No. 24-

IN THE

Supreme Court of the United States

J.A. MASTERS INVESTMENTS;
K.G. INVESTMENTS,

Petitioners,

v.

EDUARDO BELTRAMINI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court sitting in diversity may deny a party the right to present the equitable defense of impossibility to the jury—despite uncontroverted evidence and the absence of any express waiver—solely because the contract contains a one-sided force majeure clause that is silent on equitable defenses, in direct conflict with the decisions of the Fourth and Seventh Circuits and in violation of the Fifth and Seventh Amendments.

2. Whether a federal court may disregard mandatory state jury instructions, particularly those related to the legally required measure of damages under substantive state law (Texas), in diversity cases without violating the litigant's rights to due process and a fair trial under the Fifth and Fourteenth Amendments and the Erie doctrine.

3. Whether federal courts may categorically preclude invocation of impossibility and frustration-of-purpose defenses based on boilerplate force majeure clauses—regardless of waiver or contract structure—thereby eliminating equitable defenses long recognized by law and equity and creating a sharp division among the circuits on the treatment of pandemic-related contract disputes.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, JA Masters Investments and K.G. Investments disclose the following. There is no parent or publicly held company owning 10% or more of JA Masters Investments and K.G. Investments' stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *J.A. Masters Investments, et al. v. Beltramini*, No. 24A937 (Application to Extend Time to File a Petition for a Writ of certiorari from May 3, 2025 to June 2, 2025)

- *J.A. Masters Investments, et al. v. Beltramini*, No. 24A937 (Application to Extend Time to File a Petition for a Writ of certiorari from April 3, 2025 to May 3, 2025)

- *J.A. Masters Investments, et al. v. Beltramini*, No. 24A937 (Docketed March 28, 2025)

- *J.A. Masters Invs. v. Beltramini*, No. 23-20292, 2025 U.S. App. LEXIS 168 (5th Cir. Jan. 3, 2025)(D.C. Cir.), judgment entered on January 3, 2025;

- *J.A. Masters Invs. v. Beltramini*, No. H-20-4367, 2024 U.S. Dist. LEXIS 151821 (S.D. Tex. July 19, 2024) (District Court Order granting entry of judgement)

Petitioners are not aware of any other proceedings that are directly related to this case within the meaning of Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

JA MASTERS INVESTMENTS; K.G. INVESTMENTS respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The decision by the United States Court of Appeals for the Fifth Circuit decision dated January 3, 2025 is reported at 117 F.4th 321(5th Cir. 2024). The district court's opinion is available at 2023 U.S. Dist. Lexis 126662.

JURISDICTION

The judgement of the court of appeals was entered on January 3, 2025. On March 31, 2025, Justice Alito extended the time to file a petition for a writ of certiorari to May 3, 2025. On April 30, 2025, Justice Alito extended the time to file a petition for a writ of certiorari to and including June 2, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment (Due Process Clause)

> "No person shall be … deprived of life, liberty, or property, without due process of law…". USCS Const. Amend. 5

Seventh Amendment (Right to Jury Trial in Civil Cases)

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved…". USCS Const. Amend. 7

Article III of the Constitution

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." USCS Const. Art. III, § 1

STATEMENT OF THE CASE

The right to have the jury consider a Defendants' theory of defense is a right protected under the Fifth Amendment. See, *United States v. Douglas,* 818 F.2d 1317, 1319 (7th Cir. 1987). This case presents two exceptionally important questions involving the constitutionally protected rights to a fair trial and due process.

At the heart of the litigation are two distinct but compounding constitutional errors: (1) the District Court's refusal to submit the Petitioner's impossibility defense to the jury, based on its mischaracterization of that doctrine as duplicative of a contractual force majeure clause; and (2) the District Court's failure to instruct the jury on the legally required measure of damages under Texas law, despite adopting the Texas Pattern Jury Charges (PJC). These omissions denied the JA Masters Investment a

meaningful opportunity to present a complete defense and to have damages calculated under the correct legal framework, in violation of the Fifth and Seventh Amendments. These questions raise fundamental concerns about a litigant's right to present a complete defense and to receive fair and accurate jury instructions protected by the US Constitution. The lower courts are in urgent need of this Court's guidance on the proper application of these constitutional protections, particularly in cases where contractual doctrines and common-law defenses are improperly conflated between District Courts, and where jury charges fail to reflect binding state law.

Petitioner JA Masters Investment and KG Investment (collectively "JA Masters") is an investment company that finances social sporting events, specifically soccer matches. Respondent Eduardo Beltramini ("Beltramini"), a promoter of such events, owned and operated Planet Futbol Event Management ("PFEM"), an unincorporated business. JA Masters entered into a contract to acquire PFEM, which was drafted not by a neutral party but by Beltramini's son, a licensed Texas attorney. The resulting agreement was facially one-sided, most notably, it contained a force majeure clause that provided protections solely for Beltramini, and none for JA Masters. At the time of contracting, JA Masters' principal was a native Spanish speaker with limited English proficiency and no ability to read or write in English. JA Masters relied exclusively on Beltramini's representations regarding the contract's contents, including assurances that the terms were mutually protective. They were not.

The contract's core purpose was to enable the organization and promotion of large, in-person soccer

events. However, the emergence of the global COVID-19 pandemic and accompanying government-imposed restrictions rendered that purpose impossible. In response to Beltramini's breach of contract allegations, JA Masters asserted the common-law defense of impossibility, citing the extraordinary and unforeseen circumstances that precluded performance on both sides. Despite evidence supporting the defense, the District Court refused to instruct the jury on impossibility. Instead, the court erroneously held that the contractual force majeure clause, drafted unilaterally to benefit Beltramini, was legally equivalent to the common-law doctrine of impossibility. This ruling conflated two distinct legal doctrines: force majeure, which arises from express contractual language, and impossibility, which is an equitable, judicially recognized defense independent of the contract's terms. The result was that the jury never heard JA Masters' core theory of defense. In fact, no defense questions were provided to the Jury despite the JA Masters request in their submitted requested jury instructions.

The Fifth Circuit affirmed the District Court's ruling without addressing the critical legal error or its constitutional consequences. Specifically, the appellate court failed to recognize that denying the jury the opportunity to consider a legally recognized and factually supported common-law defense, here, impossibility, violates a defendant's constitutional rights to due process and a fair trial under the Fifth and Seventh Amendments. The lower courts conflated force majeure, a contractual doctrine, with impossibility, a distinct common-law defense, thereby stripping JA Masters of the opportunity to present a complete theory of the case to the jury. As this Court has made clear, "a defendant is entitled to an instruction as to any recognized defense for which there

exists evidence sufficient for a reasonable jury to find in his favor." *Id*. The decision below subverts that principle, deepens doctrinal confusion among lower courts, and warrants this Court's review.

This case presents not only a fundamental constitutional violation arising from the misapplication of the impossibility defense, but also a serious due process failure stemming from the District Court's erroneous jury instructions on fraud and damages, despite reliance on Texas's Pattern Jury Charges (PJC).

At trial, JA Masters alleged fraud in connection with a series of four contracts entered into with Respondent Beltramini to co-promote individual soccer matches. Under these agreements, JA Masters invested a percentage of event expenses in exchange for a proportional share of profits or losses. The District Court instructed the jury on fraud and direct damages using the Texas Pattern Jury Charges: Business, Consumer, Insurance and Employment (2022 ed.), specifically PJC 105.1, 105.2, and 115.19. However, while the court submitted the fraud damages question from PJC 115.19 to the jury, it failed to include the mandatory accompanying instructions on how to calculate direct damages, as expressly required by PJC 115.19. That provision clearly warns: "PJC 115.19 should be predicated on "Yes" answer to PJC 105.1 and may be adapted for use in most fraud cases by the addition of a appropriate instruction setting out legally available measure of direct damages," and references PJC 115.4 and 115.10 as the necessary standards.

This omission was not a matter of judicial discretion. PJC 115.19 expressly warns that the damages question

"should not be submitted" without the appropriate accompanying instruction on the measure of damages. The PJC commentary, citing *Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87, 90 (Tex. 1973), confirms that submitting the damages question without the required explanatory instructions may constitute reversible error under Texas law.

Nonetheless, the Fifth Circuit declined to find plain error, reasoning that JA Masters failed to demonstrate how its proposed instructions materially differed from those given. This rationale misses the core issue. The PJC were not merely "preferred" by JA Masters—they were adopted by the District Court as the governing framework for submitting the fraud claim. Having invoked Texas substantive law, the court was bound under the *Erie* doctrine to apply it fully and correctly. The legal error was not in the choice of instructions, but in the District Court's failure to include all *mandatory* components of the fraud damages instruction—specifically, the required explanatory provisions accompanying PJC 115.19, such as PJC 115.4. By failing to provide these legally required elements, the District Court not only violated Texas substantive law, it also failed to faithfully apply that law as required under *Erie*. As a result, the jury was given a charge that was not only incomplete, but affirmatively misleading and legally inadequate, violating both Texas law and the federal Due Process Clause.

This case presents an important and recurring constitutional question: whether a federal court may disregard mandatory state jury instructions when applying state law in diversity cases, and whether such disregard—especially when it results in materially incomplete or

misleading instructions—violates a litigant's fundamental rights to a fair trial and due process under the Fifth and Fourteenth Amendments. The lower courts' decisions not only conflict with Texas Supreme Court precedent but also threaten to undermine uniform application of jury instructions and constitutional protections in federal trials involving state-law claims.

A. Background and Procedural History

This case arises from a series of agreements between JA Masters and Respondent Beltramini, a sports promoter operating PFEM, an unincorporated business. JA Masters funded a portion of the expenses for international soccer matches organized by Beltramini in exchange for a share of the profits or losses, pursuant to various written agreements that required full financial transparency and the delivery of official stadium documentation.

Instead of providing objective financial records as required, Beltramini submitted self-generated spreadsheets that concealed substantial revenue. Stadium and bank records introduced at trial revealed over $332,000 in underreported revenue from three matches alone, directly contradicting the financial reports Beltramini submitted and violating the terms of the agreements.

During their final joint event, Beltramini offered to sell PFEM to JA Masters. This resulted in a BSA, drafted in English by Beltramini's son, a licensed Texas attorney, and signed by JA Masters' principal, who lacked English proficiency and relied entirely on Beltramini's oral assurances. The BSA included a unilateral force majeure clause drafted solely for Beltramini's benefit,

without reciprocal protections or any express waiver of equitable defenses.

Shortly after the agreement was executed, the COVID-19 pandemic and resulting public health restrictions made performance of the scheduled events impossible. A dispute arose, and JA Masters filed suit against Beltramini for breach of contract and fraud. In response, Beltramini asserted a counterclaim under the BSA.

At trial, JA Masters invoked the equitable defense of impossibility in response to Beltramini's breach-of-contract claim. The District Court, however, declined to submit that defense to the jury. It erroneously equated the common-law defense of impossibility with the agreement's unilateral force majeure clause and precluded the defense. The force majeure provision applied solely to one party and did not expressly waive equitable defenses. By conflating distinct legal doctrines, the court improperly foreclosed JA Masters from presenting a full and fair defense.

JA Masters also introduced extensive third-party documentation demonstrating that Beltramini had systematically concealed revenue. Nonetheless, the District Court instructed the jury on fraud using PJC 115.19 but failed to include the mandatory accompanying instruction on calculating damages, specifically, PJC 115.4, which is expressly required when using PJC 115.19. The Texas Supreme Court has consistently held that omitting such mandatory instructions constitutes reversible error, as it deprives the jury of the necessary legal framework to assess and award damages.

As a direct result of this omission, the jury, despite finding that Beltramini committed fraud, awarded zero damages. The evidentiary record was uncontroverted: for the El Salvador vs. Honduras match, Beltramini reported just $2,029 in consignment ticket sales, while stadium records reflected actual revenue of $215,790, leaving more than $213,000 unaccounted for. Similar discrepancies were documented across other matches, further substantiating the fraudulent concealment of revenue.

The appellate court nevertheless affirmed the District Court's rulings, upholding both its rejection of the impossibility defense and its issuance of defective jury instructions. Critically, the appellate court failed to address JA Masters' core argument: that the District Court fundamentally erred by conflating the equitable doctrine of impossibility with the contract's unilateral force majeure clause and thereby refused to submit the impossibility defense to the jury. That clause, drafted solely for Beltramini's benefit, did not contain any express waiver of equitable defenses, nor did it address impossibility under common law. Rather than correcting this misapplication of law, the appellate court embraced the flawed premise that the existence of a one-sided force majeure clause, categorically barred invocation of impossibility.

This conclusion deprived JA Masters of the right to present a complete and legally recognized defense, in violation of the Fifth Amendment's guarantee of due process. Had the jury been properly instructed on the impossibility defense, it could have found that performance was excused, thereby negating liability altogether. The appellate ruling also deepens an existing circuit split;

several federal courts have held that force majeure clauses do not override equitable defenses like impossibility unless there is a clear and express waiver. By treating the existence of a one-sided clause as dispositive, the appellate court contradicted the prevailing weight of authority and demonstrated the need for this Court's intervention to resolve the split and ensure the protection of core constitutional rights in diversity cases.

Before the appellate court issued its decision, JA Masters submitted a Rule 28(j) letter identifying the specific Texas Pattern Jury Charges that had been used and omitted at trial. The letter noted that the District Court charged the jury on fraud using PJC 115.19 but failed to include the mandatory accompanying instruction on calculating damages—PJC 115.4—as required under Texas law. The letter also explained the legal significance of the omission, citing controlling Texas Supreme Court precedent establishing that failure to submit a required damages instruction constitutes reversible error. Despite having this information before it, the appellate court declined to address the issue and permitted the judgment to stand—compounding the denial of a fair trial and reinforcing the urgent need for this Court's review.

In affirming the District Court's judgment, the Fifth Circuit thus sanctioned both the misapplication of Texas substantive law and the denial of federally protected constitutional rights. That failure deprived the jury of the legally mandated standard for calculating damages in fraud cases under Texas law. The omission was not merely a procedural oversight; it was a substantive violation of Texas law and a denial of JA Masters' constitutional rights to due process and a fair trial under the Fifth

and Seventh Amendments. This Court's intervention is necessary to preserve those rights and to uphold the foundational principles of the *Erie* doctrine, which require federal courts sitting in diversity to apply the full body of applicable state substantive law, including mandatory jury charge requirements.

This case exemplifies exactly the type of constitutional distortion *Erie* and *Gasperini* were meant to prevent: a federal court purporting to apply state law, but in doing so, disregarding critical state-mandated substantive requirements—thereby producing an outcome that the state's highest court would not countenance. It also presents a timely and nationally significant question in the wake of the COVID-19 pandemic: whether federal courts may effectively nullify longstanding equitable defenses—such as impossibility and frustration of purpose—by narrowly construing or misapplying boilerplate force majeure clauses. Left unchecked, the decision below will undermine public confidence in the federal judiciary's ability to fairly apply state law in diversity cases and will embolden further erosion of civil litigants' due process and jury trial rights in federal court, particularly in cases arising from pandemic-related contractual disruptions. Review is essential to restore constitutional balance and ensure uniform application of the law across jurisdictions.

REASONS FOR GRANTING THE PETITION

For decades, it has been settled law that due process requires that litigants be afforded a meaningful opportunity to present their case, including the right to assert valid legal defenses. *See Chambers v. Mississippi*, 410 U.S. 284 (1973). However, not every excluded defense

rises to a constitutional violation. Only the exclusion of those defenses that are central to the case and whose absence results in a miscarriage of justice implicates due process. *Crane v. Kentucky*, 476 U.S. 683 (1986). This case presents exactly such a scenario.

At stake are foundational constitutional rights: the Fifth Amendment guarantee of due process and the Seventh Amendment right to a fair jury trial in civil cases. The District Court denied Petitioner the opportunity to present a complete and properly framed impossibility–frustration of purpose defense, a long-recognized equitable doctrine under common law, and erroneously collapsed it into a narrow force majeure clause. That mischaracterization not only misapplied the law but also excluded critical evidence and argument from the jury, thereby depriving Petitioner of a meaningful defense. This approach reflects a deepening split among the circuits, as other courts, including the Fourth, Seventh and Eleventh Circuits, have held that force majeure and impossibility are distinct doctrines, and that equitable defenses remain available unless expressly waived. The error was compounded by the District Court's failure to provide a legally sufficient jury instruction on damages under controlling Texas law, specifically, PJC 115.4 alongside PJC 115.19, as required by the Texas Supreme Court.

The Court's review is also warranted because this case raises novel and urgent national questions in the wake of the COVID-19 pandemic, particularly concerning how federal courts should distinguish and apply the doctrines of impossibility and force majeure. Across the country, commercial litigants have turned to these doctrines in defense of performance disrupted by the pandemic. Yet

Federal District Courts have diverged sharply in their treatment of impossibility when a contract includes a force majeure clause or none at all. Whether the common-law impossibility doctrine survives and applies independently of a one-sided or absent force majeure provision is a question of first impression with far-reaching commercial and constitutional implications, yet the federal courts lack clear guidance.

The Seventh Amendment preserves the right to a jury trial not merely in form but in substance. A jury deprived of the legal framework necessary to apply governing state law—especially on core issues like damages—is not functioning as the constitutional safeguard the Amendment envisions. In this case, the District Court's decision to omit required Texas jury instructions denied the jury the tools it needed to render a lawful verdict. This omission directly contravened longstanding Texas Supreme Court precedent, including *Jackson v. Fontaine's Clinics*, *Arthur Andersen & Co. v. Perry Equip. Corp.*, and *Kinsel v. Lindsey*, all of which hold that failure to instruct on the proper measure of fraud damages constitutes reversible error. The court's deviation from mandatory state pattern instructions resulted in a jury award of zero damages despite uncontroverted evidence of substantial underreported revenues. That outcome cannot be squared with the requirements of due process or the Seventh Amendment.

This case also presents a deeper constitutional concern: whether federal courts sitting in diversity may selectively apply only portions of a state's substantive law—endorsing the form of state instructions while discarding their substance—without violating the *Erie*

doctrine and the litigant's constitutional right to a fair and lawful adjudication of state-created rights. The answer must be no. This Court has long recognized in *Gasperini v. Center for Humanities, Inc.* that state rules governing the measure of damages are substantive and binding in federal diversity cases. The District Court's disregard of those rules, and the Fifth Circuit's failure to correct the error, reflect a systemic failure that undermines confidence in the federal courts' ability to provide consistent, fair adjudication of state-law claims. The resulting conflict demands resolution.

This case presents multiple, compounding constitutional and doctrinal violations: the exclusion of a core impossibility defense grounded in centuries of common law; the omission of mandatory jury instructions on fraud damages required under controlling state law; and the consequent erosion of equitable doctrines fundamental to American contract jurisprudence. These errors denied Petitioner the fair trial guaranteed by the Fifth and Seventh Amendments and set a dangerous precedent for how federal courts address equitable defenses and jury instructions in diversity actions—contravening the principles established in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

The *Erie* doctrine requires federal courts sitting in diversity to apply not only the substantive rules of state law but also the components of that law, such as mandatory jury instructions, that bear directly on parties' rights and liabilities. By refusing to submit the impossibility defense and failing to instruct the jury on fraud damages as mandated by Texas law, the courts below displaced substantive state law with incompatible federal practice, thereby violating *Erie* and its progeny.

This case provides a critical opportunity for the Court to clarify whether and how impossibility and frustration of purpose survive as independent common-law defenses, particularly in diversity cases where federal procedural rules intersect with state substantive law. Without such guidance, similarly situated litigants will face unpredictable, forum-dependent outcomes and potentially lose access to equitable defenses long recognized by courts of law and equity-thus, promoting forum shopping and threatening consistent outcomes in state and federal courts for similar claims.

Beyond the immediate constitutional concerns, the case raises novel and urgent questions about the legal consequences of the COVID-19 pandemic—a global crisis that profoundly disrupted contractual performance on a scale unseen in modern history. Public policy implications are significant. In the wake of a national emergency, it is essential that the legal system provide a coherent and just framework for evaluating disrupted contracts—one that honors the principles of fairness and commercial reasonableness without punishing parties for events entirely beyond their control. Allowing the erosion of impossibility and frustration doctrines would undermine those equitable principles, distort private ordering, and chill legitimate commercial activity in times of uncertainty.

Review is warranted to resolve these constitutional and doctrinal conflicts, to protect the rights of civil litigants to present a complete defense and receive legally accurate jury instructions, and to promote the fair and consistent application of law in an area of growing national importance.

Certiorari is essential to vindicate the constitutional guarantees of due process and the right to a fair trial, to ensure uniform application of impossibility and frustration defenses across federal courts, and to halt the continued erosion of substantive and equitable rights in the adjudication of state-law claims under diversity jurisdiction.

A. The Fifth Circuit's Decision Conflicts with Constitutional Protections, Established Precedent, and Decisions from Other Circuits and State Supreme Courts Regarding the Right to Present a Complete Defense

The Fifth Circuit Court of Appeals' decision highlights the critical need for this Court's intervention. Although the appellate court acknowledged that the contract contained a one-sided force majeure clause that exclusively protected the drafter, Eduardo Beltramini, it failed to address JA Masters' central argument: the District Court committed reversible error by conflating the contract's force majeure clause with the distinct, well-established common-law defense of impossibility. This critical misstep deprived Petitioner of the opportunity to present a complete and viable legal defense to the jury, in violation of his constitutional rights under the Fifth and Seventh Amendments. This is not merely a procedural error, it is a constitutional one.

A long-standing due process right that has existed for decades. The Ninth Circuit has held that a defendant is entitled to a jury instruction on their theory of defense when supported by law and some evidence. *United States v. Mason*, 902 F.2d 1434, 1438 (9th Cir. 1990). Moreover, a

defendant has a constitutional right to have a jury resolve disputed issues of fact. *United States v. Perdomo-Espana*, 522 F.3d 983, 986–87 (9th Cir. 2008). This principle aligns with this Court's longstanding recognition of the jury's central role in the adjudicatory process. These principles reflect this Court's own precedent, which has consistently emphasized the central role of the jury in the federal adjudicatory process.

In *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958), this Court reversed a directed verdict on a negligence case that effectively stripped a party of its right to present a defense, holding that federal courts must preserve the jury's constitutional role, particularly in diversity cases. This Court made clear that there is a strong federal policy favoring jury determination of factual disputes, particularly where a party seeks to present a recognized legal defense. As *Byrd* explained, "[t]he federal system is an independent system for administering justice... and an essential characteristic of that system is the manner in which... it distributes trial functions between judge and jury and, under the influence, if not the command, of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury." *Id.* at 537–38.

Here, however, the lower courts circumvented that protection. The Fifth Circuit effectively held that the existence of a one-sided force majeure clause extinguished the defense of impossibility as a matter of law, thereby preventing JA Masters from presenting it to the jury. That holding directly conflicts with established principles of contract law and decisions from other circuits and the Texas Supreme Court. It also invites abuse by contract

drafters, who could deliberately insert unilateral provisions to block the availability of equitable defenses, even when the facts and law would otherwise support them. Indeed, other Circuits have already decided on such issues and taken a different approach.

i. CIRCUIT CONFLICT

Federal circuits are divided on whether the common-law defense of impossibility is available when a contract contains a force majeure clause that does not explicitly waive equitable defenses. The Fifth Circuit's rule squarely conflicts with rulings from the Fourth, Seventh and Eleventh Circuits, creating an urgent need for this Court's intervention.

The Fifth Circuit held that the existence of a contractual force majeure clause, despite being one-sided and silent on equitable defenses, foreclosed the common-law defense of impossibility as a matter of law. This approach directly conflicts with decisions from the Seventh and Fourth Circuits, which have squarely held that force majeure and impossibility are distinct doctrines, and that the presence of one does not automatically displace the other unless the contract explicitly waives equitable defenses.

In *Wisconsin Electric Power Co. v. Union Pacific R.R. Co.*, 557 F.3d 504, 507–08 (7th Cir. 2009), the Seventh Circuit explained that "[t]he doctrine of impossibility is an equitable principle that survives independently of any force majeure clause," and that courts must evaluate it on its own merits. Similarly, in *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 826 F.2d 239, 264 (4th Cir. 1987), the Fourth Circuit reaffirmed that impossibility

and force majeure are separate defenses, and the presence of a force majeure clause does not preclude judicial consideration of impossibility unless the contract "clearly and unequivocally" waives such equitable relief. And in *Opera Co. of Boston v. Wolf Trap Foundation*, 817 F.2d 1094, 1100 (4th Cir. 1987), the Fourth Circuit reversed dismissal of an impossibility defense, holding that factual and legal inquiry is required even where a force majeure clause exists.

Numerous district courts and other circuits echo this approach. In *DNC Parks & Resorts at Yosemite Inc. v. United States*, 133 Fed. Cl. 314 (2017), the court reaffirmed that parties may contract around equitable defenses, but only through clear and unambiguous language. In *Waymo LLC v. Uber Techs., Inc.*, 252 F. Supp. 3d 934 (N.D. Cal. 2017), the court held that common law obligations are not displaced by contract terms unless the contract expressly does so. Similarly, *Rembrandt Enters., Inc. v. Dahmes Stainless, Inc.*, No. C15-4248-LTS, 2017 U.S. Dist. LEXIS 144636 (N.D. Iowa Sep. 7, 2017), declined to treat a force majeure clause as barring the frustration of purpose doctrine absent explicit language. And the Eleventh Circuit in *Stein v. Paradigm Mirasol, LLC*, 586 F.3d 849, 857–58 (11th Cir. 2009), noted that while force majeure clauses may extend relief beyond common law doctrines, they do not implicitly eliminate those doctrines unless the parties clearly say so.

This Court's precedent also supports that view. In *US Airways, Inc. v. McCutchen*, 569 U.S. 88 (2013), the Court held that where an agreement is silent on an issue, common-law doctrines operate as the default rule. Here, the contract's force majeure clause protected only one party (Beltramini) and was silent as to equitable defenses

available to JA Masters. Under *McCutchen*, that silence means impossibility remains available unless expressly displaced.

In contrast, the Fifth Circuit held that the existence of the clause alone was enough to preclude an impossibility instruction, despite the clause being one-sided and containing no waiver of equitable defenses. That interpretation creates a direct and irreconcilable split with other circuits, distorting uniform contract doctrine in federal diversity cases and depriving parties of a fundamental defense based solely on geography.

The practical consequences of this conflict are profound. Parties entering into performance-based contracts, especially during and after the COVID-19 pandemic, face wildly different outcomes depending on which federal circuit hears their case. In some jurisdictions, impossibility remains an equitable safeguard against unforeseeable disruption. In others, that defense is categorically foreclosed if a force majeure clause exists, even one that is silent or one-sided.

District courts have taken note of this divergence. In *Private Jet Services Grp., LLC v. Tauck, Inc.*, 2023 U.S. Dist. LEXIS 5489 (D.N.H. 2023), the court rejected the argument that a one-sided force majeure clause precluded common-law defenses, citing Seventh Circuit precedent and holding that "impossibility and frustration of purpose defenses may remain available contract defenses unless the contract documents explicitly provide otherwise." *Id.* at *9* (citing *N. Indiana Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 277 (7th Cir. 1986) (Posner, J.)).

Even more critically, the Fifth Circuit's decision is at odds with the Texas Supreme Court, the source of governing substantive law in this diversity case. In *Hogan v. Southern Methodist University*, 688 S.W.3d 852 (Tex. 2024), that court held that pandemic-related government restrictions rendered performance impossible and excused contractual obligations. The Texas Supreme Court reaffirmed in *Centex Corp. v. Dalton*, 840 S.W.2d 952 (Tex. 1992), that government regulations may excuse performance when compliance becomes impossible. These decisions reflect Texas's recognition that impossibility remains a viable and important equitable doctrine, particularly in the face of unforeseeable events such as the COVID-19 pandemic.

Despite this clear precedent, the Fifth Circuit affirmed the District Court's refusal to submit the impossibility and frustration of purpose defenses to the jury. JA Masters argued that the contract's essential purpose—to conduct live, in-person soccer events through PFEM with the mentorship of Beltramini—was entirely frustrated by pandemic-related restrictions. The BSA explicitly contemplated live events as a core revenue-generating mechanism, and clauses 4(a) and 4(b) directly reference those anticipated events. Government mandates prohibiting live gatherings destroyed this purpose.

Nevertheless, the Fifth Circuit adopted a narrow reading of Texas contract law, relying on *Tractebel Energy Mktg., Inc. v. E.I. Du Pont De Nemours & Co.*, 118 S.W.3d 60 (Tex. App.—Houston [14th Dist.] 2003, pet. denied), to conclude that the presence of a force majeure clause precluded any further equitable defenses. That conclusion is inconsistent with both the factual record

and applicable law. The court ignored Texas law requiring that each provision in a contract be given meaning and effect. See *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex. 1994). By refusing to consider the implications of clauses 4(a) and 4(b), the court rendered those sections meaningless and deprived Petitioner of the opportunity to assert a complete and factually supported defense.

However, the Fifth Circuit is not entirely alone in adopting a narrow interpretation. For example, in *Huth v. Am. Inst. for Foreign Study, Inc.*, No. 3:20-CV-01786 (JCH), 2022 U.S. Dist. LEXIS 49344, at *14–15 (D. Conn. Mar. 21, 2022), the District Court of Connecticut, observed that "[s]ince impossibility is a common-law device for shifting risk in accordance with the parties' presumed intentions, it has no place when the contract explicitly assigns a particular risk to one party or the other," such as through a force majeure clause. Although *Huth* did not address a one-sided force majeure clause or the availability of equitable defenses to a party not protected by such a clause, its reasoning reflects the narrower view that force majeure provisions can preclude common-law defenses.

Similarly, the court in the Eastern District Court of Pennsylvania, *CL1 Philadlphia, LLC v. Nat'l Apostolate of Maronites,* No. 22-1659, 2023 U.S. Dist. LEXIS 47159 (E.D. Pa. Mar. 21, 2023), held that when a contract clearly allocates the risk of nonperformance, as a force majeure clause does, courts should not rely on common-law doctrines of risk allocation like impossibility or frustration of purpose. These district court decisions align with the Fifth Circuit's position, but they stand in direct contrast to decisions from the Fourth and Seventh Circuits, as well

as other district courts, which have held that equitable defenses remain available unless expressly waived.

These conflicting interpretations underscore a concrete and deepening split among the circuits and district courts. The resulting inconsistency deprives similarly situated litigants of uniform legal standards and further demonstrates the need for this Court's intervention.

Given the entrenched and consequential split among the circuits and district courts, this case squarely presents an issue warranting this Court's review. The Fifth Circuit's holding, that the mere presence of a one-sided force majeure clause forecloses the equitable defense of impossibility as a matter of law, directly conflicts with decisions from the Fourth, Seventh and Eleventh Circuits, which recognize impossibility and force majeure as distinct doctrines that may coexist unless the contract explicitly waives equitable defenses. This conflict also puts the Fifth Circuit at odds with the Texas Supreme Court, whose precedents affirm the continued viability of impossibility as a defense where performance is rendered impossible by unforeseeable events, such as government-mandated shutdowns during a pandemic.

The Fifth Circuit's approach collapses force majeure and impossibility into a single contractual mechanism, effectively nullifying well-established common-law defenses in cases involving unilateral or silent clauses. This is not a theoretical dispute: it has immediate, practical consequences for litigants across federal jurisdictions. Parties in diversity cases may be deprived of core equitable defenses simply because of the forum in which their case

is heard. Certiorari is necessary to resolve this doctrinal conflict, restore uniformity to federal contract law, and reaffirm that constitutionally protected defenses, such as impossibility, cannot be silently abrogated by implication or by the unilateral drafting of a force majeure provision.

At stake is a question of first impression with broad public policy implications: whether a party can be deprived of a complete and viable defense at trial, one that could fully excuse liability, merely because the contract includes a unilateral force majeure clause or because the court fails to give equal weight to all provisions of the agreement. At its core, this issue implicates fundamental constitutional protections. When courts deny a party the opportunity to present a lawful defense based on an overly narrow reading of the contract or an erroneous interpretation of equitable doctrines, they violate the Due Process Clause of the Fifth and Fourteenth Amendments. Such outcomes are an affront to public policy and undermine the foundational guarantees of a fair trial.

The decision below, if allowed to stand, endorses a dangerous legal precedent—one that incentivizes the use of one-sided contract terms that shield only the drafter, erodes longstanding equitable doctrines such as impossibility and frustration of purpose, and permits federal courts to bypass the jury's constitutionally protected role through incomplete or misleading instructions. These outcomes directly conflict with the guarantees of due process and the right to a jury trial under the Fifth and Seventh Amendments. They also undermine the Erie doctrine's core requirement that federal courts sitting in diversity must apply not just the letter, but the full substance of state law while preserving federally protected rights.

This case raises issues of exceptional national importance in the wake of the COVID-19 pandemic—a global emergency that profoundly disrupted contractual performance across all sectors of the economy. The pandemic's unforeseen and unavoidable nature has given rise to urgent legal questions surrounding the continued viability and scope of common-law defenses such as impossibility and frustration of purpose. While courts have begun to address these questions, their decisions have varied widely. No clear or uniform legal standard has emerged to guide the application of these doctrines in the context of pandemic-related disruptions. As a result, parties similarly situated are receiving inconsistent treatment across jurisdictions, and non-drafting parties are being denied a meaningful opportunity to assert equitable defenses that could fully excuse performance.

This Court's review is needed to resolve that growing uncertainty and to clarify the legal framework governing the interaction between boilerplate force majeure clauses and equitable doctrines of impossibility. Absent such guidance, federal courts will continue to reach divergent and constitutionally suspect outcomes—particularly in diversity cases, where litigants depend on consistent, faithful application of state substantive law. Public confidence in the fairness and coherence of the judicial process demands more than ad hoc judicial interpretations or procedural shortcuts.

Certiorari is warranted to restore the constitutional balance between rigid enforcement of contract terms and the availability of equitable relief, and to preserve the jury's role in assessing disputed legal and factual questions. The decision below represents a fundamental

breakdown in that balance. It permitted the exclusion of a viable defense, relied on flawed jury instructions, and condoned a verdict that is legally inconsistent and factually unsupported. These errors not only prejudiced JA Masters but also risk entrenching systemic inequities for future litigants facing similar circumstances.

This case presents a compelling opportunity for the Court to reaffirm the primacy of the jury in civil adjudication, to ensure that federal courts uphold state law in both form and substance, and to prevent the erosion of core constitutional protections through the mechanical enforcement of lopsided contractual provisions. Review by this Court is necessary to resolve circuit conflicts, reinforce the procedural safeguards required under the Fifth and Seventh Amendments, and preserve the rule of law in the adjudication of state-law claims in federal courts.

B. In Diversity Jurisdiction Cases, Federal Courts Are Bound to Apply State Substantive Law, Including State-Required Jury Instructions on the Measure of Damages

This case presents an issue of exceptional legal significance that warrants this Court's review: whether federal courts sitting in diversity may disregard mandatory state substantive law—specifically, jury instructions governing the measure of damages in fraud cases—without violating both the *Erie* doctrine and the constitutional due process rights of the parties. The answer must be no. Yet that is precisely what occurred below. The Fifth Circuit upheld a judgment entered after the district court failed to instruct the jury on the

correct measure of damages under Texas law in a fraud case. In doing so, it deepened a split with other circuits, contradicted Texas Supreme Court precedent, and ignored this Court's holdings that state law governs substantive rights, including rules for measuring damages, in diversity cases.

It is a bedrock principle of federal jurisprudence that in diversity cases, federal courts must apply state substantive law. This doctrine, first announced in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), is not merely a matter of deference—it is a structural command rooted in constitutional federalism and the Rules of Decision Act, 28 U.S.C. § 1652. In *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), this Court reaffirmed that *Erie*'s reach extends not only to substantive causes of action, but also to state standards governing the measure and determination of damages. As this Court explained, "[u]nder the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law. Classification of a law as 'substantive' or 'procedural' for *Erie* purposes is sometimes elusive. But damages rules are a prime example of a substantive rule of decision." Id. at 426–27.

Accordingly, when a federal district court presides over a state-law fraud claim, it must adhere to the substantive requirements of that state's law—including the instructions required to be given to a jury to properly assess damages.

Texas law is unequivocal in this respect. The Texas Supreme Court has repeatedly held that failure to instruct a jury on the legally correct measure of damages in a

fraud case constitutes reversible error. See *Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87 (Tex. 1973); *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812 (Tex. 1997); *Kinsel v. Lindsey*, 526 S.W.3d 411 (Tex. 2017). The Texas Pattern Jury Charges (PJC), which embody these substantive requirements, mandate that fraud liability questions—such as PJC 115.19—must be accompanied by specific instructions that guide the jury on how to calculate damages using Texas-recognized legal theories such as benefit-of-the-bargain, out-of-pocket loss, or lost profits. The commentary to PJC 115.19 explicitly warns that the question should not be submitted "without a proper accompanying instruction" and cites *Jackson* as controlling precedent. These rules are not advisory—they reflect Texas's substantive requirements for fair adjudication in fraud cases.

Here, the District Court submitted to the jury Question 1 from PJC 105.1: "Did Beltramini commit fraud against JA Masters relating to any of the four soccer games for which they had a written agreement?" While the court did provide definitions from PJC 105.2 and submitted PJC 115.19—relating to direct damages resulting from fraud—the court failed to accompany this instruction with any directive explaining how to calculate those damages. This omission violated the express terms of PJC 115.19, which unambiguously states that it should not be submitted without an accompanying instruction on the appropriate measure of damages. The commentary to PJC 115.19 specifically references *Jackson*, and it further directs courts to PJC 115.4 and 115.10 for model instructions showing how to calculate damages mathematically.

Instead of including a proper damages instruction based on benefit-of-the-bargain, out-of-pocket, or lost profits theories as described in PJC 115.4 and 115.10, the District Court simply asked the jury, "What sum of money, if any, would fairly and reasonably compensate JA Masters for its damages, if any, that resulted from such fraud?" This question, standing alone, is legally insufficient and affirmatively misleading. It asks the jury to decide what is "fair," without giving it the legal framework to determine what damages JA Masters was entitled to under Texas law. This omission was not inadvertent. It directly contravened the PJC's own directives and Texas Supreme Court precedent. This defect goes beyond a technical error. It violated the Erie doctrine, usurped the role of state substantive law in diversity cases, and denied the petitioner its right to due process and a jury trial under the Fifth and Seventh Amendments. It also undermines core federalism principles and creates the very forum-shopping disparities *Erie* was meant to eliminate.

In *Transcon. Ins. Co. v. Crump,* 330 S.W.3d 211 (Tex. 2010), the Texas Supreme Court held that omitting a component of a definition in a jury charge case was reversible error, reaffirming that omissions from required jury instructions deprive a party of a fair trial and mandate reversal.

The Fifth Circuit's conclusion that JA Masters failed to show how its proposed instruction materially differed from the one given is untenable. JA Masters' arguments are not merely because it preferred a different instruction—they are because the instruction provided was legally incomplete and contradicted the very authority the District Court claimed to follow. The court's failure to

provide a proper measure of damages rendered the jury charge fatally defective. This is not merely a technical oversight—it constitutes a violation of Texas substantive law and thus, under the *Erie* doctrine, a violation of federal procedural obligations in diversity cases.

Indeed, JA Masters provided clear, uncontested evidence at trial regarding damages. For example, Beltramini claimed only $2,029 in revenue for consignment tickets for the El Salvador v. Honduras match, when the actual revenue was $215,790-leaving over $213,000 in unreported profits. For the Peru v. Paraguay match, Beltramini reported $1,213,002 in revenue, while the stadium's report showed $1,327,012.80—a difference of $114,010.80. For the Ecuador v. Honduras match, Beltramini's report understated revenue by $5,000.32. After subtracting underreported expenses totaling $70,751, the resulting damages amounted to $261,310.12. This discrepancy clearly supports a finding of damages under any proper instruction. Yet the jury awarded nothing. The only rational explanation for this result is the court's failure to instruct the jury on how to calculate damages, a failure that deprived JA Masters of its substantive rights under Texas law and a fair trial under the Fifth and Seventh Amendments. Here, it is undisputed that the jury received no legal instruction on how to calculate damages, a failure that effectively operated as a constructive directed verdict, in direct violation of the Seventh Amendment's guarantee of a jury trial on all factual issues, including the proper assessment of damages, and Texas Supreme Court.

As this Court explained in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), due

process requires that litigants receive a fair opportunity to present their claims to an impartial decision-maker using procedures that ensure a meaningful opportunity to be heard. When a jury is asked to decide damages but is not told how to calculate them according to governing law, the verdict is arbitrary and the process fundamentally unfair.

Moreover, federal courts' repeated failure to faithfully apply mandatory state jury instructions in diversity cases threatens the uniformity and predictability of state law. The Fifth Circuit's decision creates a direct conflict with its own precedent, including *Chipser v. Kohlmeyer & Co.*, 600 F.2d 1061 (5th Cir. 1979), where the court held that failure to instruct a jury on the proper measure of damages was reversible error. It also conflicts with decisions from other circuits recognizing that instructional errors on damages in civil cases are rarely harmless and often require reversal. See *Coursen v. A.H. Robins Co.*, 764 F.2d 1329, 1337 (9th Cir. 1985); *Pryer v. C.O. 3 Slavic*, 251 F.3d 448, 454 (3d Cir. 2001); *Mason v. Texaco, Inc.*, 948 F.2d 1546, 1553 (10th Cir. 1991). And it stands in stark contrast to the Texas Supreme Court's categorical rule that submitting a fraud damages question without an accompanying measure-of-damages instruction is, by itself, grounds for reversal.

Despite these authorities, the Fifth Circuit failed to address how the trial court's omission of required instructions undermined the entire verdict. In doing so, the Fifth Circuit failed to reconcile its own precedent, ignoring Texas Supreme Court authority such as *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812 (Tex. 1997) and *Kinsel v. Lindsey*, 526 S.W.3d 411 (Tex. 2017), and disregarded the express terms of the Texas Pattern Jury Charges.

The Texas Supreme Court has made clear that the absence of a proper damages instruction in a fraud case constitutes reversible error. Federal courts sitting in diversity are bound to follow that rule. When the District Court adopted the Texas PJC as the operative framework for submitting the fraud question, it was required to follow all its directives. The omission of the required measure of damages instruction materially affected the outcome of this case and denied JA Masters a fair trial. This issue implicates not only the Erie doctrine, but also fundamental fairness under the Fifth and Seventh Amendments.

Without intervention from this Court, similarly situated plaintiffs in diversity cases will continue to face uncertainty and injustice depending on which federal court they find themselves in. The result is forum-dependent adjudication of state-law rights—precisely the problem *Erie* sought to eliminate. This case illustrates a systemic failure that endangers litigants' substantive rights, undermines confidence in the federal judiciary, and creates disuniformity in the application of state law in federal courts.

This Court should grant certiorari to reaffirm the constitutional and federalist principles at the heart of *Erie* and *Gasperini*; to make clear that jury instructions regarding the measure of damages in fraud cases are part of state substantive law that federal courts must follow; and to ensure that litigants in diversity actions are afforded the same due process protections as those in state court. This issue is of exceptional national importance. Certiorari is warranted.

CONCLUSION

This Court should grant certiorari to reaffirm the constitutional and federalist principles at the heart of *Erie* and *Gasperini*; to make clear that jury instructions regarding the measure of damages in fraud cases are part of state substantive law that federal courts must follow; and to ensure that litigants in diversity actions are afforded the same due process protections as those in state court. This issue is of exceptional national importance. Certiorari is warranted.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JANUARY 3, 2025

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-20292

J.A. MASTERS INVESTMENTS;
K.G. INVESTMENTS,

Plaintiffs-Appellants,

v.

EDUARDO BELTRAMINI,

Defendant-Appellee.

Filed January 3, 2025

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:20-CV-4367

Before HAYNES, WILLETT, and OLDHAM, *Circuit Judges.*

PER CURIAM:*

This appeal stems from a five-day jury trial on allegations of fraud and breach of contract. Appellants

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

J.A. Masters Investments and K.G. Investments raise several issues for our review. But our previous majority opinion determined that before we could reach the merits, a limited remand was necessary to resolve a threshold jurisdictional question. The district court held additional proceedings, and we are now satisfied as to our jurisdiction. Proceeding now to the merits, we AFFIRM the district court across the board, with one exception: we VACATE its award of attorney fees and REMAND for a determination as to whether they have been properly segregated.

I

A

This case involves multiple failed business dealings in the soccer industry. Defendant Eduardo Beltramini is a FIFA match agent who promotes and arranges professional soccer matches through an unincorporated business called "Planet Futbol Event Management." There are many facets to operating Planet Futbol, and arranging professional soccer matches generally, one of which is financing the matches. Rather than fund the entire operation himself, Beltramini would often invite outside investors to underwrite part of the match, and in return the investors would receive a portion of the profits.

Cue the named plaintiffs in this case: J.A. Masters Investments and K.G. Investments, both of which are owned by Jefferson Castro Guevara.[1] Guevara, who the

1. We will refer to J.A. Masters Investments and K.G. Investments collectively as "Plaintiffs" and will refer to Mr.

district court described as knowing little to nothing about either soccer or finance, decided he wanted to not only invest in future soccer matches with Beltramini but also buy his company, Planet Futbol. To that end, the parties signed a total of seven contracts, six for the soccer matches in which Guevara wanted to invest and one for the sale of Planet Futbol.

With respect to the soccer matches, the parties agreed to split the expenses and profits in various ways (usually 50/50). At the end of each match, Beltramini would provide Guevara an accounting of the revenue and expenses—or, as Plaintiffs describe it, "a self-composed worksheet"—for purposes of distributing the profit. Beltramini admits that calculating the expenses for each game required "a tremendous amount of record keeping," and the district court observed that "although Mr. Beltramini knew a lot about professional soccer, he knew less about business and accounting." At any rate, based on the numbers he estimated for each game, Beltramini would distribute the profit to Plaintiffs commensurate to their percentage investment.

With respect to the sale of Beltramini's company, Planet Futbol, Guevara agreed to a purchase price of $300,000, payable in three installments of $100,000. The sale was memorialized in the parties' Business Sale

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Guevara individually when the context necessitates it. Relatedly, Plaintiffs' liberal use of "appellant" and "appellee" throughout their briefing, which they sometimes confuse and interchange with the parties' actual names, illustrates the wisdom behind Rule 28(d) of the Federal Rules of Appellate Procedure.

Agreement, which was drafted by Beltramini's son, Mauro, who at the time was a Texas-licensed attorney. The Business Sale Agreement had seventeen articles, but only three are relevant to this dispute.

First, in Article 4, the parties agreed to the payment terms: Guevara would pay the first $100,000 on the closing date, the second $100,000 after the first soccer match under the new ownership of Guevara, and the third $100,000 after the second soccer match. Importantly, however, Article 4 also made clear that "[t]he entire Purchase Price must be paid in full no later than July 1, 2020, notwithstanding" the above terms.

Second, in Article 8, titled "Conditions Precedent," the parties agreed to five conditions that Beltramini had to meet "before the Closing Date." One of those conditions, subsection (a)(IV), required Beltramini to provide Guevara "with any and all information required so that [Guevara] may step into the shoes of [Beltramini] for the proper operation of the Business." In the last sentence of Article 8, the parties agreed that if either of them did "not satisfy their obligations under this clause, the entire Agreement [would] be null and void" and there would be "no further relationship or obligations between the Parties."

Third, in Article 10, the parties agreed to a noncompete clause: "For a period of 5 years after [Beltramini's employment under Guevara's new ownership], Beltramini agrees to refrain from engaging directly or indirectly, in any form of commercial competition (including . . . through business, marketing, investment or financial activities) with [Guevara]."

The parties signed the agreement in October 2019, and Guevara paid Beltramini the first $100,000 on the closing date, as promised. The subsequent soccer matches envisioned by the agreement, however, never came to pass. The first match was scheduled for March 2020, the same time COVID-19 was spreading throughout the United States. Predictably, the games were canceled. When Guevara tried to recover a bond payment he made to FIFA for the first game, he got into a "disagreement over funds" with Beltramini, which apparently precipitated this lawsuit.

B

Plaintiffs filed suit against Beltramini in the Southern District of Texas in December 2020, asserting, among other things, claims of fraud and breach of contract. Plaintiffs specifically alleged that Beltramini, when composing his post-game accounting reports, "wrongfully inflated" the matches' expenses and "devalued [the] profits owed" to them. They also alleged that Beltramini failed in his obligation of handing the Planet Futbol business over to Guevara by not helping him obtain his FIFA agent license and by not "ced[ing] control over and provid[ing] all business contacts to Mr. Guevara in furtherance of the on-going business acquisition."

Shortly after Plaintiffs filed their lawsuit in federal court, Beltramini filed a parallel suit in state court for breach of contract, alleging that Plaintiffs were $200,000 short on the purchase price for Planet Futbol. Plaintiffs, as defendants in the state-court action, removed the case

to federal court and moved to consolidate the cases, which the district court granted.

The parties proceeded to trial on the consolidated actions. "It was not an easy trial," the district court remarked, and it "made every effort to shield the jury from all [the] issues." To that end, the district court granted Beltramini's posttrial motion for judgment as a matter of law on two of the eight claims, concluding that (1) Plaintiffs failed to show a material misrepresentation with respect to the Peru v. El Salvador (2019) match, and (2) Plaintiffs breached the Business Sale Agreement by failing to pay Beltramini the full purchase price of $300,000.

The jury, for its part, similarly sided with Beltramini on the rest of the claims.[2] With respect to the fraud claims, the jury found that although Beltramini committed fraud for three of the four soccer matches, Plaintiffs sustained zero damages as a result. And with respect to Plaintiffs' breach-of-contract claim—that Beltramini failed to prepare Plaintiffs to take over the business—the jury found in Beltramini's favor.

Following the verdict, both parties moved for attorney fees and entry of judgment in their favor, taking opposing views as to what the jury's answers meant for their claims. As for the fraud claims, the district court found that the jury's answers—that Beltramini committed fraud but

2. When the district court took up Beltramini's Rule 50(a) motion, Plaintiffs abandoned their fraud claim arising out of the Peru v. Ecuador (2019) match, so a total of five claims were submitted to the jury.

that Plaintiffs sustained no damages—were "readily reconcilable" because the evidence at trial showed that Beltramini "actually *underreported* the expenses he incurred" for the matches. As for the breach-of-contract claim, the district court concluded that Beltramini was entitled to his attorney fees under Texas law, specifically finding that Beltramini prevailed on the claim because Plaintiffs did not pay the full purchase price and that Beltramini's fees were reasonable "in light of the numerous issues and disputes before and during trial."

Plaintiffs timely appealed and raised several issues for our review. Before reaching those issues, however, our previous majority opinion determined that the record failed to definitively establish diversity jurisdiction and remanded the case for further limited proceedings in light of that failure. *J.A. Masters Invs. v. Beltramini,* 117 F.4th 321, 322-24 (5th Cir. 2024). The district court held an evidentiary hearing and found that complete diversity of citizenship exists between the parties. Now satisfied as to our jurisdiction, we proceed to the merits.

II

Our analysis proceeds in five parts, following the order in which the parties briefed the issues. First, we discuss the jury's award of $0 in damages for Beltramini's alleged fraud. Second, we address the various evidentiary errors that Plaintiffs argue the district court made during trial. Third, we evaluate the district court's decision to grant Beltramini judgment as a matter of law on his breach-of-contract claim. Fourth, we take up whether the

district court erred in awarding Beltramini his attorney fees. Finally, we review the district court's instructions, and answer to the jury's question, regarding conditions precedent in the Business Sale Agreement.

A

Plaintiffs first complain about the jury's award of $0 in damages for their fraud claims against Beltramini. They specifically contend that the district court improperly instructed the jury on damages and that the jury's damages finding is against the great weight of the evidence.

Because Plaintiffs never objected to the district court's instruction, we review the issue raised by their first argument for plain error.[3] Our review of the record reveals none. The district court instructed the jury that if it found that Beltramini defrauded Plaintiffs, it should award "compensatory damages . . . by estimating the lost profits [Plaintiffs] should have reasonably obtained from each game." Plaintiffs fail to explain how their preferred instruction—"the difference between the price

3. Plaintiffs argue that this objection was preserved, citing the suggestion they made to the district court that it provide "[a] little more description of how you computed these [fraud] damages." That mere suggestion falls well short of preserving error on this issue. *See* Fed. R. Civ. P. 51(c)(1) ("A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection."). Indeed, when the district court said it was simply following the pattern jury charge, Plaintiffs seem to acquiesce in the instruction and said "Thank you, Your Honor."

paid and the value received"—materially differs from the instruction given to the jury. Plaintiffs have therefore failed to show any error, much less carry their heavy burden of showing plain error.

Plaintiffs' other argument—that the jury's award of $0 damages is against the great weight of evidence—is likewise unpreserved and unpersuasive. Plaintiffs concede that they failed to move for a new trial below, which is the proper way to preserve error on allegedly inadequate damages. *Bueno v. City of Donna,* 714 F.2d 484, 493-94 (5th Cir. 1983).[4] So again, we review for plain error, which in this context means that we "will not reverse if any of the evidence supports the jury's verdict." *NewCSI Inc. v. Staffing 360 Sols., Inc.*, 865 F.3d 251, 257 (5th Cir. 2017) (internal citations and quotation marks omitted). Our review of the record confirms that the jury's finding is supported by the evidence adduced at trial. Beltramini specifically pointed to all the instances in which he actually underreported expenses for the soccer matches. Testimony and various exhibits show hundreds of thousands of underreported expenses to Plaintiffs,

4. Arguing that they preserved their challenge to the jury's finding of no damages, Plaintiffs point to inapplicable Texas state procedural rules and caselaw that we need not consider here. Plaintiffs additionally submit that they raised the issue in their motion for attorney fees. Even assuming that was a proper vehicle to raise the issue, Plaintiffs fail to show where they made the argument. They cite over 70 pages of the record, none of which seem to have any relevance to the argument they now make on appeal. *See Murthy v. Missouri,* 144 S. Ct. 1972, 1992 n.8 (2024) ("[J]udges are not like pigs, hunting for truffles buried in the record." (alterations and internal quotation marks omitted)).

ranging from payments to soccer teams, advertising, referees, hotels, and transportation. As the district court noted, "Mr. Beltramini lost money in the process and [Plaintiffs] ended up with more overall profit than they would have if Mr. Beltramini had been accurate in reporting the expenses." We thus conclude that there is evidence supporting the jury's finding of $0 in damages for Beltramini's alleged fraud.

B

Plaintiffs next take issue with several of the district court's evidentiary rulings. Their objections are either waived, forfeited, or meritless.

First, Plaintiffs contend that the district court erroneously permitted Mauro Beltramini (Beltramini's son) to testify regarding the expenses incurred from the soccer matches when he had no personal knowledge or involvement with any of the matches. Even if that were true, Plaintiffs' objection to Mauro's testimony cannot be squared with their later assent to admit Joint Exhibit 1, an exhibit that included Mauro's expenses calculations—the same exact content of his testimony. Plaintiffs have therefore waived any right to complain about it on appeal. *See Capobianco v. City of New York,* 422 F.3d 47, 55 (2d Cir. 2005) ("[D]efendants waived any objections to the admissibility of the reports by offering them themselves.").

Second, Plaintiffs argue that the district court erred by not allowing them to use a soccer-match contract for the purpose of showing that Beltramini made inconsistent

statements. According to Plaintiffs, Beltramini relied upon a "falsified contract" to show the expenses incurred for the Peru v. Paraguay match, and they sought to impeach him with the "actual contract." Whatever merit this objection had below, Plaintiffs have forfeited it on appeal. They fail to explain how the district court erred, and the string of unexplained record citations they provide get us no closer to determining which documents are relevant to their argument. *See Smith v. Sch. Bd. of Concordia Par.*, 88 F.4th 588, 594 (5th Cir. 2023) ("A party forfeits an argument" by failing to "explain how the district court erred." (internal alterations and quotations omitted)).

Third, Plaintiffs contend that the district court erred in a pair of evidentiary rulings during the direct and cross-examination of Saris "Martin" Orellana, whose testimony concerned, among other things, the sale of tickets for soccer matches. When Orellana testified that the tickets he sold were complimentary, the district court permitted Beltramini to impeach him with text messages indicating that the tickets were consignment. And when Plaintiffs attempted to rehabilitate Orellana with what they say were pictures of text messages showing that the tickets were complimentary, the district court disallowed it. Plaintiffs argue that the district court erred in both directions. We disagree. The text messages Beltramini used for impeachment were properly authenticated when Orellana confirmed their authenticity, *see* FED. R. EVID. 901(b) (evidence can be authenticated by "[t]estimony that an item is what it is claimed to be"), and Plaintiffs point to nothing in the record that would support whatever error they think the district court made with respect to

the alleged pictures that they tried to admit. There is simply nothing in the record (or in the briefing) that can aid our review.

C

Plaintiffs next take aim at the district court's Rule 50(a) ruling granting Beltramini judgment as a matter of law on his breach-of-contract claim. Plaintiffs string together several reasons as to why they are excused from paying the full purchase price ($300,000) for Planet Futbol under the Business Sale Agreement. We find none of them persuasive.

Plaintiffs' first reason is that Beltramini anticipatorily repudiated the Business Sale Agreement by opening a bank account with the initials "PF" (the same initials as Planet Futbol), purportedly in violation of the Business Sale Agreement's noncompete clause. Plaintiffs do not explain how merely opening a bank account, without more, amounts to "commercial competition" under the noncompete clause. Nor do they dispute Beltramini's assertion that he never even used the account. The cases Plaintiffs cite confirm the tenuousness of their position. *See, e.g., Cook Composites, Inc. v. Westlake Styrene Corp.,* 15 S.W.3d 124, 139 (Tex. App.-Houston [14th Dist.] 2000, no pet.) ("[R]epudiation occurs when the promissor unequivocally disavows any intention to perform in the future."); *Sci. Mach. & Welding, Inc. v. FlashParking, Inc.,* 641 S.W.3d 454, 464 (Tex. App.-Austin 2021, pet. denied) ("Anticipatory repudiation centers upon an overt communication of intention or an action which renders performance impossible or demonstrates

a clear determination not to continue with performance." (internal quotation marks omitted)). Nothing of the sort occurred here.

Plaintiffs secondly blame COVID-19. "[B]ecause the entire country prohibited social events due to COVID-19," Plaintiffs say, "no soccer matches were conducted, frustrating the purpose of" the parties' contemplated payment scheme. Plaintiffs also submit that COVID-19-related closures and shutdowns made it "impossible" to comply with the Business Sale Agreement's payment terms.

We disagree. The Business Sale Agreement required Plaintiffs to pay the full purchase price "no later than July 1, 2010, notwithstanding" the contemplated payment scheme, so the fact that the envisioned soccer matches never materialized does not excuse Plaintiffs from paying. Plaintiffs also fail to show how the social conditions caused by COVID-19 resulted in "the destruction or deterioration of a thing necessary for performance." *Tractebel Energy Mktg., Inc. v. E.I. Du Pont De Nemours & Co.,* 118 S.W.3d 60, 65 (Tex. App.-Houston [14th Dist.] 2003, pet. denied). There is, to be sure, a force majeure clause in the Business Sale Agreement, but as Plaintiffs acknowledge, it protects only Beltramini. We decline to use a common-law doctrine to supersede the parties' agreed-upon terms. *See id.* at 66 ("Generally, impracticability excuses a party's breach when the contract itself doesn't provide an escape clause.").

Taking a different tack, Plaintiffs argue that Beltramini sustained no damages from their breach

of contract. Again, we disagree. Because Plaintiffs acknowledge that they did not pay the full purchase price, Beltramini did not realize the full benefit of his bargain. *See MSW Corpus Christi Landfill, Ltd. v. Gulley-Hurst, L.L.C.*, 664 S.W.3d 102, 106 (Tex. 2023). The existence of a noncompete does not somehow zero out breach-of-contract damages, as Plaintiffs suggest without any authority. Perhaps in an implicit recognition that Beltramini did in fact sustain damages, Plaintiffs assert that Beltramini failed to mitigate them. We agree with the district court that this argument is both waived and without merit. Plaintiffs raised it for the first time after trial and they make no effort to show how Beltramini could have mitigated his damages or by how much. Texas law requires more. *See, e.g., Cotten v. Weatherford Bancshares, Inc.*, 187 S.W.3d 687, 708 (Tex. App.-Fort Worth 2006, pet. denied) ("The party asserting failure to mitigate has the burden of proving facts showing lack of such mitigation and must also show the amount by which the damages were increased by failure to mitigate.").

D

In their penultimate issue, Plaintiffs complain about the district court's decision to award Beltramini his attorney fees. They argue that (1) Beltramini waived his right to fees under the Business Sale Agreement and (2) Beltramini's attorneys failed to segregate their fees. We disagree with the former but believe the latter may have merit.

Texas law provides that prevailing parties in breach-of-contract actions are entitled to attorney fees, Tex.

Civ. Prac. & Rem. Code § 38.001, but parties are free to contract around that statutory default, *see Mohican Oil & Gas, LLC v. Scorpion Expl. & Prod. Inc.,* 337 S.W.3d 310, 321 (Tex. App.-Corpus Christi-Edinburg 2011, pet. denied). Plaintiffs argue that the parties accomplished just that in Article 14 of their Business Sale Agreement, in which "[e]ach Party agree[d] to be responsible for their own expenses or costs relating to or in connection with anything in this Agreement." Thus, according to Plaintiffs, Beltramini waived any right to attorney fees because "expenses or costs" encompasses attorney fees paid in connection with litigation over the contract.

This is a compelling argument, and one reasonably grounded in the plain language of the agreement,[5] but Texas caselaw demands "clear and specific" language to overcome a statutory entitlement to attorney fees under § 38.001. *Ferrari v. Aetna Life Ins.,* 754 F. App'x 266, 269-70 (5th Cir. 2018). Under that standard, we have held that a contract must "specifically preclude" a litigant's "statutory claim to an award of attorney's fees under Section 38.001." *Tex. Nat'l Bank v. Sandi Mortg. Corp.,* 872 F.2d 692, 701 (5th Cir. 1989). Texas state appellate courts have followed suit. One has held that a party did not waive his statutory right to attorney fees because the contract did "not specifically reference Section 38.001," *Venture Cotton Co-op v. Freeman,* 395 S.W.3d 272, 276 (Tex. App.-Eastland 2013), *rev'd on other grounds,* 435 S.W.3d 222 (Tex. 2014), and another has held that a contract disclaiming liability

5. *See* Bryan A. Garner, Garner's Dictionary of Legal Usage 227 (3d ed. 2011) (entry on "costs and expenses" and defining "expense" as a "broader term" that refers to "an expenditure of money, time, labor, or resources to accomplish a result").

"for attorney fees incurred" was "too general to apprise [the plaintiff] of what rights she is relinquishing, namely her statutory right to attorney fees under Chapter 38," *Bank of Am., N.A. v. Hubler,* 211 S.W.3d 859, 865 (Tex. App.-Waco 2006, pet. granted, judgm't vacated w.r.m.). The "clear and specific" standard is thus a demanding one, and Article 14 of the Business Sale Agreement—with its broad mention of "expenses and costs"—does not meet it.

Because Beltramini is statutorily entitled to his attorney fees for his breach-of-contract claim, notwithstanding Article 14 of the Business Sale Agreement, Texas law requires him to segregate his fees. "[F]ee claimants have always been required to segregate fees," the Texas Supreme Court has observed, "between claims for which they are recoverable and claims for which they are not." *Tony Gullo Motors I, L.P. v. Chapa,* 212 S.W.3d 299, 311 (Tex. 2006). While Beltramini is entitled to his fees for the breach-of-contract claim he brought against Plaintiffs, no statute or provision in the Business Sale Agreement entitles him to attorney fees for prevailing against Plaintiffs' fraud claims. Thus, unless the two sets of claims are "intertwined," *id.* at 314, Beltramini needed to segregate the fees associated with the breach-of-contract claims from the fees associated with the fraud claims.

Beltramini claims to have done so in his briefing, but, confusingly, he also says that the claims were "inexorably intertwined to the extent that it is impossible to distinguish the proper allocation of fees."[6] Beltramini's attorneys'

6. Beltramini's briefing on this point could be understood as saying that the fees were segregated based on time spent litigating

affidavits echo the latter position, positing (among other things) that "[t]he facts [relevant to each claim] overlapped inseparably" and that Plaintiffs' theory of the case was "to claim that the amount on the contract was not due and owing because of the fraud and misrepresentations made to Guevara in the six soccer games." The Texas Supreme Court has rejected the notion, however, that "a common set of underlying facts" is sufficient to make claims "so intertwined that they need not be segregated." *Id.* at 313-14. And it is not clear to us that the affidavits' description of Plaintiffs' theory of the case is entirely accurate, at least about the intertwined nature of the claims at issue, given Plaintiffs' contentions that their performance was excused by Beltramini's various alleged breaches of the Business Sale Agreement rather than the fraud claims. *See* section C, *supra.*

We decline to take a definitive position on the issue because, despite the parties' arguments about it below, the district court did not address the segregation issue in its order awarding Beltramini his attorney fees. Thus, on the incomplete record before us, we cannot say whether Beltramini's attorneys properly segregated their fees in accordance with Texas law—or if they even needed to. We leave it to the district court to make those determinations in the first instance. *Cf. Utah v. Su,* 109 F.4th 313, 320-21 (5th Cir. 2024).

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against the different parties below (*i.e.,* Mario Gonzalez versus Plaintiffs), and not segregated based on Plaintiffs' claims. But Beltramini's response is terse, and there is virtually no argument as to why there was no need to segregate the fees with respect to Plaintiffs' claims.

E

Finally, we address Plaintiffs' contention that the district court erred in its handling of the Business Sale Agreement's conditions precedent, both in the instructions to the jury and in responding to the jury's one and only question. The district court did not err.

Article 8 of the Business Sale Agreement—titled "Conditions Precedent—requires Beltramini to, among other things, "provide [Plaintiffs] with any and all information required so that [Plaintiffs] may step into the shoes of [Beltramini] for the proper operation of the Business." Plaintiffs allege that Beltramini failed to live up to that promise, and they blame the jury's finding otherwise on the district court's failure to provide the jury "a definition or guidance as to what constitutes a condition precedent." As with many of their other issues raised on appeal, they failed to preserve this one below, so we again review for plain error. *Garcia-Ascanio v. Spring Indep. Sch. Dist.,* 74 F.4th 305, 309 (5th Cir. 2023).

And again, we discern none. It is at best unclear what difference a definition of "condition precedent" would have made to the jury's finding that Beltramini did not breach the Business Sale Agreement. The district court specifically provided to the jury Plaintiffs' theory of the breach-of-contract claim (*i.e.*, that they need not pay Beltramini due to his alleged failure to prepare them to take over Planet Futbol), which is essentially a more fact-based way of telling the jury precisely what Plaintiffs want: that a party "has no obligation to perform under

the contract" when the other party "violates part of the contract." The Business Agreement itself, moreover, also provided a similar definition of conditions precedent. So, if any error resulted from the district court's failure to define "condition precedent," it was harmless in light of the instructions and evidence already given to the jury.

Plaintiffs bookend their belated objection about the jury instruction with an argument that the district court gave an improper response to the jury's question about conditions precedent. Plaintiffs did in fact preserve this specific objection below.[7] The jury's brief, two-hour deliberation was interrupted by only one question it asked regarding conditions precedent:

> Regarding purchase agreement Article 8, conditions precedent. We have a legal question with the phrase "before the Closing Date" in conjunction with a) iv). Is it expected that part iv) is really to be performed before the Closing Date?

In response to this question, the district court restated the language of Article 8, clause (a)(iv), and urged the jury to consider it in context of the entire agreement:

---

7. In his briefing, Beltramini seems to conflate Plaintiffs' argument that the district omitted a conditions-precedent instruction with Plaintiffs' argument that the district court improperly answered the jury's question, leading him to incorrectly suggest that Plaintiffs failed to preserve either. The district court plainly noted Plaintiffs' objection to its answer on the record.

> Article 8(a)(iv) states that the seller will provide the buyer with any and all information required so that the buyer may step into the shoes of the seller for the proper operation of the business before the closing date. Consider this provision in the context of the entire agreement, including the provisions on effectuating an orderly transition.

According to Plaintiffs, the district court should have instead answered the jury's question with a simple "yes because Article 8 addresses conditions precedent." Beltramini offers little response to this argument. Nevertheless, we have no trouble dispensing with it. The district court could have certainly adopted Plaintiffs' proposed answer, but Plaintiffs fail to explain how the district court's preferred response was erroneous. The response acknowledged that the obligation of (a)(iv) did indeed have to be completed "before the closing date," and it was not legally erroneous to tell the jury that it had to consider Article 8, clause (a)(iv), "in the context of the entire agreement." *See, e.g., Plains Expl. & Prod. Co. v. Torch Energy Advisors Inc.*, 473 S.W.3d 296, (Tex. 2015) ("No single provision taken alone is given controlling effect; rather, each must be considered in the context of the instrument as a whole."). We therefore reject Plaintiffs' last point of error.

III

In sum, we AFFIRM the district court's judgment below but VACATE the award of attorney fees to Beltramini and REMAND for further proceedings consistent with this opinion.

APPENDIX B — VERDICT FORM OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, FILED MAY 19, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-20-4367
consolidated with
CIVIL ACTION NO. H-21-2150

J.A. MASTERS INVESTMENTS,
K.G. INVESTMENTS, AND
JEFFERSON CASTRO GUEVARA,

Plaintiffs,

v.

EDUARDO BELTRAMINI,

Defendant.

Filed May 19, 2023

VERDICT FORM

QUESTION 1

Did Eduardo Beltramini commit fraud against J.A. Masters Investments and K.G. Investments relating to

any of the four soccer games for which they had a written agreement?

Answer "Yes" or "No" for each of the four games listed below.

El Salvador v. Honduras (June 2018)	Yes
Peru v. Paraguay (March 2019)	Yes
Ecuador v. Honduras (March 2019)	Yes
El Salvador v. Haiti (June 2019)	No

QUESTION 2

If you have answered "Yes" to any of the subparts of Question 1, then answer the corresponding subparts of Question 2. Otherwise, do not answer Question 2.

What sum of money, if any, would fairly and reasonably compensate J.A. Masters Investments and K.G. Investments for their damages, if any, that resulted from such fraud? Answer separately in dollars and cents for damages, if any.

El Salvador v. Honduras (June 2018)	0
Peru v. Paraguay (March 2019)	0
Ecuador v. Honduras (March 2019)	0
El Salvador v. Haiti (June 2019)	0

Appendix B

QUESTION 3

If you have answered "Yes" to any of the subparts of Question 1, then answer Question 3. Otherwise, do not answer Question 3.

Are J.A. Masters Investments and K.G. Investments entitled to punitive damages for Mr. Beltramini's fraud, if you find that Mr. Beltramini did in fact commit fraud? Answer "Yes" or "No."

No

QUESTION 4

If you have answered "Yes" to Question 3, then answer Question 4. Otherwise, do not answer Question 4.

If J.A. Masters Investments and K.G. Investments are entitled to punitive damages, how much should they be awarded? Answer in dollars and cents for punitive damages, if any.

QUESTION 5

Did Mr. Beltramini materially breach the Business Sale Agreement? Answer "Yes" or "No."

No

Appendix B

QUESTION 6

If you have answered "Yes" to Question 5, then answer Question 6. Otherwise, do not answer Question 6.

Did Mr. Beltramini materially breach the Business Sale Agreement before July 1, 2020? Answer "Yes" or "No."

_____

QUESTION 7

If you have answered "Yes" to Question 6, then answer Question 7. Otherwise, do not answer Question 7.

What sum of money, if any, if paid now in cash, would fairly and reasonably Mr. Castro Guevara for damages, if any, that resulted from Mr. Beltramini's material breach of the Business Sale Agreement? Answer separately in dollars and cents for damages, if any.

_____

* * *

After answering the questions above, the foreperson of the jury must sign and date one completed form and submit it to the court.

Date: May 19, 2023

Signature: _____

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, FILED JULY 24, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-20-4367
consolidated with
CIVIL ACTION NO. H-21-2150

J.A. MASTERS INVESTMENTS,
K.G. INVESTMENTS, AND
JEFFERSON CASTRO GUEVARA,

Plaintiffs,

v.

EDUARDO BELTRAMINI,

Defendant.

Filed July 24, 2023

MEMORANDUM AND ORDER

This case is about the business side of soccer, or futbol. The defendant, Eduardo Beltramini, was in the business of promoting and arranging professional soccer matches. The plaintiffs, J.A. Masters Investments, K.G.

Investments, and Jefferson Castro Guevara, invested in some of those matches and separately contracted to buy a soccer-related business from Mr. Beltramini. The plaintiffs accused Mr. Beltramini of fraud and breach of contract; Mr. Beltramini counterclaimed against Mr. Castro Guevara for breach of contract.

The case went to trial before a 12-person jury in May 2023. It was not an easy trial. There were many claims and issues, and counsel for the plaintiffs complicated the proceedings by a series of missteps.[1] The court made every effort to shield the jury from all these issues. After granting in part and denying in part the defendant's motion for judgment as a matter of law, the court instructed the jury on the five remaining claims. (Docket Entry No. 86). As to those five claims, the jury was asked to decide thirteen issues (counting each subpart on the verdict form as a separate issue). (Docket Entry No. 91). The jury returned a unanimous verdict, finding in Mr. Beltramini's favor on the vast majority of the thirteen issues and finding for the plaintiffs on a few of the liability issues but awarding no damages. (Docket Entry No. 91).

1. These missteps included failing to arrange for an interpreter for their witnesses; failing to have witnesses available to testify (even after the court accommodated counsels' scheduling requests); failing to follow the court's instructions to avoid argumentative objections before the jury; failing to follow the court's instructions on timing; and failing to show basic respect to the court, court staff, and opposing counsel. For these and other missteps, plaintiffs' counsel blamed the court, court staff, opposing counsel, and even the U.S. District Court for the District of New Jersey, which, they argued, routinely accepted that sort of behavior.

The parties have taken opposing views on what the jury's answers mean for the legal claims raised. Both sides assert that they have succeeded on at least one claim that entitles them to recover their attorney's fees. Plaintiffs' counsel filed a motion for entry of judgment in their favor and a motion for attorneys' fees. (Docket Entry No. 98, 100). Mr. Beltramini filed a proposed final judgment, along with attorney affidavits and billing records, that grants judgment in his favor and awards compensatory damages and attorney's fees. (Docket Entry No. 97).

Having reviewed the record, the briefing, and the case law, the plaintiffs' motions for entry of judgment and for attorneys' fees are denied, and the defendant's motion for final judgment and an award of attorney's fees is granted. The court holds that, although the jury found for the plaintiffs on certain *issues*, the plaintiffs did not, as a matter of law, succeed on any *claims*. Under Texas law, the plaintiffs are not entitled to attorney's fees. The defendant did, however, succeed on his counterclaim. Accordingly, judgment is granted in favor of Mr. Beltramini for $175,000 in actual damages, plus pre-judgment and post-judgment interest. Having succeeded on his counterclaim for breach of contract, Mr. Beltramini is also entitled to attorney's fees. The court grants attorney's fees in the amount of $103,985.00. Final judgment is separately entered, and the reasons for these rulings are explained below.

I. Background

This case arises out of a series of business deals between the parties. Mr. Beltramini owned Planet Futbol,

a business that promoted professional soccer matches in Central and South America. J.A. Masters Investments and K.G. Investments entered into contracts with Planet Futbol to split the expenses and profits from a series of soccer matches scheduled to occur in 2018 and 2019. J.A. Masters Investments and K.G. Investments are owned by Mr. Castro Guevara. Mr. Castro Guevara separately entered into a Business Sale Agreement with Mr. Beltramini in October 2019. Under this contract, Mr. Beltramini agreed to sell Planet Futbol to Mr. Castro Guevara for $300,000.

The evidence showed that although Mr. Beltramini knew a lot about professional soccer, he knew less about business and accounting. Mr. Castro Guevara appeared to know neither soccer nor finance. Representing J.A. Masters Investments and K.G. Investments, Mr. Castro Guevara alleged that Mr. Beltramini committed fraud by overreporting the expenses he incurred on six separate soccer games. Mr. Castro Guevara also alleged that Mr. Beltramini breached the Business Sale Agreement by failing to fulfill certain requirements in the Agreement. Mr. Castro Guevara alleged that Mr. Beltramini failed to comply with Article 8, which required Mr. Beltramini to provide Mr. Castro Guevara with "any and all information required so that [Mr. Castro Guevara] may step into the shoes of [Mr. Beltramini] for the proper operation of the Business." Mr. Beltramini counterclaimed, alleging that Mr. Castro Guevara breached the Business Sales Agreement by paying him only $125,000 of the $300,000 agreed-upon purchase price for the business.

Appendix C

The court held a five-day jury trial in May 2023. When the trial began, there were eight claims:

1. J.A. Masters Investments and K.G. Investments allege that Mr. Beltramini defrauded them by misrepresenting expenses in the **June 2018 El Salvador v. Honduras** game.

2. J.A. Masters Investments and K.G. Investments allege that Mr. Beltramini defrauded them by misrepresenting expenses in the **March 2019 Peru v. Paraguay** game.

3. J.A. Masters Investments and K.G. Investments allege that Mr. Beltramini defrauded them by misrepresenting expenses in the **March 2019 Ecuador v. Honduras** game.

4. J.A. Masters Investments and K.G. Investments allege that Mr. Beltramini defrauded them by misrepresenting expenses in the **March 2019 Peru v. El Salvador** game.

5. J.A. Masters Investments and K.G. Investments allege that Mr. Beltramini defrauded them by misrepresenting expenses in the **June 2019 El Salvador v. Haiti** game.

6. J.A. Masters Investments and K.G. Investments allege that Mr. Beltramini defrauded them by misrepresenting expenses in the **September 2019 Peru v. Ecuador** game.

7. Mr. Beltramini alleges that Mr. Castro Guevara breached the Business Sale Agreement by only paying $125,000 out of the $300,000 he owed Mr. Beltramini.

8. Mr. Castro Guevara alleges that Mr. Beltramini breached the Business Sale Agreement by failing to provide the required information under Article 8 of the contract.

After the plaintiffs rested, the court heard argument on the defendant's motion for judgment as a matter of law under Rule 50(a). At that time, the plaintiffs abandoned the following claim:

6. J.A. Masters Investments and K.G. Investments allege that Mr. Beltramini defrauded them by misrepresenting expenses in the **September 2019 Peru v. Ecuador** game.

The court granted judgment as a matter of law in favor of Mr. Beltramini on the following two claims:

4. J.A. Masters Investments and K.G. Investments allege that Mr. Beltramini defrauded them by misrepresenting expenses in the **March 2019 Peru v. El Salvador** game.

7. Mr. Beltramini alleges that Mr. Castro Guevara breached the Business Sale Agreement by only paying $125,000 out of the $300,000 he owed Mr. Beltramini.

The court granted judgment as a matter of law on the fraud claim for the **Peru v. El Salvador** game. The claim, under Texas law, required proof of a material misrepresentation made with knowledge or reckless disregard of its falsity. *See Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 577 (Tex. 2001) (the elements of fraud under Texas law are: (1) "a material representation that was false"; (2) knowledge that the statement was false or reckless disregard for its truth or falsity; (3) intended to induce action; and (4) actual and justifiable reliance on the statement and a resulting injury).

For the **Peru v. El Salvador game**, the basis for the alleged material misrepresentation was a projected expense statement. The statement was clearly labeled as a projection. The court ruled that a "projection" of costs is, by definition, an estimate, and the mere fact of a difference between the projected costs and the actual costs was not sufficient, as a matter of law, to show a misrepresentation, much less a material one, on which Mr. Castro Guevara

could have reasonably relied. Moreover, even if the plaintiffs had presented evidence that the projected expense reports were misrepresentations (they did not), the plaintiffs offered no evidence that Mr. Beltramini made the statements with knowledge or reckless disregard of their falsity. Knowledge and reckless disregard are high standards. The lack of evidence combined with the high standard meant that, as a matter of law, "a reasonable jury would not have a legally sufficient evidentiary basis" to conclude that Mr. Beltramini defrauded the plaintiffs as to that game. The court, therefore, granted Mr. Beltramini's Rule 50(a) motion on the claim of fraud as to the **Peru v. El Salvador** match.

The court also granted judgment as a matter of law on Mr. Beltramini's breach of contract claim. The basis for that claim was Article 4 of the Business Sale Agreement, which provided:

> Article 4—Payments:
>
> [Mr. Castro Guevara] will pay $100,000.00 (one-hundred-thousand US dollars) on the Closing Date.
>
> The remaining Purchase Price of $200,000.00 (two-hundred-thousand US dollars) shall be paid by Buyer as follows:
>
> a) $100,000.00 (one-hundred-thousand US dollars) due immediately upon completion of the first Event under ownership of PFEM for an Event as contemplated by this agreement herein.

> b) $100,000.00 (one-hundred-thousand US dollars) due immediately upon completion of the second Event under ownership of PFEM for an Event as contemplated by this agreement herein.
>
> The entire Purchase Price must be paid in full no later than July 1, 2020, notwithstanding Art. 4(a)-(b).

It was undisputed that Mr. Castro Guevara paid Mr. Beltramini $100,000 on the closing date, and later paid an additional $25,000. It was also undisputed that some of the scheduled matches referred to in the Agreement were cancelled due to Covid-19. The plaintiffs argued that the occurrence of these matches was a condition precedent that did not happen, so the plaintiffs did not owe the defendant anything. Alternatively, the plaintiffs argued that the provision was invalid. Mr. Beltramini argued that the final clause in Article 4—"The entire Purchase Price must be paid in full no later than July 1, 2020, notwithstanding Art. 4(a)-(b)."—meant that he was owed the entire purchase price regardless of the occurrence of the scheduled matches.

"Contract interpretation is a purely legal issue." *Gonzalez v. Denning*, 394 F.3d 388, 392 (5th Cir. 2004). The court determined that, under Texas law, the provision was valid and did not require the occurrence of the scheduled games as a condition precedent. "In construing a contract, the thing of first importance is the language of the contract itself." *Gallup v. St. Paul Ins. Co.*, 515

S.W.2d 249, 250 (Tex. 1974). The court determined that the provision requiring the purchase price to be paid in full by July 1, 2020, "notwithstanding" the occurrence of the events, meant what it plainly stated—the money was due to Mr. Beltramini even if those events did not occur. *Cf. Criswell v. Eur. Crossroads Shopping Ctr., Ltd.*, 792 S.W.2d 945, 948 (Tex. 1990) ("In order to make performance specifically conditional, a term such as 'if,' 'provided that,' 'on condition that,' or some similar phrase of conditional language must normally be included. If no such language is used, the terms will be construed as a covenant in order to prevent a forfeiture." (quoting reference omitted)). Because it was undisputed that Mr. Castro Guevara did not pay the remaining purchase price by July 1, 2020, the court held that Mr. Castro Guevara materially breached the Business Sale Agreement.

The remaining five claims were sent to the jury. Those claims were the following:

1. J.A. Masters Investments and K.G. Investments allege that Mr. Beltramini defrauded them by misrepresenting expenses in the **June 2018 El Salvador v. Honduras** game.

2. J.A. Masters Investments and K.G. Investments allege that Mr. Beltramini defrauded them by misrepresenting expenses in the **March 2019 Peru v. Paraguay** game.

3. J.A. Masters Investments and K.G. Investments allege that Mr. Beltramini defrauded them by misrepresenting expenses in the **March 2019 Ecuador v. Honduras** game.

5. J.A. Masters Investments and K.G. Investments allege that Mr. Beltramini defrauded them by misrepresenting expenses in the **June 2019 El Salvador v. Haiti** game.

8. Mr. Castro Guevara alleges that Mr. Beltramini breached the Business Sale Agreement by failing to provide the information required under Article 8 of the contract.

The jury was asked to answer questions with multiple subparts. Those answers are now a matter of dispute.

II. Post-Trial Judgment Disputes

A. The Fraud Claims

Question 1 asked the jury: "Did Eduardo Beltramini commit fraud against J.A. Masters Investments and K.G. Investments relating to any of the four soccer games for which they had an agreement?" Question 1 was split into four subparts so that the jury could answer "Yes" or "No" for each of the four games at issue. The jury was instructed to "[c]onsider each game separately" and that

each element of fraud must be proven by a preponderance of the evidence for each game. (Docket Entry No. 86, at 12).

The jury was instructed that the elements of fraud were as follows:

> *First*: Mr. Beltramini made a material misrepresentation as to the expenses he paid for each game at issue;
>
> *Second*: Mr. Beltramini made that misrepresentation with knowledge of its falsity or recklessly without any knowledge of the truth;
>
> *Third*: Mr. Beltramini made that misrepresentation with the intention that it should be acted on by J.A. Masters and K.G. Investments; and
>
> *Fourth*: J.A. Masters and K.G. Investments justifiably relied on the misrepresentation and suffered an injury.

(Docket Entry No. 86, at 11-12). Consistent with Texas law and the Texas Pattern Jury Charges, the fourth element specified that the plaintiffs must suffer an injury.

The jury was tasked with answering Question 2 only if it found, in its answer to Question 1, that all the elements of fraud had been met. The predicated Question 2 asked

the jury to determine compensatory damages—that is, to quantify the injury to the plaintiffs that the jury had found. (Docket Entry No. 91, at 2). The jury was instructed that "[t]he purpose of compensatory damages is . . . to compensate the plaintiff for the damage that the plaintiff has suffered. You may award compensatory damages only for injuries that J.A. Masters and K.G. Investments prove were proximately caused by Mr. Beltramini's allegedly wrongful conduct." (Docket Entry No. 86, at 15-16). Question 2 was also split into 4 subparts, one for each game at issue. (Docket Entry No. 91, at 2).

The jury returned a unanimous verdict on each of the questions they answered. (Docket Entry No. 91). On Question 1, which asked the jury whether Mr. Beltramini committed fraud on the four games at issue, the jury answered "Yes" as to three games (El Salvador v. Honduras, Peru v. Paraguay, and Ecuador v. Honduras) and "No" as to one game (El Salvador v. Haiti). (Docket Entry No. 91, at 1). On Question 2, which asked the jury to quantify the injury in dollars that the plaintiffs incurred, the jury answered "$0" as to each of the four games. (Docket Entry No. 91, at 2).

The plaintiffs argue that there "is an inherent contradiction" in the jury's answers to those two questions. (Docket Entry No. 107, at 2). By answering "Yes" to whether Mr. Beltramini committed fraud in Question 1, the jury concluded that all the elements of fraud had been met, and injury is one of the elements of fraud. But by answering "$0" to the amount in compensatory damages in Question 2, the jury concluded that the plaintiffs suffered

no injury. The plaintiffs argue that the "only explanation is that [the jury] did find injury and damages but failed to calculate or did not know how to calculate it despite all the evidence submitted." (Docket Entry No. 107, at 2).

The court disagrees. The jury was instructed on how to calculate damages, including instructions directing the jury to the parties' exhibits most relevant to damages. (Docket Entry No. 86, at 17). The jury was instructed that "[c]omputing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork." (Docket Entry No. 86, at 16). Early in the deliberations, the jury requested and received a calculator, even though the jury was also instructed that "the law does not require that the plaintiff prove the amount of his losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit." (Docket Entry No. 86, at 16). Finally, the court instructed the jury it could submit written questions to the court during deliberations. (Docket Entry No. 86, at 21). The jury took advantage of this procedure, asking the court about the interpretation of a provision of the Business Sale Agreement. (Docket Entry No. 92). The jury did not submit any questions about the calculation of damages.

It is implausible that the jury's findings resulted from the jury not knowing, as the plaintiffs argue, how to calculate damages. But there is an inconsistency in the jury's answers to Question 1 and Question 2. When the jury's answers "to the questions propounded by the court" are "[in]consistent with each other," "it is the duty of the district judge to attempt to harmonize the jury's answers,

if it is at all possible under a fair reading of the responses." 9B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2510 (3d ed. 1998 & Supp. 2023) (footnote omitted). "Indeed, this effort is required by the Seventh Amendment." *White v. Grinfas*, 809 F.2d 1157, 1161 (5th Cir. 1987); *see also Hiltgen v. Sumrall*, 47 F.3d 695, 701 (5th Cir. 1995) ("[W]e are constitutionally required under the Seventh Amendment to adopt a view of the case that makes the jury's answers consistent.").

"The touchstone in reconciling apparent conflict is whether 'the answers may fairly be said to represent a logical and probable decision on the relevant issues as submitted.'" *White*, 809 F.2d at 1161 (quoting *Griffin v. Matherne*, 471 F.2d 911, 915 (5th Cir.1973)). "Such reconciliation must be done 'in light of the surrounding circumstances, including the instructions of the court.'" *Davis v. W. Cmty. Hosp.*, 755 F.2d 455, 465 (5th Cir. 1985) (quoting reference omitted). The goal is to "effectuate best the intent of the jury." *White*, 809 F.2d at 1161.

The jury's intent is clear and its answers can readily be reconciled. In answering "Yes" to the fraud question, the jury found that four elements had been satisfied: (1) the existence of a material misrepresentation; (2) knowledge or reckless disregard; (3) intent; and (4) justifiable reliance. In answering "$0" to the damages question, the jury found that the final element of fraud, (5) a quantifiable amount of injury, had *not* been satisfied. In other words, the jury did not understand a quantifiable amount of an injury to be a separate element that needed to have been decided in Question 1.

Appendix C

In drafting the jury instructions, the court used the Texas Pattern Jury Charges. Consistent with the case law, those instructions set out only four elements of fraud:

> Fraud occurs when—
>
> 1. a party makes a material misrepresentation, and
>
> 2. the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion, and
>
> 3. the misrepresentation is made with the intention that it should be acted on by the other party, and
>
> 4. the other party [*justifiably*] relies on the misrepresentation and thereby suffers injury.

State Bar of Tex., Tex. Pattern Jury Charges—Bus., Consumer, Ins. & Emp. § 105.2 (2022) [hereinafter Tex. Pattern Jury Charges]; *accord, e.g.*, *Ernst & Young*, 51 S.W.3d at 577; *JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648, 653 (Tex. 2018); *Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471, 496 (Tex. 2019). *But see, e.g.*, *Anderson v. Durant*, 550 S.W.3d 605, 614 (Tex. 2018) (describing fraud as having five elements, instead of four); *Mercedes-Benz USA, LLC v. Carduco, Inc.*, 583 S.W.3d 553, 557 (Tex. 2019) (same).

So, consistent with those pattern instructions and the majority of the cases, the court instructed the jury that there were four elements of fraud under Texas law. The jury was instructed that the fourth and final element is that "J.A. Masters and K.G. Investments justifiably relied on the misrepresentation and suffered an injury." (Docket Entry No. 86, at 12). That instruction was followed by a definition of justifiable reliance. There was not a separate definition for injury. (Docket Entry No. 86, at 12); *see also* TEX. PATTERN JURY CHARGES § 105.2 & following commentary.

But, in truth, there are five elements of fraud. The last element—"the other party justifiably relies on the misrepresentation and thereby suffers injury"—has two parts: justifiable reliance and injury. The jury followed the Pattern Jury Charges instruction that there are four elements of fraud, with the final or fourth element of fraud that of justifiable reliance. The jury's answers made it clear that it did not consider a specific amount of injury as a separate requirement in answering Question 1.

This reading of the jury's answers is consistent with the trial record. The basis for the plaintiffs' fraud claims was that, for each of the identified soccer matches that were played, Mr. Beltramini overstated the expenses he incurred. Because the plaintiffs and Mr. Beltramini split the expenses and profits, overstating the expenses would mean that the plaintiffs would spend more money on each game and end up with less overall profit. But what the trial record showed is that Mr. Beltramini, who handled the accounting himself and admittedly did not keep good

track of the financial records relating to the games, actually *underreported* the expenses he incurred. This meant that Mr. Beltramini lost money in the process and that the plaintiffs ended up with *more* overall profit than they would have if Mr. Beltramini had been accurate in reporting the expenses. So, when asked to quantify the plaintiffs' injury, the jury responded, consistent with the trial record, $0.

Finally, even if the plaintiffs are correct that the jury was confused about calculating damages (which the record does not support), the tie breaker is the burden of proof. The plaintiffs had the burden of proving each element of their fraud claim by a preponderance of the evidence. Based on the trial record, and the jury's conclusion that the plaintiffs incurred $0 in damages, the plaintiffs did not establish injury by a preponderance of the evidence. The plaintiffs are not entitled to judgment on the fraud claims.

B. The Breach of Contract Claims

There were two breach of contract claims. One was Mr. Beltramini's claim that Mr. Castro Guevara did not pay him the full price set out in the Business Sale Agreement for Mr. Castro Guevara to purchase Planet Futbol. The other was Mr. Castro Guevara's claim that Mr. Beltramini violated the Business Sale Agreement by not providing him with the information and training required in the Agreement. The court granted Mr. Beltramini's Rule 50(a) motion on his breach of contract claim. But the court also held that Mr. Castro Guevara's breach could be excused if the jury found that Mr. Beltramini

materially breached the Business Sale Agreement before July 1, 2020. The jury was asked whether Mr. Beltramini breached the Business Sale Agreement and, if the jury so found, whether Mr. Beltramini's breach occurred before Mr. Castro Guevara was obligated to pay the balance of the purchase price. The jury found that Mr. Beltramini did not materially breach the Business Sale Agreement at any point, so they did not reach the question of whose breach occurred first. (Docket Entry No. 91, at 5).

The court did not send the question of Mr. Beltramini's damages on his breach of contract claim to the jury because there was no disputed factual issue for the jury to decide. The parties agreed repeatedly that (1) Mr. Castro Guevara bought Planet Futbol for $300,000 and (2) Mr. Castro Guevara only paid Mr. Beltramini $125,000. Because these facts were undisputed, the damages amount was $175,000.

The plaintiffs raise two sets of additional arguments to make the point that Mr. Beltramini is not entitled to judgment in his favor on the breach of contract claim. The first set of arguments concerns the validity of the Business Sale Agreement. The plaintiffs argue that Mr. Beltramini is not entitled to judgment because the Business Sale Agreement was unconscionable, both procedurally, (Docket Entry No. 106, at 7-10), and substantively, (Docket Entry No. 106, at 10-18). There are several problems with this argument. First, the court already determined that the provisions in Article 4 of the Business Sale Agreement were valid. The plaintiffs cannot avoid that ruling by now arguing (for the first time, in a post-trial responsive

brief) that the Agreement was unconscionable. The issue is waived.

Second, the plaintiffs brought a breach of contract claim against Mr. Beltramini, meaning that they believed a valid contract existed. Having lost their breach of contract claim, the plaintiffs now raise, for the first time, a fraudulent inducement argument that Mr. Castro Guevara was tricked into signing the Business Sale Agreement, making it invalid. The evidence showed that Mr. Castro Guevara knowingly signed the Agreement, after it was translated into Spanish and after he had the opportunity to read it and seek advice or counsel. The jury determined that Mr. Beltramini did not breach the Agreement. The court has determined that, as a matter of law, Mr. Castro Guevara did. This argument provides no basis to disturb either finding.

The next set of arguments concerns the damages calculation. The plaintiffs argue that Mr. Beltramini is not entitled to $175,000 in damages because: (1) Mr. Beltramini failed to mitigate his damages, (Docket Entry No. 106, at 3-6); (2) Mr. Beltramini did not suffer any damages because he himself breached the contract and gained from that breach, (Docket Entry No. 106, at 18-23); and (3) "The question on damages as it related to counter-plaintiff Mr. Beltramini never went to the jury. No other questions related to damages were presented to the jury or to this Court," (Docket Entry No. 106, at 2). Each argument is separately addressed.

First, this is the first time that the plaintiffs have raised a failure to mitigate issue. That argument is both waived and without a basis in the trial evidence. Second, the jury determined that Mr. Beltramini did not breach the contract, and the plaintiffs cannot relitigate that issue. Third, the question of damages did not need to go to the jury because the relevant numbers were the amount that Mr. Castro Guevara agreed to pay to buy Planet Futbol ($300,000) and the amount he actually paid ($125,000). *See Mays v. Pierce*, 203 S.W.3d 564, 577 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) ("The normal measure of damages in a breach-of-contract case is the benefit-of-the-bargain measure, the purpose of which is to restore the injured party to the economic position it would have been in had the contract been performed."). Those two numbers—the $300,000 and $125,000—were undisputed. There was no question of disputed fact to send to the jury on Mr. Beltramini's damages.

Mr. Beltramini succeeded on his breach of contract claim and is entitled to $175,000 in compensatory damages.

III. Attorneys' Fees

The next issue is attorneys' fees. The plaintiffs argue that they are entitled to fees because they succeeded on their fraud claims. As explained above, the jury's determination that the plaintiffs suffered no damages means that the plaintiffs did not succeed on those claims. Even if they had, the plaintiffs still would not be entitled to attorneys' fees.

"[A]ttorney's fees are recoverable only if authorized by statute or by a contract between the parties." *Intercontinental Grp. P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 653 (Tex. 2009). The Business Sale Agreement has no provision for attorney's fees, and under Texas law, success on a fraud claim is not a basis for attorney's fees. *See*, *e.g.*, *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 304 (Tex. 2006) ("For fraud, [the plaintiff] could recover economic damages, mental anguish, and exemplary damages, *but not attorney's fees*." (emphasis added)). Even if a fraud claim arises out of a breach of contract, Texas law is conclusive that success on a fraud claim does not create an entitlement to fees. *See MBM Fin. Corp. v. Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 667 (Tex. 2009) ("We explicitly rejected this intertwining exception in *Tony Gullo Motors I, L.P. v. Chapa* and reiterated that fees are not allowed for torts like fraud. Thus, even if the Woodlands' fraud claim arose from a breach of contract, that is no basis for an attorney's fee award." (footnote omitted)). The plaintiffs' attorneys are not entitled to fees.

Mr. Beltramini's attorneys, however, are entitled to fees. The Texas Civil Practice and Remedies Code allows for the recovery of attorney's fees for a litigant who succeeds on a breach of contract claim. Tex. Civ. Prac. & Rem. Code § 38.001(b)(8). "To recover fees under this statute, a litigant must do two things: (1) prevail on a breach of contract claim, and (2) recover damages." *MBM Fin. Corp.*, 292 S.W.3d at 666. Mr. Beltramini did prevail on his breach of contract claim and is entitled to $175,000 in damages from that breach. Both elements for attorney's fees under § 38.001(b)(8) have been satisfied.

As to the amount, the calculation of reasonable attorney's fees is a two-step process. *See Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (5th Cir. 1998). First, the court calculates a "lodestar." *Id.* "In determining the appropriate amount of attorney's fees, a district court first must calculate the 'lodestar' by 'multiplying the reasonable number of hours expended on the case by the reasonable hourly rates for the participating lawyers.'" *Rodney v. Elliott Sec. Sols., L.L.C.*, 853 F. App'x 922, 924 (5th Cir. 2021) (quoting *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (5th Cir. 1998)). Whether an hourly rate is reasonable depends on whether that rate is consistent with the "hourly rate in the community for the work at issue." *Smith & Fuller, P.A. v. Cooper Tire & Rubber Co.*, 685 F.3d 486, 490 (5th Cir. 2012). That said,

> determining an appropriate 'market rate' for the services of a lawyer is inherently difficult. . . . The type of services rendered by lawyers, as well as their experience, skill and reputation, varies extensively—even within a law firm. Accordingly, the hourly rates of lawyers in private practice also vary widely.

Blum v. Stenson, 465 U.S. 886, 896 n.11, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984).

"The district court also should exclude from this initial fee calculation hours that were not 'reasonably expended.' Cases may be overstaffed, and the skill and experience of lawyers vary widely." *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) (quoting

reference omitted). Additionally, the court considers whether the attorneys demonstrated adequate billing judgment by writing "off unproductive, excessive of redundant hours." *Walker v. United States HUD*, 99 F.3d 761, 769 (5th Cir. 1996); *see also Hensley*, 461 U.S. at 434 ("Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.").

Second, the court considers whether the circumstances of the case warrant an upward or downward lodestar adjustment. *Migis*, 135 F.3d at 1047. To determine whether "appropriate adjustments to the lodestar are necessary," the court "examine[s] the *Johnson* factors." *Rodney*, 853 F. App'x at 924 (citing *Migis*, 135 F.3d at 1047). The *Johnson* factors are: (1) time and labor required for the litigation; (2) novelty and difficulty of the questions presented; (3) skill requisite to perform the legal services properly; (4) preclusion of other employment; (5) customary fee; (6) whether the fee is fixed or contingent; (7) limitations imposed by the client or circumstances; (8) amount involved and the result obtained; (9) experience, reputation, and ability of the attorneys; (10) undesirability of the case; (11) nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, at 717-19 (5th Cir. 1974), *abrogated on other grounds by Blanchard v. Bergeron*, 489 U.S. 87, 91-93, 109 S. Ct. 939, 103 L. Ed. 2d 67 (1989). "[T]he most critical factor in determining an attorney's fee award is the degree of

success obtained." *Hensley*, 461 U.S. at 436. "This factor is particularly crucial when plaintiffs only 'prevail' on some of their claims." *Id.* at 434.

If the district court determines that an adjustment is necessary, "no precise rule or formula" governs how that adjustment should be made. *Id.* at 436. "The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment." *Id.* at 436-37. "[T]rial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection." *Fox v. Vice*, 563 U.S. 826, 838, 131 S. Ct. 2205, 180 L. Ed. 2d 45 (2011). Courts are guided by "their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time." *Id.*

Mr. Beltramini requests $103,985.00 in attorney's fees and expenses. (Docket Entry No. 97-3, at 1). Mr. Beltramini had two attorneys: Brock Akers and Cortd Akers. Both attorneys have extensive litigation experience; Brock Akers has been a trial lawyer since 1981, and Cortd Akers since 2012. They both billed at an hourly rate of $350 per hour, below their usual rate. Whether an hourly rate is reasonable depends on whether that rate is consistent with the "hourly rate in the community for the work at issue." *Smith & Fuller, P.A.*, 685 F.3d at 490. "In other cases involving Texas lawyers, the hourly rates range from $220 for associates to $510 for senior partners." *Fluor Corp. v. Citadel Equity Fund Ltd.*, No. 3:08-CV-1556-B, 2011

U.S. Dist. LEXIS 96771, 2011 WL 3820704, at *5 (N.D. Tex. Aug. 26, 2011) (collecting cases). Given the numerous issues and disputes before and during trial, the court finds the hourly rate reasonable.

Both attorneys submitted affidavits and billing records showing that Mr. Brock Akers billed 183.4 hours from February 2021 through trial in May 2023 and that Mr. Cordt Akers, who came in to help with the trial, billed 110.7 hours in May 2023. They also request $1,050 in fees for the work done by a legal secretary. The court has reviewed the attorney time records and finds the hours expended reasonable.

Nothing about this case warrants a downward adjustment, and no other adjustment was requested. Mr. Beltramini is, accordingly, entitled to $103,985.00 in attorney's fees and expenses.

IV. Conclusion

The plaintiffs' motions, (Docket Entry Nos. 98, 100), are denied. Judgment is granted in favor of Mr. Beltramini for $175,000 in actual damages, plus pre-judgment interest accruing as of December 29, 2020, at a rate of 8.25%, and post-judgment interest accruing as of the date of this judgment, at a rate of 5.36%. Having succeeded on his claim for breach of contract, Mr. Beltramini is also entitled to attorneys' fees. The court grants attorney's fees in the amount of $103,985.00. Each party is to bear its own costs of court.

Final judgment will be entered separately. The notice of appeal, (Docket Entry No. 95), will be effective as of the date of the entry of the final judgment. *See* FED. R. APP. P. 4(a)(2) ("A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.").

SIGNED on July 24, 2023, at Houston, Texas.

/s/ Lee H. Rosenthal
Lee H. Rosenthal
United States District Judge

APPENDIX D — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, FILED JULY 24, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-20-4367
consolidated with
CIVIL ACTION NO. H-21-2150

J.A. MASTERS INVESTMENTS,
K.G. INVESTMENTS, AND
JEFFERSON CASTRO GUEVARA,

Plaintiffs,

v.

EDUARDO BELTRAMINI,

Defendant.

Filed July 24, 2023

FINAL JUDGMENT

For the reasons set out in this court's memorandum and order entered on July 24, 2023, judgment is entered in favor of Eduardo Beltramini for $175,000 in actual damages, plus prejudgment interest accruing as of

December 29, 2020, at a rate of 8.25%, and post-judgment interest accruing as of the date of this judgment, at a rate of 5.36%, and attorney's fees in the amount of $103,985.00. This is a final judgment.

SIGNED on July 24, 2023, at Houston, Texas.

/s/ Lee H. Rosenthal
Lee H. Rosenthal
United States District Judge

APPENDIX E — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, FILED JULY 19, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-20-4367
CONSOLIDATED CASE: H-21-2150

J.A. MASTERS INVESTMENTS,
K.G. INVESTMENTS, AND MARIO GONZALEZ,

Plaintiffs,

v.

EDUARDO BELTRAMINI,

Defendant.

EDUARDO BELTRAMINI,

Counter Plaintiff,

v.

JEFFERSON CASTRO GUEVARA,

Counter Defendant.

Filed July 19, 2024

Appendix E

MEMORANDUM AND ORDER

I. Background

Following a jury trial, the court entered final judgment in favor of Eduardo Beltramini against Jefferson Castro Guevara for $175,000 in damages. (Docket Entry No. 110). Mr. Guevara's appeal from the judgment is pending before the Fifth Circuit. (Docket Entry No. 95).

After trial, Mr. Guevara moved the court for an order requiring Mr. Beltramini to sign a letter authorizing the release of a $50,000 deposit that was held by a third-party, Mediapro U.S. Sports LLC, and undisputedly owed to Mr. Guevara. (Docket Entry No. 111). The court held a hearing in September 2023 to resolve the issue. At the hearing, Mr. Beltramini's counsel argued that Mr. Beltramini should not be required to authorize the release of the funds "without any understanding or expectation that we are covered on our ability to collect on this judgment." The court then issued a written order for the deposit of funds into the court's registry, stating "[t]he ultimate disbursement of these funds will be later determined by the Court at the appropriate time unless the parties later agree how and when the funds should be distributed." (Docket Entry No. 129).

In May 2024, Mr. Beltramini moved the court to release the funds from the court's registry in partial satisfaction of the judgment. (Docket Entry No. 139). Mr. Beltramini argues that, because Mr. Guevara has not superseded the judgment, and the automatic stay

under Rule 62(a) has expired, there is nothing preventing him from collecting the judgment debt. In response, Mr. Guevara argues that Mr. Beltramini's motion should be treated as a motion for reconsideration of the order for deposit of funds into the court registry under Rule 59(e). (Docket Entry No. 142). Mr. Guevara also moves for a stay of the judgment pending appeal, without posting a supersedeas bond. (*Id.*).

Mr. Beltramini's motion to release the funds is granted, (Docket Entry No. 139), and Mr. Guevara's motion for stay is denied, (Docket Entry No. 142). The reasons are set out below.

II. Legal Standard

Federal Rule of Civil Procedure 62 "establishes a general rule that losing parties in the district court can obtain a stay pending appeal only by giving a supersedeas bond." *MM Steel, L.P. v. JSW Steel (USA) Inc.*, 771 F.3d 301, 303 (5th Cir. 2014). "The purpose of a supersedeas bond is to preserve the status quo while protecting the non-appealing party's rights pending appeal. A judgment debtor who wishes to appeal may use the bond to avoid the risk of satisfying the judgment only to find that restitution is impossible after reversal on appeal. At the same time, the bond secures the prevailing party against any loss sustained as a result of being forced to forgo execution on a judgment during the course of an ineffectual appeal." *Poplar Grove Planting & Ref. Co., Inc. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1190–91 (5th Cir. 1979). "Absent a stay under Rule 62, a prevailing party may seek

to enforce a judgment pursuant to Rule 69." *MM Steel*, 771 F.3d at 303.

The Fifth Circuit has identified two situations in which a district court can dispense with Rule 62(b)'s requirement of a "full security supersedeas bond to suspend the operation of an unconditional money judgment." *Poplar Grove*, 600 F.3d at 1191. First, "[i]f a judgment debtor objectively demonstrates a present financial ability to facilely respond to a money judgment and presents to the court a financially secure plan for maintaining that same degree of solvency during the period of an appeal, the court may then exercise a discretion to substitute some form of guaranty of judgment responsibility for the usual supersedeas bond." *Id.* Second, "if the judgment debtor's present financial condition is such that the posting of a full bond would impose an undue financial burden, the court similarly is free to exercise a discretion to fashion some other arrangement for substitute security through an appropriate restraint on the judgment debtor's financial dealings, which would furnish equal protection to the judgment creditor." *Id.* The burden is on the moving party to "objectively demonstrate" that one of these circumstances exists. *Id.* This burden is not satisfied by a movant's "mere representations" that it either has or does not have the financial ability to pay the judgment or post a bond. *See Howell v. Town of Ball*, 2017 WL 6210869, at *5 (W.D. La. Dec. 7, 2017). The movant must present evidence of its financial condition and explain how waiving the bond would protect the interests of the judgment creditor. *See id.* at *6.

Appendix E

Factors relevant to determining whether to waive a bond include:

> (1) the complexity of the collection process; (2) the amount of time required to obtain a judgment after it is affirmed on appeal; (3) the degree of confidence that the district court has in the ability of funds to pay the judgment; (4) whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money; and (5) whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position.

Halliburton Energy Services, Inc. v. NL Indus., No. CIV.A. H-05-4160, 2008 WL 2787247, at *2 (S.D. Tex. July 16, 2008) (quoting *Chaney v. New Orleans Pub. Facility Mgmt., Inc.*, 1998 WL 43140, at *2 (E.D. La. Feb. 3, 1998)).

III. Analysis

Mr. Guevara argues that he should be granted a stay of the judgment pending appeal without posting a supersedeas bond. (Docket Entry No. 142). However, he erroneously argues from the factors used to determine whether a judgment granting injunctive relief should be stayed pending appeal under Rule 62(d)—likelihood of success on the merits, irreparable harm, harm to other parties, and public interest. *See Fucich Contracting, Inc. v. Shread-Kuyrkendall & Associates, Inc.*, 2023 WL

4201756, at *3 (E.D. La. June 27, 2023); *Coastal States Gas Corp. v. Dep't of Energy*, 609 F.2d 736, 737 (5th Cir. 1979). Those factors are not applicable when the issue is whether to stay the execution of a money judgment.

Mr. Guevara argues in passing that the second *Poplar Grove* exception applies: "[T]he Counter-Defendant will suffer severe financial hardship by having to sell his business or property in order to secure a loan [to post a bond]." (Docket Entry No. 142 at 11). This bare representation that posting a bond would cause Mr. Guevara financial hardship does not satisfy his burden under *Poplar Grove*. *See Howell*, 2017 WL 6210869, at *5. Mr. Guevara has not produced evidence of his financial condition and has not explained how waiving the bond would protect Mr. Beltramini's interest in executing the judgment if the appeal is unsuccessful. *See id.*

Mr. Guevara has not posted a bond to supersede the judgment, and is not entitled to a stay pending appeal without a bond. Accordingly, Mr. Beltramini may enforce the judgment under Rule 69, including by collecting the $50,000 held in the registry of the court under the court's November 2023 order. *See MM Steel*, 771 F.3d at 303.

IV. Conclusion

Mr. Beltramini's motion to release funds from the court's registry is granted. (Docket Entry No. 139). The $50,000, plus any accrued interest, that was deposited into the court's registry under its November 2023 order, (Docket Entry No. 129), is ordered released to Mr.

Beltramini in partial satisfaction of the final judgment. Mr. Guevara's motion for stay pending appeal is denied. (Docket Entry No. 142).

SIGNED on July 19, 2024, at Houston, Texas.

/s/ Lee H. Rosenthal
Lee H. Rosenthal
United States District Judge

APPENDIX F — LETTER FROM ESTRELLA LAW, LLC, TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, WITH ATTACHED EXCERPTS OF TEXAS PATTERN JURY INSTRUCTIONS, FILED JUNE 27, 2024

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June 27, 2024

The United States Court of Appeals
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Suite 115
New Orleans, LA 70130

Re: JA Masters Investments, KG Investments v. Eduardo Beltramini
Docket No: 23-20292

Appendix F

Dear Court Clerk,

We respectfully submit this letter pursuant to Federal Rule of Appellate Procedure 28(j) to advise the Court of authorities that were going to be presented during the oral argument which was scheduled for July 9, 2024 but was canceled on June 27, 2024. The new authority submission relates to the Texas Pattern Jury Charges Business, Consumer, Insurance & Employment 2022 (PJC) which the District Court relied on. The PJC had to be purchased for its availability and was purchased on May 31, 2024 in preparation for oral arguments.

The District Court relied on PJC 105.2, 105.1, and 115.19 to instruct the jury on fraud and direct damages. PJC 115.19 stated in the comments section, mandates the inclusion of further instructions on the legally available measure of direct damages. PJC 115.19 explicitly states that it should not be submitted without appropriate instructions on the measure of damages and references PJC 115.4 and 115.10 as sources/samples for these instructions. PJC 115.19 further cites *Jackson v. Fontaine's Clinics. Inc.*, 499 S.W.2d 87, 90 (Tex. 1973). The District Court only submitted the jury question presented in PJC 115.19 without any further instructions as required under PJC 115.19.

We are respectfully attaching the relevant sections of the PJC relied on, as it would be helpful for this Court to have a physical copy of the PJC, in order to properly decide the Appellant's issue of the District Court's failure to provide measures to calculate damages.

Respectfully submitted,

/s/ Yasmin Estrella
YASMIN ESTRELLA, Esq.
Attorney of record for Appellants

Appendix F

TEXAS PATTERN JURY CHARGES

BUSINESS, CONSUMER, INSURANCE & EMPLOYMENT

2022

PJC 105.1 **Question on Common-Law Fraud—Intentional Misrepresentation**

QUESTION _____

Did *Don Davis* commit fraud against *Paul Payne*?

[Insert appropriate instructions.]

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 105.1 is appropriate for use in most cases involving claims for fraud and can be used to submit both affirmative claims for damages and affirmative defenses.

Broad-form submission. PJC 105.1 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v.*

Young, 366 S.W.3d 678, 689 (Tex. 2012) (rule 277's use of "whenever feasible" mandates broad-form submission in any or every instance in which it is capable of being accomplished). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Accompanying instructions and definitions. PJC 105.1 should be accompanied by appropriate instructions and definitions. see PJC 105.2-105.4.

Damages. Damages questions are set out in chapter 115. PJC 115.19 submits direct damages in fraud cases, and PJC 115.20 submits consequential damages in such cases. For recovery of exemplary damages, see PJC 115.37 and 115.38.

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PJC 105.2 Instruction on Common-Law Fraud—Intentional Misrepresentation

Fraud occurs when—

1. a party makes a material misrepresentation, and

2. the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion, and

3. the misrepresentation is made with the intention that it should be acted on by the other party, and

4. the other party [*justifiably*] relies on the misrepresentation and thereby suffers injury.

"Misrepresentation" means—

[Insert appropriate definitions from PJC 105.3A-105.3E.]

COMMENT

When to use. PJC 105.2 should be used in a common-law fraud case if there is a claim of intentional misrepresentation.

Accompanying question, definitions. PJC 105.2 is designed to follow PJC 105.1 and to be accompanied by one or more of the definitions of misrepresentation at PJC 105.3A-105.3E.

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Use of "or." If more than one definition of misrepresentation is used, each must be separated by the word or, because a finding of any one type of misrepresentation would support recovery. *see Lundy v. Masson*, 260 S.W.3d 482, 494 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (approving the use of "or").

Source of instruction. The supreme court has repeatedly identified these elements of common-law fraud. *See, e.g., Anderson v. Durant*, 550 S.W.3d 605, 614 (Tex. 2018); *Johnson v. Brewer & Pritchard, PC.*, 73 S.W.3d 193, 211 n.45 (Tex. 2002) (identifying the recognized elements of common-law fraud); *Formosa Plastics Corp. USA v. Presidio Engineers & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998) (discussing recoverable damages sounding in tort); *Oilwell Division, United States Steel Corp. v. Flyer*, 493 S.W.2d 487, 491 (Tex. 1973) (first announcing the recognized elements of common-law fraud and discussing fraudulent inducement as an affirmative defense).

Justifiable. The word *justifiably* is in brackets in PJC 105.2 because some recent supreme court cases list it as an element of fraud while others do not. *Compare Barrow-Shaver Resources Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471, 496 (Tex. 2019) (requiring *justifiable* reliance); *Mercedes-Benz USA, LLC v. Carduco, Inc.*, 583 S.W.3d 553, 554 (Tex. 2019) (same); *JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648, 653 (Tex. 2018) (same), *with International Business Machines Corp. v. Lufkin Industries, LLC*, 573 S.W.3d 224, 228 (Tex. 2019) (requiring reliance without stating whether it must be justifiable); *Anderson v. Durant*, 550 S.W.3d 605,

614 (Tex. 2018) (same); *Zonilla v. Aypco Construction II, LLC*, 469 S.W.3d 143, 153 (Tex. 2015) (same).

Justifiably as question of law or fact. "Justifiable reliance usually presents a question of fact. But the element can be negated as a matter of law when circumstances exist under which reliance cannot be justified." *Orca Assets*, 546 S.W.3d at 654 (citations omitted). *see also National Property Holdings L.P. v. Westergren*, 453 S.W.3d 419, 424 (Tex. 2015) (holding that, as a matter of law, "a party to a written contract cannot justifiably rely on oral misrepresentations regarding the contract's unambiguous terms"); *Mercedes-Benz USA*, 583 S.W.3d at 559 (same). If the evidence in the case presents a question of fact for the jury, a practitioner may wish to ask the court to include "justifiable" in the question. *see Cho v. Kim*, 572 S.W.3d 783, 803 (Tex. App.—Houston [14th Dist.] 2019, no pet.) (holding that when no party, either by objection or requested question, definition, or instruction, complained of the charge's failure to require that the reliance was justifiable, the court would not consider whether there was sufficient evidence of justifiable reliance and instead affirmed the jury's finding of reliance); *Ghosh v. Grover*, 412 S.W.3d 749, 756 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (same). *see also Harstan, Ltd. v. Si Kyu Kim*, 441 S.W.3d 791, 799 (Tex. App.—El Paso 2014, no pet.) (because no objection was raised to the lack of "justifiable" in the statutory fraud question, the sufficiency of the evidence was measured by the charge as given). *Contra Ginn v. NCI Building Systems, Inc.*, 472 S.W.3d 802, 831 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (inclusion of "reliance" in fraud charge was sufficient, making "actually and justifiably relied" unnecessary).

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Due diligence. A number of supreme court cases discuss a party's duty of due diligence or due care in a fraud case. Beginning with *Labbe v. Corbett*, 69 Tex. 503, 509, 6 S.W. 808, 811 (1888), the court held: "When once it is established that there has been any fraudulent misrepresentation, by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry." In *Isenhower v. Bell*, 365 S.W.2d 354, 357 (Tex. 1963), the court held: "Where one has been induced to enter into a contract by fraudulent representations, the person committing the fraud cannot defeat a claim for damages based upon a plea that the party defrauded might have discovered the truth by the exercise of proper care." In *Koral Industries v. Security-Connecticut Life Insurance Co.*, 802 S.W.2d 650, 651 (Tex. 1990), the court held: "Failure to use due diligence to suspect or discover someone's fraud will not act to bar the defense of fraud to the contract. ... Therefore, only the insurer's actual knowledge of the misrepresentations would have destroyed its defense of fraud." *see also Hooks v. Samson Lone Star Ltd. Partnership*, 457 S.W.3d 52, 57 n.6 (Tex. 2015) ("Hooks and amicus ... cite cases stating that if there is a fraudulent misrepresentation, it is no defense that proper inquiry might have revealed the truth. *See, e.g., Buchanan v. Burnett*, 102 Tex. 492, 119 S.W. 1141, 1142 (1909); *Labbe v. Corbett*, 69 Tex. 503, 6 S.W. 808, 811 (1888); *Mitchell v. Zimmerman*, 4 Tex. 75, 79-80 (1849). These cases, however, stand for the general proposition that one may be liable for fraud even if it could be discovered by due diligence; they do not hold that limitations is extended even if due diligence would reveal the fraud.").

Most recently, in *Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 923 (Tex. 2010), the supreme court held:

> In measuring justifiability, we must inquire whether, "given a fraud plaintiff's individual characteristics, abilities, and appreciation of facts and circumstances at or before the tune of the alleged fraud[,] it is extremely unlikely that there is actual reliance on the plaintiff's part." *Haralson v. E.F. Hutton Group, Inc.*, 919 F.2d 1014, 1026 (5th Cir. 1990). . . . Moreover, "a person may not justifiably rely on a representation if 'there are "red flags" indicating such reliance is unwarranted.'" *Lewis v. Bank of America NA*, 343 F.3d 540, 546 (5th Cir. 2003).

In 2015, the supreme court held in *Westergren* that: "In an arm's-length transaction[,] the defrauded party must exercise ordinary care for the protection of his own interests. ... [A] failure to exercise reasonable diligence is not excused by mere confidence in the honesty and integrity of the other party." *Westergren*, 453 S.W.3d at 425 (citing *Thigpen v. Locke*, 363 S.W.2d 247, 251 (Tex. 1962)). And in 2018, the court held in *Orca Assets*:

> [W]hen a party fails to exercise such diligence, it is "charged with knowledge of all facts that would have been discovered by a reasonably prudent person similarly situated." *see AKB [Hendrick, LP v. Musgrave Enterprises, Inc.]*, 380 S.W.3d [221,] 232 [(Tex. App.—Dallas

> 2012, no pet.)]. To this end, that party "cannot blindly rely on a representation by a defendant where the plaintiff's knowledge, experience, and background warrant investigation into any representations before the plaintiff acts in reliance upon those representations." *see Shafipour v. Rischon Development Corp.*, No. 11-13-002 12-CV, 2015 WL 3454219, at *8 (Tex. App.—Eastland May 29, 2015, pet. denied).

Orca Assets, 546 S.W.3d at 654.

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PJC 115.4 Sample Instructions on Direct and Incidental Damages—Contracts

Explanatory note: Damages instructions in contract actions are often necessarily fact-specific. Unlike most other form instructions in this volume, therefore, the following sample instructions are illustrative only, using a hypothetical situation to give a few examples of how instructions may be worded to submit various legal measures of damages for use in connection with the contract damages question, PJC 115.3.

Sample A—Loss of the benefit of the bargain

The difference, if any, between the value of the paint job agreed to by the parties and the value of the paint job performed by *Don Davis*. The difference in value, if any, shall be determined at the time and place the paint job was performed.

Sample B—Remedial damages

The reasonable and necessary cost to repaint *Paul Payne*'s truck.

Sample C—Loss of contractual profit

The difference between the agreed price and the cost *Paul Payne* would have incurred in painting the truck.

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Sample D—Loss of contractual profit plus expenses incurred before breach

The amount *Don Davis* agreed to pay *Paul Payne* less the expenses *Paul Payne* saved by not completing the paintjob.

Sample E—Damages after mitigation

The difference between the amount paid by *Paul Payne* to *John Jones* for painting the truck and the amount *Paul Payne* had agreed to pay *Don Davis* for that work.

Sample F—Mitigation expenses

Reasonable and necessary expenses incurred in attempting to have the truck repainted.

Sample G—Incidental Damages

Reasonable and necessary costs to store *Paul Payne*'s tools while the truck was being repainted.

COMMENT

When to use. See explanatory note above. Because damages instructions in contract suits are necessarily fact-specific, no true "pattern" instructions are given—only samples of some measures of general damages available in contract actions. This list is not exhaustive. The samples are illustrative only, adapted to a hypothetical fact situation, and must be rewritten to fit the particular

damages raised by the pleadings and proof and recoverable under a legally accepted theory. The instructions should be drafted in an attempt to make the plaintiff factually whole but not to put the plaintiff in a better position than he would have been in had the defendant fully performed the contract. *See Osoba v. Bassichis*, 619 S.W.2d 119, 122 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). For a comprehensive discussion of the theories of contract damages, see *Restatement (Second) of Contracts* §§ 346-356 (1981).

Measures generally alternative. The measures outlined here are generally alternatives, although some, particularly incidental damages, may be available in addition to one of the other measures, as may consequential damages (see PJC 115.5).

Direct damages. Since *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854), contract damages have been divided into two categories: direct and consequential. *see Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 816 (Tex. 1997). Direct damages "are the necessary and usual result of the defendant's wrongful act; they flow naturally and necessarily from the wrong." *El Paso Marketing. L.P. v. Wolf Hollow I, L.P.*, 383 S.W.3d 138, 144 (Tex. 2012). Direct damages "compensate a plaintiff for a loss that is conclusively presumed to have been foreseen by the defendant as a usual and necessary consequence of the defendant's act." *DaimlerChrysler Motors Co. v. Manuel*, 362 S.W.3d 160, 179 (Tex. App.—Fort Worth 2012, no pet.). The general or direct nature

of a type of damages is a determination of law to be made by the court. No question should be submitted concerning the foreseeability of direct damages; even if the evidence shows that such damages were not factually foreseeable to the parties, recovery is permitted if the damages are properly characterized by the court as direct rather than consequential. *American Bank v. Thompson*, 660 S.W.2d 831, 834 (Tex. App.—Waco 1983, writ ref'd n.r.e.).

Even damages usually not considered recoverable may be deemed direct damages if they stem as a matter of law from the breach of the contract in question. *see Cactus Utility Co. v. Larson*, 709 S.W.2d 709, 716 (Tex. App.—Corpus Christi-Edinburg 1986), *rev'd in part on other grounds*, 730 S.W.2d 640 (Tex. 1987) (expert witness fee, for accountant, recoverable as direct damages for breach of agreement to provide accounting services).

Benefit of the bargain and remedial damages. Whether difference in value or cost of repair is the proper measure of damages depends on the particular facts and circumstances in each case. *Fidelity & Deposit Co. of Maryland v. Stool*, 607 S.W.2d 17, 21 (Tex. App.—Tyler 1980, no writ).

Loss of contractual profit. Lost profits from collateral contracts are generally classified as consequential damages. Profits lost from the actual contract in question, however, are direct damages for the seller. *Continental Holdings, Ltd. v. Leahy*, 132 S.W.3d 471, 475 (Tex. App.—Eastland 2003, no pet.).

Lost profit plus capital expenditures. If the plaintiff has incurred expenses in preparation or performance and reasonably expected to recoup that investment as well as make a profit, this lost profit plus capital expenditures may be an appropriate measure of damages. *Houston Chronicle Publishing Co. v. McNair Trucklease, Inc.*, 519 S.W.2d 924, 929-31 (Tex. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

Reliance damages. The plaintiff may elect to recover expenditures made in preparation or performance instead of claiming lost benefit of the bargain or profit damages. If the plaintiff makes this election because he would have lost money had the contract been completed and the defendant proves the amount of loss avoided as a result of the breach, the jury should also be instructed to deduct those prospective losses from the reliance damages. *Mistletoe Express Service v. Locke*, 762 S.W.2d 637, 638-39 (Tex. App.—Texarkana 1988, no writ).

Mitigation damages. Although normally raised defensively, the reasonable expenses of mitigating an economic loss are recoverable as actual damages for breach of contract. *Hycel, Inc. v. Wittstruck*, 690 S.W.2d 914, 924 (Tex. App.—Waco 1985, writ dism'd).

Incidental damages. A variety of expenditures and other incidental damages may be recoverable as direct damages, depending on the particular facts and circumstances of each case. *See, e.g.*, *LaChance v. Hollenbeck*, 695 S.W.2d 618, 621-22 (Tex. App.—Austin 1985, writ ref'd n.r.e.) (improvements to real property);

Anderson Development Corp. v. Coastal States Crude Gathering Co., 543 S.W.2d 402, 405 (Tex. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.) (additional salaries and expenses for equipment, maintenance, and supervision). Whether any particular incidental damages are characterized as direct or consequential is, as discussed above, a question for the court. If a claimed expense is deemed consequential, it should be submitted as such, using the form in PJC 115.5.

UCC cases. If the contract is for the sale of goods, the damages instructions should be drafted to incorporate the appropriate damages provisions in Tex. Bus. & Com. Code §§ 2.701-.724 (Tex. UCC). The following examples are illustrative only, using only a few damages provisions in the Uniform Commercial Code.

Sample A—(§ 2. 708) Seller's damages for nonacceptance

The difference between the market price of the goods at the tune and place *Paul Payne* was to tender them to *Don Davis* and the unpaid contract price.

Sample B—(§ 2. 710) Seller's incidental damages

Commercially reasonable charges, expenses, or commissions *Paul Payne* incurred in stopping delivery of goods.

Commercially reasonable charges *Paul Payne* incurred for transportation, care, and custody of goods in connection with their return or resale.

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Sample C—(§ 2. 713) Buyer's damages for nondelivery

The difference between the market price at the time *Paul Payne* learned of *Don Davis*'s failure to comply and the contract price.

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PJC 115.10 Sample Instructions—Deceptive Trade Practice Damages

Explanatory note: Damages instructions in DTPA actions are often necessarily fact-specific. Unlike most other form instructions in this volume, therefore, the following sample instructions are illustrative only, using a hypothetical situation to give a few examples of how instructions may be worded to submit various legal measures of damages for use in connection with the DTPA damages question, PJC 115.9.

Sample A—Loss of the benefit of the bargain

The difference, if any, in the value of the paint job as it was received and the value it would have had if it had been as [*represented*] [warranted]. The difference in value, if any, shall be determined at the time and place the paint job was done.

Sample B—Out of pocket

The difference, if any, in the value of the paint job as it was received and the price *Paul Payne* paid for it. The difference, if any, shall be determined at the time and place the paint job was done.

Sample C—Expenses

The reasonable and necessary cost to repaint the truck.

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The reasonable and necessary interest expense that *Paul Payne* incurred on the loan he received to pay for the paintjob.

Sample D—Loss of use

[The reasonable and necessary expense incurred in renting a car.] [The reasonable rental value of a replacement vehicle.]

Sample E—Lost profits

Paul Payne's lost profits sustained in the past.

Paul Payne's lost profits that, in reasonable probability, he will sustain in the future.

Sample F—Lost time

The reasonable value of the time spent by *Paul Payne* correcting or attempting to correct the problems with the paintjob.

Sample G—Damage to credit

Damage to *Paul Payne* credit reputation sustained in the past.

Damage to *Paul Payne*'s credit reputation that, in reasonable probability, he will sustain in the future.

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Sample H—Medical care

Medical care in the past.

Medical care that, in reasonable probability, *Paul Payne* will sustain in the future.

Sample I—Loss of earning capacity

Loss of earning capacity sustained in the past.

Loss of earning capacity that, in reasonable probability, *Paul Payne* will sustain in the future.

Sample J—Mental anguish

Paul Payne's mental anguish sustained in the past.

Paul Payne's mental anguish that, in reasonable probability, he will sustain in the future.

COMMENT

When to use. See explanatory note above. Because damages instructions in DTPA suits are necessarily fact-specific, no true "pattern" instructions are given—only samples of damages available in DTPA actions. This list is not exhaustive. The samples are illustrative only, adapted to a hypothetical fact situation, and must be rewritten to fit the particular damages raised by the pleadings and proof. Instructions on one or more measures of damages must be submitted with the DTPA damages question,

PJC 115.9. In addition to the measures outlined above, any of the common-law measures of damages for breach of contract may be available to the plaintiff in a DTPA action. See PJC 115.4.

Separating elements of damages. Based on Tex. Civ. Prac. & Rem. Code § 41.008(a), the Committee suggests separating economic from other compensatory damages. Separating economic from noneconomic and past from future damages is required—

1. to allow the court to apply the limits on recovery of exemplary damages based on economic and noneconomic damages as required by Tex. Civ. Prac. & Rem. Code § 41.008(b);

2. to allow calculation of prejudgment interest on damages in cases governed by Tex. Fin. Code § 304.1045 (for final judgments signed or subject to appeal on or after September 1, 2003); and

3. to allow the court to apply the proper standards for recovery of economic, mental anguish, and additional damages under Tex. Bus. & Com. Code § 17.50(b) (DTPA).

Available measures. Damages available to DTPA plaintiffs are those recoverable at common law. *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 939 (Tex. 1980). Traditional measures of damages for misrepresentation are the out-of-pocket and benefit-of-the-bargain measures, the first two samples listed above. *W.O. Bankston Nissan, Inc. v. Walters*, 754 S.W.2d 127,

128 (Tex. 1988); *Leyendecker & Associates v. Wechter*, 683 S.W.2d 369, 373 (Tex. 1984). Cost of repair is another recognized measure. *Nobility Homes of Texas, Inc. v. Shivers*, 551 S.W.2d 77, 78 n.1 (Tex. 1977). Damages for cost of repair and diminution in value may or may not be duplicative. *See Houston Unlimited, Inc. Metal Processing v. Mel Acres Ranch*, 443 S.W.3d 820, 826 (Tex. 2014). A wide variety of incidental and consequential damages are recoverable. *Henry S. Miller Co. v. Bynum*, 836 S.W.2d 160, 162 (Tex. 1992); *Kisk v. Van Note*, 692 S.W.2d 463, 466-67 (Tex. 1935). Except as specifically provided in DTPA § 17.50(b), (h), damages for bodily injury or death or for the infliction of mental anguish are exempted from DTPA coverage. DTPA § 17.49(e).

Alternative measures. The DTPA permits the injured consumer to recover the greatest amount of actual damages caused by the wrongful conduct. Thus, the consumer may submit to the jury alternative measures of damages for the same loss and then elect after the verdict the recovery desired by waiving the surplus findings on damages. *Kish*, 692 S.W.2d at 466-67.

Separate answer for each element. Broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted. *Harris County v. Smith*, 96 S. W.3d 230, 233-34 (Tex. 2002). If there is any question about the sufficiency of the evidence to support one or more of the elements, the Committee recommends that the elements of damages be separately submitted to the jury.

Loss of use. The consumer does not need to actually incur out-of-pocket expenses to recover for loss of use of an item. Evidence of the reasonable rental value of the substitute is sufficient. *Lima v. North Star Hodge Sales, Inc.*, 661 S.W.2d 115, 118-19 (Tex. 1984).

Expenses. Recoverable damages include reasonably necessary expenses shown to be factually caused by the defendant's conduct. *Kish*, 692 S.W.2d at 466. In *Jacobs v. Danny Darby Real Estate, Inc.*, 750 S.W.2d 174, 175 n.2 (Tex. 1988), the supreme court raised, but because it was not asserted by point of error, left unanswered, the question of whether those expenses must be proved reasonable and necessary.

Lost time. *See Village Mobile Homes, Inc. v. Porter*, 716 S.W.2d 543, 549-50 (Tex. App.—Austin 1986, writ ref'd n.r.e.), and *Ybarra v. Saldana*, 624 S.W.2d 948, 951-52 (Tex. App.— San Antonio 1981, no writ), *abrogation on other grounds recognized by Milt Ferguson Motor Co. v. Zeretzke*, 827 S.W.2d 349 (Tex. App.— San Antonio 1991, no writ), for discussion of damages for lost time.

Consideration paid. Another accepted measure of damages is the consumer's net economic loss, determined by subtracting the amount of any benefits received from the consideration the consumer has paid. For example, in *Woo v. Great Southwestern Acceptance Corp.*, 565 S.W.2d 290, 298 (Tex. App.—Waco 1978, writ ref'd n.r.e.), the consumer recovered as damages the amount paid for a distributorship, less the value of certain materials she had received, and in *Henry S. Miller- Co. v. Bynum*, 797

S.W.2d 51, 54 (Tex. App.—Houston [1st Dist.] 1990), *aff'd*, 836 S.W.2d 160 (Tex. 1992), the consumer recovered the amounts spent to open a business, less the amount he recouped when the business was sold. If the consumer receives nothing or if what is received is worthless, then the recovery under this measure of damages would be simply the consideration paid. *Vogelsang v. Reece Import Autos, Inc.*, 745 S.W.2d 47, 48 (Tex. App.—Dallas 1987, no writ), *abrogated on other grounds by E.I. du Pont de Nemours de Co. v. Robinson*, 923 S.W.2d 549, 554 (Tex. 1995). In addition to being a measure of damages, restoration of money paid is available under a theory of rescission and restitution in DTPA § 17.50(b)(3). *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 824-27 (Tex. 2012).

Medical care. If there is a question whether medical expenses are reasonable or medical care is necessary, the phrase *Reasonable expenses for necessary medical care* should be substituted for the phrase *Medical care* in sample H.

No foreseeability required. Proof of foreseeability is not required to recover consequential damages, such as lost profits, under the DTPA. *Howell Crude Oil Co. v. Donna Refinery Partners, Ltd.*, 928 S.W.2d 100, 110-11 (Tex. App.— Houston [14th Dist.] 1996, writ denied); *Hycel, Inc. v. Wittstruck*, 690 S.W.2d 914, 922-23 (Tex. App.—Waco 1985, writ dism'd); *cf. Investors, Inc. v. Hadley*, 738 S.W.2d 737, 739 (Tex. App.—Austin 1987, writ denied). Nonetheless, if these damages are too remote, too uncertain, or purely conjectural, they cannot be recovered.

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Arthur Andersen v. Perry Equipment Corp., 945 S.W.2d 812, 816 (Tex. 1997).

Mental anguish. Mental anguish damages may be recoverable in DTPA actions if the trier of fact finds the conduct was committed knowingly, DTPA § 17.50(b)(1), or if a claimant is granted the right to bring a cause of action under the DTPA by "another law," DTPA § 17.50(h).

Appendix F

PJC 115.19 Question and Instruction on Direct Damages Resulting from Fraud

[Insert predicate, PJC 115.1.]

QUESTION _____

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *his* damages, if any, that resulted from such fraud?

Consider the following elements of damages, if any, and none other.

[Insert appropriate instructions. see sample instructions in PJC 115.4 and 115.10 for format.]

In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment. Do not add any amount for interest on damages, if any.

Answer separately in dollars and cents for damages, if any.

1. [*Element A*] sustained in the past.

Answer: _____

2. *[Element A]* that, in reasonable probability, will be sustained in the future.

Answer: _____

3. *[Element B]* sustained in the past.

Answer: _____

4. *[Element B]* that, in reasonable probability, will be sustained in the future.

Answer: _____

COMMENT

When to use. PJC 115.19 should be predicated on a "Yes" answer to PJC 105.1 or 105.7 and may be adapted for use in most fraud cases by the addition of appropriate instructions setting out legally available measures of direct damages. See PJC 115.4 and 115.10. If only one measure of damages is supported by the pleadings and proof, the measure may be incorporated into the question.

Instruction required. PJC 115.19 *should not* be submitted without an instruction on the appropriate measures of damages. *See Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87, 90 (Tex. 1973). See PJC 115.4 and 115.10 for sample instructions.

Direct damages. PJC 115.19 should be used only for the submission of direct damages in fraud cases. For

a discussion of direct damages, see PJC 115.4 Comment. In fraud cases, direct damages are sometimes referred to as general damages—that is, damages that are the necessary and usual result of the wrongful act. *Baylor University v. Sonnichsen*, 221 S.W.3d 632, 636 (Tex. 2007). "Two types of direct damages are available for common-law fraud; out-of-pocket damages, measured by the difference between the value expended versus the value received, and benefit-of-the-bargain damages, measured by the difference between the value as represented and the value received." *Anderson v. Durant*, 550 S.W.3d 605, 614 (Tex. 2018) (citing *Zorrilla v. Aypco Construction II, LLC*, 469 S.W.3d 143, 153 (Tex. 2015)). However, the benefit-of-the-bargain measure is not available for fraud that induces a nonbinding contract. *Anderson*, 550 S.W.3d at 614; *Zonilla*, 469 S.W.3d at 153 (citing *Haase v. Glazner*, 62 S.W.3d 795, 799-800 (Tex. 2001)). "[I]f there is a defect in contract formation, the only potentially viable measure of fraud damages is the out-of-pocket measure." *Zorilla*, 469 S.W.3d at 153.

PJC 115.20 may be used to submit consequential damages, and PJC 115.38 may be used to submit exemplary damages.

Elements of damages submitted separately. The Committee generally recommends that multiple elements of damages be separately submitted to the jury. *Harris County v. Smith*, 96 S.W.3d 230, 233-34 (Tex. 2002) (broad-form submission of valid and invalid elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more

of the elements submitted); *see also* Tex. Civ. Prac. & Rem. Code § 41.008(a) ("In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages."). Separating economic from noneconomic damages is required to allow the court to apply the limits on recovery of exemplary damages based on economic and noneconomic damages as required by Tex. Civ. Prac. & Rem. Code § 41.008(b).

Further, "[p]rejudgment interest may not be assessed or recovered on an award of future damages." Tex. Fin. Code § 304.1045 (wrongful death, personal injury, or property damage cases). Therefore, separation of past and future damages is required.

Elements considered separately. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2003), provides an instruction for cases involving undefined or potentially overlapping categories of damages. In those cases, the following language should be substituted for the instruction to consider each element separately:

> Consider the following elements of damages, if any, and none other. You shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any.

Prejudgment interest. Instructing the jury not to add interest is suggested because prejudgment interest,

if recoverable, will be calculated by the court at the time of judgment. If interest paid on an obligation is claimed as an element of damages, it may be necessary to modify the instruction on interest.

Damages for securities law violation. Damages are available for a securities law violation "if the buyer no longer owns the security." Tex. Rev. Civ. Stat. art. 58 1-3 3A, 33B (now codified at Tex. Gov't Code § 4008.057, effective January 1, 2022). To submit such damages in cases in which the amount is disputed, this question should be modified by replacing the word "fraud" with the words "securities law violation." The instruction on the elements of damages should track Tex. Rev. Civ. Stat. art. 581-33D(3) or 33D(4), as applicable.

If the remedy of rescission is sought, PJC 115.19 should not be submitted. Instead, if the amount of money due is disputed, the jury should be asked to determine the amount using the formula in Tex. Rev. Civ. Stat. art. 581-33D(1) or 33D(2), as applicable (now codified at Tex. Gov't Code § 4008.056, effective January 1, 2022).

APPENDIX G — JURY INSTRUCTIONS, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, FILED MAY 19, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-20-4367

consolidated with

CIVIL ACTION NO. H-21-2150

J.A. MASTERS INVESTMENTS,
K.G. INVESTMENTS, and
JEFFERSON CASTRO GUEVARA,

Plaintiffs,

v.

EDUARDO BELTRAMINI,

Defendant.

JURY INSTRUCTIONS

Members of the Jury:

It is my duty and responsibility to instruct you on the law you are to apply in this case. The law contained in these instructions is the only law you may follow. It is your duty to follow what I instruct you the law is, regardless of any

opinion that you might have as to what the law ought to be. You should consider all of the instructions about the law as a whole and regard each instruction in light of the others, without isolating a particular statement or paragraph.

First, I will give you some general instructions—for example, instructions about the burden of proof and how to judge the believability of witnesses—which apply in every case. Then, I will give you some specific rules of law about this particular case, and finally, I will explain to you the procedures you should follow in your deliberations.

GENERAL INSTRUCTIONS

This is a civil case. The plaintiffs—J.A. Masters, K.G. Investments, and Mr. Jefferson Castro Guevara—have the burden of proving each of their claims by a preponderance of the evidence. To establish a claim "by a preponderance of the evidence" means proving that something is more likely so than not. In other words, "preponderance of the evidence" means the greater weight of credible evidence presented in this case. If you find that J.A. Masters, K.G. Investments, or Mr. Castro Guevara have failed to prove any element of any claim they allege by a preponderance of the evidence, then they may not recover on that claim.

There are several claims in this case. Your determination that a party has proven or failed to prove one claim by a preponderance of the evidence may not have any bearing on your determinations for any other claim.

You, as jurors, are the judges of the facts. To determine the facts, you must consider only the evidence presented

during the trial. Evidence is the sworn testimony of the witnesses and the exhibits. The questions, statements, objections, and arguments made by the lawyers are not evidence. It is important for you to distinguish between the arguments of counsel and the evidence on which those arguments rest. What the lawyers say or do is not evidence. You may, however, consider their arguments in light of the evidence that has been admitted and determine whether the evidence admitted in this trial supports the arguments. You must determine the facts from all the testimony that you have heard and the other evidence submitted. You are the judges of the facts, but in finding those facts, you must apply the law as I instruct you.

Generally speaking, there are two types of evidence. One is direct evidence, such as testimony of an eyewitness. The other is indirect or circumstantial evidence. Circumstantial evidence is evidence that proves a fact from which you can logically conclude another fact exists. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts from a preponderance of all the evidence, both direct and circumstantial.

You alone are to determine the questions of credibility or truthfulness of the witnesses. In weighing the testimony of the witnesses, you may consider the witness's manner and demeanor on the witness stand, any feelings or interest in the case, or any prejudice or bias about the case, that he or she may have, and the consistency or inconsistency of his or her testimony considered in the light of the circumstances. Has the witness been contradicted by other credible evidence? Has he or she

made statements at other times and places contrary to those made here on the witness stand? You must give the testimony of each witness the credibility that you think it deserves.

Even though a witness may be a party to the action and therefore interested in its outcome, the testimony may be accepted if it is not contradicted by direct evidence or by any inference that may be drawn from the evidence, if you believe the testimony. You are not to decide this case by counting the number of witnesses who have testified on the opposing sides. Witness testimony is weighed; witnesses are not counted. The test is not the relative number of witnesses, but the relative convincing force of the evidence. The testimony of a single witness is sufficient to prove any fact, even if a greater number of witnesses testified to the contrary, if after considering all of the other evidence, you believe that witness.

The fact that a person or company brought a lawsuit and is in court seeking damages creates no inference that they are entitled to a judgment. Anyone may make a claim and file a lawsuit. The act of making a claim in a lawsuit, by itself, does not in any way tend to establish that claim and is not evidence.

During the trial, I sustained objections to certain questions. You must disregard those questions entirely. Do not speculate as to what the witness would have said if permitted to answer the question.

During the trial, I sustained objections to the admission of certain exhibits. You must disregard those

exhibits entirely. Do not speculate as to what the exhibit would have shown had the court allowed you to see the exhibit. You will receive, for your deliberations, only those exhibits that I admitted into evidence.

A summary chart, labeled as Combined Exhibit 1, has been shown to you and will be sent back during your deliberations solely to help explain or summarize the facts that are in evidence. This summary chart is not evidence or proof of any facts. It is a description by each party to describe how they categorize or describe certain underlying evidence in the case. You should determine the facts from the evidence. If the underlying evidence contradicts the summary chart or if the summary chart mischaracterizes the underlying evidence in their descriptions, you must rely only on the underlying evidence.

You are required by law to decide the case in a fair, impartial, and unbiased manner, based entirely on the law and on the evidence presented to you in the courtroom. You may not be influenced by passion, prejudice, or sympathy you might have for the plaintiffs or the defendant in arriving at your verdict. A corporation and all other persons are equal before the law and must be treated as equals in a court of justice.

Notes that you may have taken during the trial should be used only as memory aids. You should not give your notes precedence over your independent recollection of the evidence. If you did not take notes, you should rely on your own independent recollection of the proceedings, and you should not be unduly influenced by other jurors'

notes. Notes are not entitled to any greater weight than each juror's recollection or impression as to what the testimony was. Whether you took notes or not, each of you must form and express your own opinion on the facts of the case.

If I have given you the impression during the trial that I favor either party, you must disregard that impression. If I have given you the impression during the trial that I have an opinion about the facts of this case, you must disregard that impression. You are the sole judges of the facts of this case. Other than my instructions to you on the law, you should disregard anything I may have said or done during the trial in arriving at your verdict.

INSTRUCTIONS ON THE NATURE OF THE CASE

This is a civil case that involves certain business aspects of soccer, which will also be referred to as futbol. The parties entered into a series of contracts with one another. In the first six contracts, J.A. Masters and K.G. Investments, agreed to invest in six soccer games set to occur from June 2018 to September 2019. You heard testimony about these six games, but only four of those games are at issue before you. The four games before you are:

- El Salvador v. Honduras (June 2018)
- Peru v. Paraguay (March 2019)

- Ecuador v. Honduras (March 2019)

- El Salvador v. Haiti (June 2019)

You are not to decide any issue related to the remaining two games, which are: Peru v. El Salvador (March 2019) and Peru v. Ecuador (September 2019).

Mr. Beltramini, through his company, Planet Futbol, entered into separate contracts with Mr. Castro Guevara through his companies, J.A. Masters and K.G. Investments, for Planet Futbol to promote each of these games. Under all the contracts, Mr. Castro Guevara became an investor for these games. The parties agreed to arrange for the splitting of expenses associated with each game and the profits that resulted. The expense-and-profit splitting arrangement varied from contract to contract. For three of the four contracts, J.A. Masters and K.G. Investments agreed to cover 50% of the expenses, and for one contract, they agreed to cover 40% of the expenses. The arrangements for each contract are explained in more detail below.

But as to all four contracts, J.A. Masters and K.G. Investments argue that Mr. Beltramini made material misrepresentations in reporting the actual expenses Mr. Beltramini incurred and paid. If true, that would mean that J.A. Masters and K.G. Investments paid more for their share of the expenses than they should have under the contract for each of the four games.

Appendix G

Under the contract for the El Salvador v. Honduras (June 2018) game, J.A. Masters and K.G. Investments agreed to cover 40% of the expenses for that game. After the game, the parties would then split the profits. J.A. Masters and K.G. Investments would receive 40% of the profits.

The remaining three games you are to consider—Peru v. Paraguay (March 2019), Ecuador v. Honduras (March 2019), and El Salvador v. Haiti (June 2019)— each had the same percent-based fee splitting arrangement. For those three games, J.A. Masters and K.G. Investments agreed to cover 50% of the expenses. After each game, the parties would then split the profits, with J.A. Masters and K.G. Investments receiving 50% of the profit.

As to all four contracts, J.A. Masters and K.G. Investments allege that Mr. Beltramini materially misrepresented the amounts he actually paid. J.A. Masters and K.G. Investments allege that the actual money Mr. Beltramini spent was different than the amount he reported as the actual expenses from the game and used to calculate profits. Mr. Beltramini denies any misrepresentation and asserts that he submitted accurate records. J.A. Masters and K.G. Investments seek to recover for the alleged lost profits. They also seek punitive damages. Mr. Beltramini denies that he owes J.A. Masters and K.G. Investments any additional money to compensate them for any losses or damages.

Separately, Mr. Beltramini entered into a Business Sale Agreement in October 2019 with Jefferson Castro

Guevara, a principal for K.G. Investments. Under this agreement, Mr. Beltramini agreed to sell Planet Futbol to Mr. Castro Guevara for a total of $300,000.

Article 4 of the Business Sale Agreement is reproduced below, as it appears in the document, for your reference:

Article 4 - PAYMENTS:

Buyer will pay $100,000.00 (one-hundred-thousand US dollars) on the Closing Date.

The remaining Purchase Price of $200,000.00 (two-hundred-thousand US dollars) shall be paid by Buyer as follows:

a) $100,000.00 (one-hundred-thousand US dollars) due immediately upon completion of the first Event under ownership of PFEM for an Event as contemplated by this agreement herein.
b) $100,000.00 (one-hundred-thousand US dollars) due immediately upon completion of the second Event under ownership of PFEM for an Event as contemplated by this agreement herein. NOTE: FIRST EVENT ON 2020.

The entire Purchase Price must be paid in full no later than July 1, 2020, notwithstanding Art. 4(a)-(b).

This clause may be modified only by consent of both Parties in writing.

You are instructed that "Buyer" means Mr. Castro Guevara, and "Seller" means Mr. Beltramini.

Mr. Castro Guevara paid the first $100,000 on the Closing Date, October 10, 2019. The parties contemplated the occurrence of two soccer games and scheduled the next two payments of $100,000 each to occur after the completion of each game. The first game was set for January 2020 and occurred. The second game was set for March 2020. It did not occur due to Covid-19. Mr. Castro Guevara did not pay Mr. Beltramini the remaining

$200,000 that was due to be paid by July 1, 2020, under the Business Sale Agreement.

You are instructed that Mr. Castro Guevara breached the Business Sale Agreement by failing to pay the remaining balance by July 1, 2020, as required by Article 4 of the Business Sale Agreement. Determining the validity and the meaning of the contract is a legal issue for the court to decide. The court has determined, as a matter of law, that the Business Sale Agreement is valid and that Mr. Castro Guevara was required to pay the remaining $200,000 by July 1, 2020. The parties do not dispute that Mr. Castro Guevara failed to do so.

Mr. Castro Guevara argues that Mr. Beltramini materially breached the Business Sale Agreement before July 1, 2020, which would excuse Mr. Castro Guevara's failure to pay. Specifically, Mr. Castro Guevara claims that Mr. Beltramini materially breached the agreement by failing to provide Mr. Castro Guevara with "any and all information required so that [Mr. Castro Guevara] may step into the shoes of [Mr. Beltramini] for the proper operation of the Business," which is a requirement under Article 8 of the Business Sale Agreement.

Both sides deny that they violated any contract or any other duties owed to the other. They also deny that they owe the other side any money.

INSTRUCTIONS ON EACH QUESTION

There are 7 questions on the verdict form you have received. Pay careful attention to this form. Some

questions have subparts. Some questions should only be answered based on your responses to other questions.

A. Fraud Claims: Questions 1 to 4

The first 4 questions concern the fraud claims asserted by J.A. Masters and K.G. Investments. In **Question 1**, you are asked whether you find, by a preponderance of the evidence, that Mr. Beltramini committed fraud against J.A. Masters and K.G. Investments relating to any of the four soccer games for which they had separate agreements. Those four games are:

- El Salvador v. Honduras (June 2018)
- Peru v. Paraguay (March 2019)
- Ecuador v. Honduras (March 2019)
- El Salvador v. Haiti (June 2019)

To prove that Mr. Beltramini committed fraud as to any of these games, J.A. Masters and K.G. Investments must prove by a preponderance of the evidence each of the following elements:

First: Mr. Beltramini made a material misrepresentation as to the expenses he paid for each game at issue;

Second: Mr. Beltramini made that misrepresentation with knowledge of its falsity or recklessly without any knowledge of the truth;

Third: Mr. Beltramini made that misrepresentation with the intention that it should be acted on by J.A. Masters and K.G. Investments; and

Fourth: J.A. Masters and K.G. Investments justifiably relied on the misrepresentation and suffered an injury.

"Misrepresentation" means making a false statement of fact. The statement may be an affirmative representation or a failure to disclose. "Material" means that the representation was important to the recipient in making a decision. "Justifiable reliance" means that a reasonably prudent person similarly situated would have relied on that statement. A reasonable person cannot justifiably rely on a statement when there are "red flags" indicating that reliance is unwarranted.

Question 1 has four subparts, one for each game that J.A. Masters and K.G. Investments allege fraud. J.A. Masters and K.G. Investments must prove, by a preponderance of the evidence, each of the above elements of fraud for each game. Consider each game separately,

and do not consider any of the games that are not before you.

For the El Salvador v. Honduras (June 2018) game, J.A. Masters and K.G. Investments contend that Mr. Beltramini allegedly misrepresented an expense report provided to you in Plaintiffs' Exhibit 22. This report is labeled as a "projected" expense report. You are to determine whether J.A. Masters and K.G. Investments have proven by a preponderance of the evidence that that report contained a material misrepresentation, whether Mr. Beltramini made that misrepresentation with knowledge of its falsity or recklessly without any knowledge of the truth, and whether J.A. Masters and K.G. Investments reasonably relied on the misrepresentation.

For the Peru v. Paraguay (March 2019) game, J.A. Masters and K.G. Investments contend that Mr. Beltramini allegedly misrepresented an expense report provided to you on page 1 of Defendant Exhibit 2. This report is labeled as a "final" expense report. You are to determine whether J.A. Masters and K.G. Investments have proven by a preponderance of the evidence that that report contained a material misrepresentation, whether Mr. Beltramini made that misrepresentation with knowledge of its falsity or recklessly without any knowledge of the truth, and whether J.A. Masters and K.G. Investments reasonably relied on the misrepresentation. You are not, in making these determinations for the Peru v. Paraguay (March 2019) game, to consider whether Defendant Exhibit 10 contains a material misrepresentation. If you find a material misrepresentation on page 1 of Defendant

Exhibit 2, you may, however, consider Defendant Exhibit 10 to determine Mr. Beltramini's state of mind (that is, whether he acted recklessly or with knowledge or the statement's alleged falsity).

For the Ecuador v. Honduras (March 2019) game, J.A. Masters and K.G. Investments contend that Mr. Beltramini allegedly misrepresented an expense report provided to you on page 1 of Defendant Exhibit 3. This report is labeled as a "final" expense report. You are to determine whether J.A. Masters and K.G. Investments have proven by a preponderance of the evidence that that report contained a material misrepresentation, whether Mr. Beltramini made that misrepresentation with knowledge of its falsity or recklessly without any knowledge of the truth, and whether J.A. Masters and K.G. Investments reasonably relied on the misrepresentation. You are not, in making these determinations for the Ecuador v. Honduras (March 2019) game, to consider whether page 1 of Defendant Exhibit 11 contains a material misrepresentation. If you find a material misrepresentation in Defendant Exhibit 3, you may, however, consider Defendant Exhibit 11 to determine Mr. Beltramini's state of mind (that is, whether he acted recklessly or with knowledge or the statement's alleged falsity).

For the El Salvador v. Haiti (June 2019) game, J.A. Masters and K.G. Investments contend that Mr. Beltramini allegedly misrepresented an expense report provided to you on page 1 of Defendant Exhibit 5. This report is labeled as a "final" expense report. You are to determine whether that report contained a material

misrepresentation, whether Mr. Beltramini made that misrepresentation with knowledge of its falsity or recklessly without any knowledge of the truth, and whether J.A. Masters and K.G. Investments reasonably relied on the misrepresentation. You are not, in making these determinations for the El Salvador v. Haiti (June 2019) game, to consider whether Defendant Exhibit 13 contains a material misrepresentation. If you find a material misrepresentation in on page 1 of Defendant Exhibit 5, you may, however, consider Defendant Exhibit 13 to determine Mr. Beltramini's state of mind (that is, whether he acted recklessly or with knowledge or the statement's alleged falsity).

If you find that Mr. Beltramini committed fraud as to any of these four games, **Question 2** asks you to determine the amount that is fair compensation for the J.A. Masters and K.G. Investments' damages. You should not interpret the fact that I am giving instructions about damages as an indication in any way that I believe that J.A. Masters and K.G. Investments should or should not win this case. It is your task first to decide whether Mr. Beltramini is liable. I am instructing you on damages only so that you will have guidance in the event that you decide that Mr. Beltramini is liable and that J.A. Masters and K.G. Investments is entitled to recover money from Mr. Beltramini.

The damages asked about in **Question 2** are called compensatory damages. The purpose of compensatory damages is to make the plaintiff whole—that is, to compensate the plaintiff for the damage that the plaintiff has suffered. You may award compensatory damages

only for injuries that J.A. Masters and K.G. Investments prove were proximately caused by Mr. Beltramini's allegedly wrongful conduct. The damages that you award must be fair compensation for all of J.A. Masters or K.G. Investments' damages, no more and no less. Compensatory damages are not punishment and cannot be imposed or increased to penalize anyone. You should not award compensatory damages for speculative injuries, but only for those injuries which J.A. Masters or K.G. Investments have actually suffered or are reasonably likely to suffer in the future.

If you decide to award compensatory damages, you should be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require that the plaintiff prove the amount of his losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit. You must use sound discretion in fixing an award of damages, drawing reasonable inferences where you find them appropriate from the facts and circumstances in evidence.

If you find that Mr. Beltramini committed fraud as to any of the four games, determine the compensatory damages for each game you found satisfied the elements of fraud by estimating the lost profits J.A. Masters Investments or K.G. Investments should have reasonably obtained from each game. To determine the actual expenses charged for each game, if you get this far, you are instructed to use the following exhibits:

- For El Salvador v. Honduras (June 2018), use Defendant Exhibit 1.

- For Peru v. Paraguay (March 2019), use Defendant Exhibit 2.

- For Ecuador v. Honduras (March 2019), use Defendant Exhibit 3.

- For El Salvador v. Haiti (June 2019), use Defendant Exhibit 5.

If you find that Mr. Beltramini committed fraud and award the appropriate compensatory damages, you may—but you are not required to—find that J.A. Masters or K.G. Investments are entitled to punitive damages in addition to compensatory damages. Punitive damages are damages awarded as a penalty or for punishment. **Question 3** asks you whether you award J.A. Masters and K.G. Investments punitive damages. You may determine that J.A. Masters and K.G. Investments should receive punitive damages if you find that the Mr. Beltramini made any misrepresentation to J.A. Masters and K.G. Investments with the specific intent to cause substantial injury or harm to J.A. Masters and K.G. Investments. J.A. Masters and K.G. Investments must prove their entitlement to punitive damages by clear and convincing evidence. "Clear and convincing evidence" is the measure or degree of proof that will produce in your mind a firm belief or conviction as to the truth of the allegations sought to be established.

If you determine that J.A. Masters and K.G. Investments should receive punitive damages, then **Question 4** asks you to determine how much you award in punitive damages to J.A. Masters and K.G. Investments. In determining the amount of punitive damages, you may consider evidence, if any, relating to the following:

1. the nature of the alleged wrong;

2. the character of the conduct involved;

3. the degree of culpability of the alleged wrongdoer;

4. the situation and the sensibilities of the parties concerned; and

5. the extent to which such conduct offends a public sense of justice and propriety.

B. Breach of Business Sale Agreement Claims: Questions 5 to 7

The remaining questions concern the Business Sale Agreement. Mr. Castro Guevara claims that Mr. Beltramini breached the Business Sale Agreement before July 1, 2020, by failing to provide appropriate aid to Mr. Castro Guevara in operating Planet Futbol.

You are instructed that the contract required Mr. Beltramini to provide Mr. Castro Guevara "with any and all information required so that [Mr. Castro Guevara]

may step into the shoes of [Mr. Beltramini] for the proper operation of the Business." In determining breach, you are only to determine whether Mr. Beltramini provided the required information to Mr. Castro Guevara to allow him to "step into the shoes" of Mr. Beltramini. You shall not consider any other basis for breach, and you shall disregard any testimony as to alternate bases for breach.

Under Texas law, the breach of contract claim asserted here requires that Mr. Castro Guevara prove, by a preponderance of the evidence, that Mr. Beltramini failed to comply with the Business Sale Agreement. A failure to comply with a contract must be material. The circumstances to consider in determining whether a failure to comply with a contract is "material" include:

1. The extent to which the allegedly injured party will be deprived of the benefit that he or it reasonably expected;

2. the extent to which the allegedly injured party can be adequately compensated for the part of that benefit that should have been provided;

3. the extent to which the behavior of the party alleged failing to perform meets the standards of good faith and fair dealing.

Question 5 asks you to determine whether Mr. Beltramini materially breached the Business Sale Agreement. If you find that Mr. Beltramini did breach

the Business Sale Agreement, **Question 6** asks you to determine whether he did so before July 1, 2020.

If you find that Mr. Beltramini materially breached before July 1, 2020, you must answer **Question 7.** This question asks you to determine the compensatory damages Mr. Beltramini would owe to Mr. Castro Guevara, if any. Remember that the goal of compensatory damages is to put the non-breaching party in the same position he or she would have been in if the breach had not occurred. The goal is not to punish.

To answer **Question 7**, consider only the difference, if any, between the value of Planet Futbol agreed to by the parties and the value of Planet Futbol as delivered. The difference in value should be determined at the time that Planet Futbol was transferred to Mr. Castro Guevara.

Those are the questions you are asked to decide. Do not decide any other issue or matter. Remember to read each question and each subpart of each question carefully.

FINAL INSTRUCTIONS

It is now your duty to deliberate and to consult with one another in an effort to reach a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to re-examine your own opinions and change your mind if you are convinced that you were wrong. But do not give up on your honest beliefs because the other jurors think differently, or just to finish the case.

Appendix G

Remember at all times, you are the judges of the facts. You have been allowed to take notes during this trial. Any notes that you took during this trial are only aids to memory. If your memory differs from your notes, you should rely on your memory and not on the notes. The notes are not evidence. If you did not take notes, rely on your independent recollection of the evidence and do not be unduly influenced by the notes of other jurors. Notes are not entitled to greater weight than the recollection or impression of each juror about the testimony.

When you go into the jury room to deliberate, you may take with you a copy of this charge, the verdict form, the exhibits that I have admitted into evidence, and your notes. You must select a jury foreperson to guide you in your deliberations and to speak for you here in the courtroom. Your verdict must be unanimous. After you have reached a unanimous verdict, your presiding juror must fill out the answers to the written questions on the verdict form and sign and date it. After you have concluded your service and I have discharged the jury, you are not required to talk with anyone about the case.

If you need to communicate with me during your deliberations, the jury foreperson should write the inquiry and give it to the court security officer. After consulting with the attorneys, I will respond either in writing or by meeting with you in the courtroom. Keep in mind, however, that you must never disclose to anyone, not even to me, your numerical division on any question.

You may now proceed to the jury room to begin your

deliberations. SIGNED on May 19, 2023, at Houston, Texas.

/s/ Lee H. Rosenthal
Lee H. Rosenthal
United States District Judge

APPENDIX H — VERDICT FORM OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, FILED MAY 19, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-20-4367
consolidated with
CIVIL ACTION NO. H-21-2150

J.A. MASTERS INVESTMENTS,
K.G. INVESTMENTS, AND
JEFFERSON CASTRO GUEVARA,

Plaintiffs,

v.

EDUARDO BELTRAMINI,

Defendant.

Filed May 19, 2023

VERDICT FORM

QUESTION 1

Did Eduardo Beltramini commit fraud against J.A. Masters Investments and K.G. Investments relating to

any of the four soccer games for which they had a written agreement?

Answer "Yes" or "No" for each of the four games listed below.

El Salvador v. Honduras (June 2018)	Yes
Peru v. Paraguay (March 2019)	Yes
Ecuador v. Honduras (March 2019)	Yes
El Salvador v. Haiti (June 2019)	No

QUESTION 2

If you have answered "Yes" to any of the subparts of Question 1, then answer the corresponding subparts of Question 2. Otherwise, do not answer Question 2.

What sum of money, if any, would fairly and reasonably compensate J.A. Masters Investments and K.G. Investments for their damages, if any, that resulted from such fraud? Answer separately in dollars and cents for damages, if any.

El Salvador v. Honduras (June 2018)	0
Peru v. Paraguay (March 2019)	0
Ecuador v. Honduras (March 2019)	0
El Salvador v. Haiti (June 2019)	0

Appendix H

QUESTION 3

If you have answered "Yes" to any of the subparts of Question 1, then answer Question 3. Otherwise, do not answer Question 3.

Are J.A. Masters Investments and K.G. Investments entitled to punitive damages for Mr. Beltramini's fraud, if you find that Mr. Beltramini did in fact commit fraud? Answer "Yes" or "No."

No

QUESTION 4

If you have answered "Yes" to Question 3, then answer Question 4. Otherwise, do not answer Question 4.

If J.A. Masters Investments and K.G. Investments are entitled to punitive damages, how much should they be awarded? Answer in dollars and cents for punitive damages, if any.

QUESTION 5

Did Mr. Beltramini materially breach the Business Sale Agreement? Answer "Yes" or "No."

No

Appendix H

QUESTION 6

If you have answered "Yes" to Question 5, then answer Question 6. Otherwise, do not answer Question 6.

Did Mr. Beltramini materially breach the Business Sale Agreement before July 1, 2020? Answer "Yes" or "No."

_____

QUESTION 7

If you have answered "Yes" to Question 6, then answer Question 7. Otherwise, do not answer Question 7.

What sum of money, if any, if paid now in cash, would fairly and reasonably Mr. Castro Guevara for damages, if any, that resulted from Mr. Beltramini's material breach of the Business Sale Agreement? Answer separately in dollars and cents for damages, if any.

_____

* * *

After answering the questions above, the foreperson of the jury must sign and date one completed form and submit it to the court.

Date: May 19, 2023

Signature: _____