franchisees to operate the restaurants between five and eight years each. (A74, A44-45, A210, A255-56, A347, A489 & A534-35). To help ensure that Bonanza's

¹ Wink Depo. at 17. The transcript of Wink's deposition was submitted to the Superior Court as Exhibit A to Bonanza's motion for summary judgment. (A859). Because the transcript was filed under seal, it is not included in the accompanying Appendix.

financial interest in the restaurants would not be impaired by the transfer, Wink's Consent Agreements each contained a personal guaranty of the new franchisees' performance:

Assignor's Continuing Limited Personal Guaranty. Assignor [i.e., Wink] agrees to unconditionally and personally guarantee to BRC [i.e., Bonanza] the performance of all of the Assignee's [i.e., the new franchisee] obligations (monetary and other) under the New Franchise Agreement . . If any default should be made by Assignee, Assignor individually promises and agrees to comply with the terms and conditions of the New Franchise Agreement for and on behalf of Assignee and further agrees to pay BRC all moneys due and payable to BRC under the terms and conditions of Franchise Agreement. Furthermore, Assignor the acknowledges and agrees that his continuing liability under the Personal Guaranty shall be direct, immediate, and independent of the liability of, and shall be joint and several with, Assignee and any other party who may be held liable for Assignee's performance under the New Franchise Agreement. Assignor represents and warrants that . . . he agrees to be bound by the terms of the New Franchise Agreement . . . Notwithstanding anything contained in this Agreement or the New Franchise Agreement to the contrary, BRC agrees that Assignor's obligations under the Personal Guaranty shall be limited to a period of one (1) year from the effective date of the New Franchise Agreement (the "Guaranty Period"). If the Guaranty Period does not end prior to the expiration or termination of the Franchise Agreement, Assignor's Personal Guaranty will survive beyond such expiration or termination and will be subject to the Assignee's post-termination obligations. . . .

(A734-35 at \P 6). Thus, the Consent Agreements established a simple quid pro quo: Bonanza would agree to entrust the operation of the restaurants to new franchisees, and Wink agreed to guarantee their performance during the critical first year of transition, during which the new franchisees would assume their duties under the new Franchise Agreements.

The Franchise Agreements did not permit the new franchisees to unilaterally terminate the franchises prior to the end of their terms.

See Wink MSJ Ex. A. § 17.B (A696). But in October 2007 - prior to the

end of their terms, and prior to the expiration of Wink's one-year personal guaranty period - the new franchisees closed down each of the four restaurants. (A814 at \P 11, A816 at \P 23, A818 at \P 35 & A821 at ¶ 48). Accordingly, on October 25, 2007, Bonanza terminated the four franchises under section 17.A(2)(e) of the franchise agreements, sending the franchisees and Wink written notice of the terminations. (A170, A305, A443 & A586); (A614 at $\P\P$ 17-18, A618 at $\P\P$ 31-32, A621-22 at ¶¶ 45-46 & A625 at ¶¶ 60-614); (A694-95 at § 17.A(2)(3)). termination notices demanded payment for the royalties and other fees due under the franchise agreements, including future royalties. (A170, A305, A443 & A586). On that same day, Bonanza also sent Wink a separate demand for payment under his personal guaranty obligations in the Consent Agreements. (A591); (A627 at $\P\P$ 65-66). Wink refused to Wink Depo. at 91, 94. Accordingly, on October 15, 2010, Bonanza filed suit to enforce Wink's obligations under the guaranty provisions of the Consent Agreements.

The case proceeded to cross-motions for summary judgment. Wink contended (1) that Bonanza's claims were barred by a contractual limitations clause, (2) that post-termination royalties were "consequential" damages that were prohibited by the terms of the franchise agreements, and (3) that post-termination royalties were too speculative to be recovered. Bonanza filed a response to that motion, and also filed its own cross-motion seeking to establish Wink's liability for breach of the Consent Agreements. In response, Wink asserted that the franchise agreements only obligated the payment of royalties that were owed at the time of the breach, and that he could

not have had any obligation to guaranty royalties that would have come due after the one-year term of the Consent Agreements.

On April 17, 2012, the Superior Court issued its Memorandum Opinion. The court rejected Wink's limitations defense and ruled that future royalties were direct damages that flowed from the new franchisees' breach, not consequential damages that were incidental to the performance of the contract. Mem. Op. at 4, 7-9 (attached hereto But the Superior Court also agreed with Wink's as Exhibit A). construction of the Franchise Agreements and Consent Agreements, ruling that they did not require payment of future royalty fees. at 10. The court also stated that it found "nothing in the parties' post-termination obligations that warrants extending Wink's Guaranties past the one year Guaranty Period." Id. at 11. The court therefore granted Wink's motion for summary judgment and denied Bonanza's. On August 6, 2012, the court entered final judgment in the case, awarding Bonanza only the \$2,120.90 stipulated to by the parties as the amounts that were currently owed by the franchisees at the time they breached their franchise agreements. (A875); see also Order dated Aug. 6, 2012 (attached hereto as Exhibit B). This appeal followed.

ARGUMENT

I. THE SUPERIOR COURT ERRED BY RULING THAT WINK HAD NO LIABILITY FOR DAMAGES ATTRIBUTABLE TO FUTURE ROYALTIES DUE UNDER THE FRANCHISE AGREEMENTS.

A. Question Presented

Did the Superior Court err in granting summary judgment in favor of Wink and against Bonanza on its claim for recovery of future royalties owed under the Franchise Agreements that Wink personally guaranteed?²

B. Scope of Review

The Superior Court's summary judgment ruling is reviewed de novo. See Grabowski v. Mangler, 938 A.2d 637, 641 (Del. 2007). Likewise, the interpretation of a contract is a question of law subject to de novo review. See Emmons v. Hartford Underwriters Ins. Co., 697 A.2d 742, 744-45 (Del. 1997). When opposing parties make cross-motions for summary judgment, neither party's motion should be granted unless there is no genuine issue of material fact and one of the parties is entitled to judgment as a matter of law. Id.

C. Merits of Argument

This case presents the Supreme Court with an opportunity to issue an opinion on an emerging issue of importance to franchisors and franchisees across the country. Two other courts, including the United States Court of Appeals for the Fourth Circuit, have written recently on this precise issue. Both of those courts rejected the

 $^{^2}$ This question was preserved below in Wink's summary judgment motion (A637) and Bonanza's response thereto (A804) as well as Bonanza's summary judgment motion (A859) and Wink's response to that motion (A866).

franchisees' attempts to avoid liability for damages attributable to their failure to pay royalties that would have been paid to the franchisor but for the franchisee's breach of their franchise agreements. In the present case, however, the Superior Court reached the opposite conclusion, ruling that the franchisor could not recover damages for lost future royalties because the franchise agreement did not expressly provide for such damages. That ruling was in error.

Franchise agreements are intended to create a relationship by which both the franchisor and the franchisee can succeed. franchisor provides the franchisee with substantial assistance in opening the business, including the valuable consumer awareness of the franchise's brand, in exchange for a dependable stream of revenue from royalties and/or other franchise fees paid by the franchisee. franchise business cannot work without that revenue stream, and so it is of vital importance to the franchisor to ensure that the franchisee performs its contractual obligations as agreed, for the full term of the parties' agreement. The personal quaranty of the franchisee - or, in this case, a departing franchisee who has sold his interest in the restaurants to new owners - helps to ensure that the franchisor can continue to rely on that contracted-for revenue stream. Superior Court's rejection of the right to recover damages for loss of that revenue stream is a ruling of great significance to both Bonanza and to the franchise industry in general.

In its summary judgment ruling, the Superior Court took a twostep approach to analyzing Wink's liability for damages attributable to the new franchisees' failure to pay Bonanza the royalties that would have been due under the Franchise Agreements if they had not breached those agreements by closing down the restaurants. First, the court ruled - correctly - that damages for loss of future royalties are recoverable precisely because they are amounts that are directly due under the Franchise Agreements. See Mem. Op. at 9-10. Second, the court ruled that the Franchise Agreements nevertheless prohibited any recovery for the very same damages that it had just described as "inherent to the nature of the contracts." Id. at 10. Because the Superior Court's error occurred in the second part of its analysis, Bonanza addresses that issue first.

1. The Franchise Agreements Do Not Prohibit Bonanza From Recovering Damages for Loss of Future Royalties.

This case turns on the application of two contracts: (1) the Franchise Agreements between Bonanza and franchisees who took over Mr. Wink's restaurants, and (2) the Consent Agreements between Bonanza and Wink, by which he agreed to guaranty the payment and performance obligations of the new franchisees. Although those parties executed separate contracts for each of the four restaurants, the relevant terms of the contracts are identical for each restaurant. Neither party argues that the relevant provisions of the contracts are in any way ambiguous.³

In section 5.B of each Franchise Agreement, the new franchisees agreed to pay "a continuing non-refundable royalty fee in an amount

³ In the unlikely event that the Court determines the terms of the contract are in any way ambiguous, Bonanza would request that the Supreme Court remand the case to the Superior Court so that the parties' conflicting interpretations of the written contracts can be resolved by the finder of fact.

equal to the percentage of Gross Sales set forth in the Franchise Summary." (A663 at § 5.B). Thus, the new franchisees were agreeing to pay those royalty fees for the full terms - five to eight years of the Franchise Agreements. Failing to actively operate the restaurants was an event of default under section 17.A(2)(e) of each Franchise Agreement, and that breach deprived Bonanza of the royalty revenue that it was entitled to under the contract. But the Franchise Agreements make no mention of liability for future royalties, and for that reason the Superior Court determined that they could not be Mem. Op. at 10. That determination was erroneous. recovered. contract does not have to expressly provide for any form or measure of damages for it to be recoverable at law, and that principle is amply illustrated by a recent case from the United States Court of Appeals for the Fourth Circuit. See Meineke Car Care Ctrs., Inc. v. RLB Holdings, LLC, 423 F. App'x. 274 (4th Cir. 2011)(attached hereto as Exhibit C).

The Meineke case presented almost exactly the same situation as in the case before this Court: a franchisee that breached its agreements by closing its stores, and a franchisor that sought to recover future royalties that would have otherwise been paid under the parties' franchise agreements. See id. at 277-78. Like Bonanza, the Meineke franchise agreements required the franchisee to pay royalty fees based on a percentage of each shop's gross sales, and each of the franchise agreements was subject to personal guaranties by the individuals who owned the franchisee. Id. at 276-77. As is the case here, the franchise agreements provided for the payment of royalties

during the term of the franchise agreement, but did not expressly provide that the franchisee would be required to pay future royalties as damages if they closed their shops before the end of the term. *Id.* at 279. Nevertheless, Meineke sued the franchisee and the guarantors for payment of future royalties, and the Fourth Circuit authorized Meineke to do so. *Id.* at 278, 280-81. Its reasoning for doing so is fully applicable here.

As the Fourth Circuit wrote:

The district court is correct that the [franchise agreements] do not specifically provide for recovery of future damages in the event of a breach of contract. However, nothing in the [franchise agreements] precludes such damages either. No principle of North Carolina contract law suggests that in all circumstances a contract must specifically provide for recovery of future damages in order to preserve a party's right to recover them. To the contrary, cases discussing recovery of lost profits do not refer to the parties' contracts as the basis for the nonbreaching party's right to such a recovery. While the parties were certainly free to contract for liquidated damages or to bar a right to recover lost profits under North Carolina law, they did not do so in this case. the extent the district court's decision required the agreements] to specifically provide prospective damages as a mandatory condition precedent to preserve a non-breaching party's right to recover such damages, this was error.

Meineke, 423 F. App's at 279-80 (citations and footnote omitted). That reasoning is fully applicable to the present case, where the Superior Court erroneously concluded that Bonanza could not recover damages for the loss of future royalty payments simply because "There is no mention of future royalties or any method of calculating such payments." Mem. Op. at 10. But of course, contract law does not require the parties to expressly provide for recovery of lost profits in order to recover them in a breach of contract case.

The Meineke case also rejected another argument relied on by both Wink and the Superior Court in this case. As with the contracts in the present case, the Meineke franchise agreements included a provision identifying the obligations of the franchisees following termination of the franchises, including payment of amounts owed to the franchisor at the time of termination. See Meineke, 423 F. App'x at 280. The Bonanza Franchise Agreements provided for similar post-termination payment obligations by the franchisees (and therefore, Wink as their guarantor) in section 18 of the contracts. (A697-98 at \$\$\$18.A & 18.D). Because the post-termination provision did not state that the franchisees had to pay Bonanza for royalties that would have been owed in the future, Wink argued that no such damages were owed by the franchisees. (A867-68). The Superior Court agreed. See Mem. Op. at 10-11.

Meineke again highlights the error inherent in the Superior Court's reasoning. Stated simply, providing for certain things that the franchisee must do upon termination does not eliminate the other legal rights that the franchisor has:

Contrary to the district court' conclusion, Articles 15.1 and 15.5 of the [franchise agreements] do not operate as bars to recovering future damages. Article 15.1 states that upon termination or expiration of the [franchise agreements], RLB "agree[s] to pay [Meineke] all royalties, [advertising fund] payments, amounts owed for purchases ..., interest due on any of the foregoing and all other amounts owed to [Meineke] which are then unpaid." Article 15.1 only addresses what is owed up to termination of the [franchise agreements]. It is silent about RLB's liability for periods after termination. By expressly providing for certain obligations upon termination or expiration of the FTAs, Meineke and RLB did not implicitly exclude other legal rights that may accrue in addition to those stated. The district court's construction in this instance runs contrary to the instruction that courts "will not resort to

construction [of a contract] where the intent of the parties is expressed in clear and unambiguous language." There is no need to construe the Article 15.1 language to mean something other than the circumstances to which it clearly applies — pre-breach damages. The provision is silent as to prospective damages arising after termination pursuant to breach of the [franchise agreements]. The district court erred in reading Article 15.1 as precluding future damages.

Meineke, 423 F. App'x at 280 (citation omitted).

The Superior Court also reasoned that the "Continuing Obligations" provision of section 18.D negated any liability of the franchisees for payment of future royalties. That section of the contract provides:

All obligations of Franchisor and Franchisee under this Agreement which expressly or by their nature are to survive or are intended to survive the termination of this Agreement or expiration of this Agreement shall continue in full force and effect subsequent to and notwithstanding its termination or expiration until they are satisfied in full or by their nature expire.

(A698 at § 18.D) (emphasis added). According to the Superior Court, royalty payments "by their nature expire" after termination if a franchise closes for a simple reason: "No sales, no fees." Mem. Op. at 11. Yet the Meineke court faced nearly identical language in that case's franchise agreements, and the Fourth Circuit held it was no impediment to recovery of damages for post-breach royalties by the franchisor:

The district court's construction of Article 15.5 is similarly mistaken. Article 15.5 states: "All obligations under this Agreement which expressly or by their nature survive the expiration or termination of this Agreement will continue in full force and effect until they are satisfied in full or by their nature expire." Although the right to royalties and advertising fund contributions do not expressly survive the expiration or termination of the Agreement as a provision of the contract, they need not do so in order to form the basis of a prospective damages

claim in the event Meineke is otherwise entitled to those damages under other applicable law. As discussed below, Meineke's right to recover such sums as the measure of damages resulting from a breach of the FTAs arises under North Carolina law and is independent and separate from any obligation to pay such sums as a new obligation arising under the FTAs.

Meineke, 423 F. App'x at 280 (citation and footnote omitted).

Meineke is not the only recent case to have rejected Wink's claim that a franchisor cannot recover damages for unpaid future royalties where the franchise agreement speaks only to royalties due at the time of breach. In Hardee's Food Systems, Inc. v. Hallbeck, 2011 WL 4407435 (E.D. Mo. 2011) (attached hereto as Exhibit D), the court endorsed the Meineke case and adopted its reasoning in rejecting the franchisees' motion for summary judgment, ruling that:

[T]he absence of an explicit contract provision as to future damages and of a liquidated damages provision does not warrant summary judgment in favor of a franchisee that breaches a franchise agreement mid-term. Rather, genuine issues of material fact exist as to whether lost royalties and advertising fund contributions in the event of a breach were reasonably within [the] parties' contemplation at the time they entered into the Agreement.

Hardee's, 2011 WL 4407435, at *3. The same principle applies to this dispute between Bonanza and Mr. Wink. The Franchise Agreements' silence as to the availability of damages for post-breach royalty payments does not prevent Bonanza from recovering such damages if they are otherwise available under the law. And as even the Superior Court recognized, lost royalty payments are precisely the type of damages that are recoverable for the new franchisees' breach of their Franchise Agreements.

2. Applicable Law Permits the Recovery of Damages for Lost Future Royalties.

As explained above, the Franchise Agreements do not prohibit Bonanza from recovering damages for future royalties that the franchisees would have paid but for their breach of contract. As the Fourth Circuit noted in *Meineke*, such damages are nothing more than compensation for the profits that the franchisor would have made under the franchise agreement if it had not been breached by the franchisee. *Meineke*, 423 F. App'x at 279-80. Thus, the determinative question is simply whether Bonanza is permitted to recover its lost profits under the Franchise Agreements under the governing law. As the Superior Court properly determined, the law does permit recovery of such damages. See Mem. Op. at 9-10.

The Franchise Agreements are governed by the substantive law of Texas, and the Superior Court followed the parties' choice of law by applying Texas contract law. (A702 at § 20.F); Mem. Op. at 6. In addition, the parties agreed that the outcome would be the same under both Texas and Delaware law. See Mem. Op. at 6.

Under Texas law, a breach of contract claimant can recover damages for the benefit of its bargain, in order to place the claimant in the same economic position it would have occupied if the contract had been fully performed. See, e.g., Qaddura v. Indo-European Foods, Inc., 141 S.W.3d 882, 888-89 (Tex. App. 2004); see also Restatement (Second) of Contracts § 344(a). Benefit-of-the-bargain damages include the net profit that the claimant would have earned on the contract if the defendant had performed it as agreed. See Formosa Plastics Corp. v. Presidio Engineers & Contractors, Inc., 960 S.W.2d

41, 50 (Tex. 1998) ("[W]hile a benefit-of-the-bargain measure can include lost profits, it only compensates for the profits that would have been made if the bargain had been performed as promised. Accordingly, the proper calculation of benefit-of-the-bargain damages is Presidio's anticipated profit on the \$600,000 bid plus the actual cost of the job less the amount actually paid by Formosa"); Qaddura, 141 S.W.3d at 889 ("The benefit of the bargain is measured by the prevailing party's anticipated receipts and losses caused by the breach less any cost or other loss he has avoided by not having to perform"). Furthermore, contract damages are measured as of the time of breach, and lost profits may be recovered at the time of trial no matter when the profits would have been earned. Miga v. Jensen, 96 S.W.3d 207, 214 (Tex. 2002) (measuring damages at time of breach); Bowen v. Robinson, 227 S.W.3d 86, 96 (Tex. App. 2006) (permitting recovery of lost profits that would have been earned on contract).

Thus, there can be no question that Bonanza was entitled to recover damages for the future royalty payments that the franchisees would have been obligated to pay if they had not breached the Franchise Agreements, and those damages were due and payable at the time of breach. Each Consent Agreement (a) requires Wink to "unconditionally and personally guarantee to [Bonanza] the performance of all of the Assignee's obligations (monetary and other) under the New Franchise Agreement," and (b) requires Wink to pay Bonanza "all moneys due and payable to [Bonanza] under the terms and conditions of the New Franchise Agreement." (A734-35 at ¶ 6). Thus, there can also

be no dispute that Bonanza is entitled to seek recovery of those damages from Wink.

3. Wink Guaranteed All of the New Franchisees' Payment and Performance Obligations, Not Just the First Year.

Before the Superior Court, Wink also argued that because his guaranty obligations only lasted for one year, he could not be required to pay damages for any royalties that would have been due after the one-year anniversary of the Franchise Agreements. The court appears to have agreed with that contention, writing (without any analysis or elaboration) that "The Court finds nothing in the parties' post-termination obligations that warrants extending Wink's Guaranties past the one year Guaranty Period." To the extent that the Superior Court's summary judgment ruling rested on that conclusion, the court once again erred.

Under the Consent Agreements, Wink agreed to "unconditionally and personally guarantee to [Bonanza] the performance of all of the Assignee's obligations (monetary and other) under the New Franchise Agreement." (A734 at ¶ 6) (emphasis added). The key word in that phrase is "all," meaning that the guaranty applies to each and every obligation of the new franchisees through the full terms of the Franchise Agreements.

Wink seeks to alter that requirement by pointing to the Consent Agreement's provision that the guaranty obligation would only last for one year:

Notwithstanding anything contained in this Agreement or the New Franchise Agreement to the contrary, [Bonanza] agrees that [Wink's] obligations under the Personal Guaranty shall be limited to a period of one (1) year from the effective date of the New Franchise Agreement (the "Guaranty

Period"). If the Guaranty Period does not end prior to the expiration or termination of the Franchise Agreement, [Wink's] Personal Guaranty will survive beyond such expiration or termination and will be subject to the Assignee's post-termination obligations.

(A735 at \P 6). Under both its plain language and the ordinary rules of contractual interpretation, that provision does not alter Wink's obligation to guarantee the new franchisees' obligations in this case.

Under Texas law, a court should ascertain the parties' objective intent, as expressed in the contract, by examining the entire contract, harmonizing and giving effect to all provisions to the extent possible, so that none of the provisions will be rendered meaningless. Grohman v. Kahling, 318 S.W.3d 882, 887 (Tex. 2010). One contractual provision should generally not be interpreted in a way that nullifies another provision. Burnett Ranches v. Cano Petroleum, Inc., 289 S.W.3d 862, 867 (Tex. App. 2009). When a contract contains provisions that may conflict, the court should construe them together and attempt to harmonize and give effect to all of the provisions. Frost Nat'l Bank v. L&F Distribs., Ltd., 165 S.W.3d 310, 312 (Tex. 2005). An interpretation that gives each clause a reasonable meaning is preferred to one that leaves a part of the contract meaningless. Vincent v. Bank of Am., N.A., 109 S.W.3d 856, 867 (Tex. App. 2003).

It requires no effort to harmonize Wink's agreement to guarantee "all" of the franchisees' contractual obligations with the one-year Guaranty period. The first term identifies what contractual obligations Wink was guaranteeing — i.e., all of the new franchisees' obligations under the entirety of the Franchise Agreements. The second term identifies the period during which Wink's guarantee would

apply - namely, the initial one-year period following the effective date of the Franchise Agreements, during which the new franchisees would be learning how to operate the restaurants. Construed together, these two provisions simply mean that Wink was guaranteeing the whole contract, but the guaranty could only be invoked during the one-year Guaranty Period. Because the new franchisees breached their obligations during the Guaranty Period, Wink is liable for the damages caused by the breach.

That reading is confirmed by the very first sentence following the one establishing the Guaranty Period, which provides that "If the Guaranty Period does not end prior to the expiration or termination of the Franchise Agreement, [Wink's] Personal Guaranty will survive beyond such expiration or termination and will be subject to the Assignee's post-termination obligations." (A735 at ¶ 6). undisputed that each of the Franchise Agreements was terminated prior to the end of the Guaranty Period, meaning that Wink's guaranty obligations "survive beyond" the terminations. If the new franchisees operated the restaurants in compliance with the Franchise Agreements and the franchises had not been terminated within the oneyear Guaranty Period, Wink's guaranty obligations would have been eliminated after the first year. Because the breach and termination occurred within the first year, however, Wink's guaranty obligations remain fully effective, and the Supreme Court should confirm those obligations by entering judgment that Wink breached his contracts with Bonanza by failing to pay Bonanza as required by his personal guaranty.

CONCLUSION

For the foregoing reasons, Bonanza respectfully requests the Supreme Court to reverse the judgment of the Superior Court, grant judgment establishing that Wink breached his personal guaranty obligations in the Consent Agreements with Bonanza, and remand the case to the Superior Court for a determination of Bonanza's damages. Bonanza further requests all additional and alternative relief to which it may be justly entitled, including the recovery of its costs and expenses.

DATED: October 19, 2012

SAUL EWING LLP

/s/ James D. Taylor, Jr.
James D. Taylor, Jr.(#4009)
Jennifer M. Becnel-Guzzo (#4492)
222 Delaware Avenue, Suite 1200
P.O. Box 1266
Wilmington, Delaware 19899
jtaylor@saul.com
jbecnel-guzzo@saul.com
Telephone: (302) 421-6800
Facsimile: (302) 421-6813

Eric W. Pinker
Texas Bar No. 16016550
Richard A. Smith
Texas Bar No. 24027990
LYNN TILLOTSON PINKER & COX, LLP
2100 Ross Avenue, Suite 2700
Dallas, Texas 75201
epinker@lynnllp.com
rsmith@lynnllp.com
Telephone: 214-981-3800
Facsimile: 214-981-3839

ATTORNEYS FOR PLAINTIFF-BELOW APPELLANT BONANZA RESTAURANT COMPANY