** NOT FOR PRINTED PUBLICATION **

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

DICKEY'S BARBECUE PIT, INC. and DICKEY'S BARBECUE RESTS., INC.	§	
	§	CIVIL ACTION No. 4:14-cv-484
Plaintiffs,	§	
	§	JUDGE RON CLARK
v.	§	
	§	BRC
JAMES L. NEIGHBORS,	§	
	§	
Defendant.	§	

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION TO DISMISS

Plaintiffs Dickey's Barbecue Pit, Inc. and Dickey's Barbecue Restaurants, Inc. ("Dickey's") have filed a Motion for Summary Judgment. (Dkt. # 30). The unredacted version of this motion (Dkt. # 27) remains under seal.[1] Dickey's requests liquidated damages for breach of contract, dismissal of Mr. Neighbors's counterclaims and affirmative defenses, a permanent injunction, court costs, prejudgment interest, and post-judgment interest at the judgment rate of interest on all sums awarded in the judgment.

Mr. Neighbors is proceeding pro se. He has not filed a response to Dickey's Motion for Summary Judgment. He has filed an Answer, which this court construes as asserting counterclaims of negligent misrepresentation and defamation, the affirmative defense of fraudulent inducement, and a motion to dismiss. (Dkt. # 13).

[1] Dickey's previously filed a Motion to Seal Confidential Financial & Commercial Information Attached to Their Motion for Summary Judgment. (Dkt. # 26). The court granted this motion, but ordered that Dickey's file unsealed versions of several exhibits and documents. (Dkt. # 29). One such document was a copy of Dickey's Motion for Summary Judgment, in which four lines containing confidential commercial information were redacted. (Dkt. # 30).

Dickey's Motion for Summary Judgment is GRANTED as to breach of contract based on summary judgment evidence submitted with its Motion. The court holds that the liquidated damages clause is an unenforceable penalty, as it requires payment of $675,122.55 in damages, even though Mr. Neighbors was in breach for failure to pay $5,463.00 in royalty fees. (Dkt. # 27-2, at 310 of 334). The court will enforce actual damages in the amount of $5,463.00.

Dickey's request for a permanent injunction is GRANTED.

The Motion for Summary Judgment is also GRANTED as to dismissal of Mr. Neighbors's counterclaims and affirmative defense. Mr. Neighbors's Motion to Dismiss is DENIED. (Dkt. # 13).

Dickey's is entitled to attorney's fees, costs, and interest. Dickey's shall have until September 29, 2015 to file proof of reasonable attorney's fees.

I. Factual Background

On July 28, 2014, Dickey's filed a complaint against former franchisee Mr. James Neighbors, alleging, among other things, breach of contract and violations of the Lanham Act concerning Mr. Neighbors's failed management of a Dickey's restaurant. (Dkt. # 1). The second point in Dickey's prayer for relief reads as follows:

> Ordering Neighbors to deliver to Plaintiffs for destruction or other disposition all remaining inventory of the Neighbors's restaurant, or other merchandise bearing the Dickey's Pit's trademarks, Dickey's Restaurants System, or any marks confusingly or substantially similar thereto, including all advertisements, promotional and marketing materials therefore, as well as means of making same including signs.

(Dkt. # 1, at 21).

Mr. Neighbors did not appear at an August 4, 2014 hearing before a magistrate judge on Plaintiffs' Application for Temporary Restraining Order and Temporary Injunctive Relief. (Dkt. # 10).

Mr. Neighbors filed an answer on August 18, 2014. (Dkt. # 13). He stated the following regarding the prospective return of the requested materials:

> All proprietary items including pictures, signage, artwork etc have been removed and are available for repurchase to anyone that would like to buy them back from me since I paid hard earned cash for them in the first place. However, until they are sold they will not be used in a business function. If there is any item Dickey's is claiming ownership over that I have not paid for I will be happy to return it to them at any time.

(Dkt. # 13, at 2).

When Dickey's filed its 26(f) Report on October 14, 2014, it claimed that it had spoken with Mr. Neighbors on the telephone on three occasions. (Dkt. # 17, at 4).

On March 31, 2015, Judge Schell adopted the Magistrate Judge's Report and Recommendation granting the preliminary injunction against Mr. Neighbors. (Dkt. # 21). This injunction prohibited Mr. Neighbors from selling products bearing the Dickey's logo and ordered him to return such material to Dickey's. *Id*.

According to Dickey's Motion for Summary Judgment, filed May 28, 2015, Mr. Neighbors has not complied with the preliminary injunction order, has failed to send required disclosures, and has not responded to requests for admission. (Dkt. # 27, at 6–7). This motion was sent by certified United States mail (return receipt requested) and regular United States mail to Mr. Neighbor's last known address on file with the court.[2] (Dkt. # 27, at 30). The certified copy was returned to Dickey's counsel. (Dkt. # 31). According to the address on file with the court, which

[2] Dickey's properly served its Motion for Summary Judgment to Mr. Neighbors by mailing it to his last known address on May 28, 2015. Federal law states that service of "pleadings and other papers" can be made by "mailing it to the person's last known address—in which event service is complete upon mailing." Fed. R. Civ. P. 5(b)(2)(C). The same is true under the laws of Texas and Tennessee. *See* Tenn. R. Civ. P. 5.02; Tex. R. Civ. P. 21a. In the Eastern District of Texas, a party essentially has seventeen days to respond to a motion from the day of service, with extensions built in if the last day falls on a weekend or a holiday. *See* Fed. R. Civ. P. 6(a)(1)(C) (stating how to calculate a deadline ending on a non-workday); L.R. CV-6 (providing an additional three days to the end of certain deadlines); L.R. CV-7(e) (providing 14 days to respond).

is also the mailing address for Mr. Neighbors's Answer, Mr. Neighbors is a resident of Tennessee. (Dkt. # 13, at 26).

On August 5, 2015, Dickey's filed a "Motion for the Court to Select Mediator by Dickey's Barbecue Pit, Inc., Dickey's Barbecue Restaurants, Inc." (Dkt. # 34). In this motion, Dickey's stated that Mr. Neighbors has continued to be unresponsive.

Dickey's Motion for Summary Judgment seeks the following relief:

1. Liquidated damages for breach of contract,
2. Dismissal of Mr. Neighbors's counterclaims and affirmative defenses,
3. A permanent injunction, and
4. Court costs, prejudgment interest, and post-judgment interest at the judgment rate of interest on all sums awarded in the judgment.

(Dkt. # 30).

II. Dickey's Motion for Summary Judgment is Granted

A. Legal Background

The standard under which a court reviews a motion for summary judgment is set out in Federal Rule of Civil Procedure 56, which has been interpreted by numerous decisions of the United States Supreme Court and the Circuit Courts of Appeals, need not be revisited here. In short, a summary judgment motion should be granted if "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Only a genuine dispute over a material fact—a fact that might affect the outcome of the suit under the governing substantive law—will preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

B. Dickey's Has Provided Sufficient Evidence to Establish That There Is No Genuine Issue of Fact Regarding Its Breach of Contract Claim.

The Franchise Agreement between the parties has a choice of law clause specifying that Texas law applies to the agreement. (Dkt. # 30-5, at 53 of 78). Under Texas law, "[f]or a

contract to exist, there must be an offer, an acceptance, and valid consideration." *Harco Energy, Inc. v. Re-Entry People, Inc.*, 23 S.W.3d 389, 392 (Tex. App.—Amarillo 2000, no pet.). "To prove that an offer was made, a party must show (1) the offeror intended to make an offer, (2) the terms of the offer were clear and definite, and (3) the offeror communicated the essential terms of the offer to the offeree." *Domingo v. Mitchell*, 257 S.W.3d 34, 39 (Tex. App.—Amarillo 2008, pet. denied). The acceptance must be "identical to the offer." *Id*. In assessing whether there was an offer and acceptance, courts also consider whether there was a "meeting of the minds," defined as "a mutual understanding and assent to the expression of the parties' agreement," which is based on an objective standard. *Id*. The elements of a breach of contract are: "(1) a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained by the plaintiff as a result of the breach." *Marquis Acquisitions, Inc. v. Steadfast Ins. Co.*, 409 S.W.3d 808, 813 (Tex. App.—Dallas 2013, no pet.).

Dickey's summary judgment evidence establishes that Mr. Neighbors entered into a valid contract with Dickey's. Dickey's Franchise Agreement was sent to Mr. Neighbors, had "terms [that] were clear and definite," and contained all of the "essential terms" to be communicated to Mr. Neighbors. *Domingo*, 257 S.W.3d at 39. Dickey's therefore made an offer when it gave Mr. Neighbors the Franchise Agreement on July 5, 2013. (Dkt. # 30-2). Mr. Neighbors signed the Franchise Agreement 43 days later, on August 17, 2013. (Dkt. # 30-5, at 78 of 78). What he signed was "identical to the offer," so there was acceptance. *Domingo*, 257 S.W.3d at 39. Dickey's has also provided affidavit testimony from its General Counsel describing additional steps that the parties took in entering the Franchise Agreement. (Dkt. # 30-1, at ¶¶ 7–13). Objectively, this evidence establishes that there was "a mutual understanding and assent to the expression of the parties' agreement," thereby constituting a "meeting of the minds" between the

parties. *Domingo*, 257 S.W.3d at 39. Finally, there was consideration, in that Mr. Neighbors provided financing from his personal savings (Dkt. #13, at 11) and Dickey's provided training and resources, including proprietary information. (Dkt. #30-1, at ¶¶ 14–26).

Dickey's summary judgment evidence also establishes that it performed under the contract by providing training and resources to Mr. Neighbors. Dickey's General Counsel states that Mr. Neighbors was provided with proprietary information such as recipes and materials bearing Dickey's logos and trade dress. Regarding training, an affidavit of Dickey's Vice President of Training describes the curriculum of its "Barbecue University" training program for franchisees. (Dkt. # 27-3, at 225–31). Dickey's has also provided copies of Mr. Neighbors's final exam from Barbecue University, on which he made a score of 96/100 (Dkt. # 28-2, at 8–33) and Mr. Neighbor's Certificate of Graduation from Barbecue University. (Dkt. # 30-16). Mr. Neighbors does not deny that Dickey's provided him with training, although his Answer purported to question the quality and comprehensiveness of it. (Dkt. # 13, at 3–4, 15–16). Mr. Neighbors also acknowledges that he has proprietary items provided by Dickey's. (Dkt. # 13, at 2). Taken together, this constitutes evidence of performance.

Dickey's summary judgment evidence also establishes Mr. Neighbors's breach. Under the Franchise Agreement, Mr. Neighbors had a duty to pay franchise fees, royalty fees, and marketing fund contributions. (Dkt. # 30-1, at ¶ 28); (Dkt. # 30-5, at 40 of 78). Dickey's has provided affidavit testimony that Mr. Neighbors did not pay these fees. (Dkt. # 30-1, at ¶ 35). Mr. Neighbors agrees that he did not pay the royalty fees, stating that he was "broke" and "could not afford" to pay them. (Dkt. # 13, at 17).

The fact that Dickey's did not receive payments that it was due is evidence of damages. When Dickey's terminated the Franchise Agreement, it stated that Mr. Neighbors was in default

for $5,463.00 in missed royalty fees. (Dkt. # 27-2 at 310 of 334). As this is the only proof of actual damages, the court will assess damages in this amount. For reasons to be explained in detail below, the court will not enforce Dickey's liquidated damages provision, as this is an impermissible penalty that calls for the payment of $675,122.55 in liquidated damages, which is 123.58 times more than actual damages.

Mr. Neighbors's Answer corroborates Dickey's summary judgment evidence. Mr. Neighbors provides evidence that there was a contract, in that he states that "[o]n April 10, 2014," the restaurant that he operated "opened for business." (Dkt. # 13, at 3). He also states that he and his wife were concerned that they "would not be accepted" but now "wish they had not been." (Dkt. # 13, at 9). Regarding Dickey's performance, he acknowledges that he received training (Dkt. # 13, at 3–4) and proprietary information, *id*. at 2, which included "permission to use [Dickey's] trademarks." *Id*. at 1. Regarding breach, Mr. Neighbors admits that he did not pay royalty fees as required under the contract. (Dkt. # 13, at 17). Mr. Neighbors, then, has not provided any evidence to controvert Dickey's summary judgment evidence.

Dickey's has provided summary judgment evidence to "demonstrate the absence of a genuine issue of material fact" regarding the formation of contract between Dickey's and Mr. Neighbors. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal quotations and citations omitted). It has done the same regarding Mr. Neighbors's breach and the amount of actual damages resulting from that breach.

C. The Liquidated Damages Amount Is an Impermissible Penalty.

"In order to enforce a liquidated damage clause, the court must find: (1) that the harm caused by the breach is incapable or difficult of estimation, and (2) that the amount of liquidated damages called for is a reasonable forecast of just compensation." *Phillips v. Phillips*, 820

S.W.2d 785, 788 (Tex. 1991) (internal citations and quotations omitted).

Under Texas Law, "[a] term fixing unreasonably large liquidated damages is void as a penalty." Tex. Bus. & Com. Code Ann. § 2.718(a). The Supreme Court of Texas has held that the defense of penalty "is not waived by the failure to plead it if it is apparent on the face of the petition and established as a matter of law." *Phillips*, 820 S.W.2d at 789. The rationale is that "[e]nforcement of a penalty, like enforcement of an illegal contract, violates public policy." *Id*. at 789–90.

In *Phillips*, the Court held that the following liquidated damages provision was an impermissible penalty: "If the general partner breaches his trust hereunder, he shall pay to the limited partner as liquidated damages ten times the amount she loses as a result of such breaches of trust." *Phillips*, 820 S.W.2d at 788. This was a penalty because the harm was capable of calculation and "instead of attempting to forecast actual damages, it calls for them to be determined and then multiplied." *Id*. at 789. The *Phillips* Court upheld the appellate court's decision to only enforce actual damages, not the liquidated damages that were deemed to be a penalty.

A Texas appellate court concluded that a liquidated damages provision was a penalty where the provision calculated liquidated damages by multiplying the amount of actual damages by three. *Magill v. Watson*, 409 S.W.3d 673, 681 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (holding that since "the contract provision simply takes the value of the earnest money, which the parties have agreed represents the actual damages . . . and multiplies it times three . . . the provision is an unlawful penalty and does not attempt to forecast actual damages"). That court also upheld actual damages, but not liquidated damages that were deemed to be a penalty.

In the present case, Dickey's liquidated damages clause is an impermissible penalty.

When Dickey's terminated the Franchise Agreement, it stated that Mr. Neighbors owed $5,463.00 in past royalty fees. (Dkt. # 27-2, at 310 of 334). But Dickey's liquidated damages clause demands $676,122.55 in damages. In *Magill* and *Phillips*, courts held that liquidated damages clauses calling for three times and ten times the amount of actual damages, respectively, were unenforceable penalties. Here, by comparison, the ratio of liquidated damages to actual damages is 123.58. As Dickey's liquidated damages amount is clearly a penalty, the court will only enforce actual damages in the amount of $5,463.00. *See Phillips*, 820 S.W.2d at 787–90 (affirming appellate court decision to award actual damages but not liquidated damages deemed a penalty); *Magill*, 409 S.W.3d at 681–82 (affirming district court's decision to award actual damages but not liquidated damages deemed a penalty).

III. Dickey's Is Entitled to Prejudgment Interest

"[T]he purpose of prejudgment interest is to put a plaintiff in the position he would have been in had he had his trial and recovered his judgment immediately after his injury." *Reyes-Mata v. IBP, Inc.*, 299 F.3d 504, 507 (5th Cir. 2002) (internal citations and quotations omitted). As this is a diversity case applying Texas law, Texas law governs the award of prejudgment interest. *Arete Partners, L.P. v. Gunnerman*, 643 F.3d 410, 412 (5th Cir. 2011).

The Texas Supreme Court has held that for common law claims such as breach of contract "prejudgment interest accrues at the rate for postjudgment interest and it shall be computed as simple interest." *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 532 (Tex. 1998). *See Arete*, 643 F.3d at 415 ("Thus, under Texas law, whether entitlement to prejudgment interest is derived from statute or, as in this case, equity, 'prejudgment interest accrues at the rate for postjudgment interest and [is] computed as simple interest.'") (quoting *Johnson*, 962 S.W.2d at 532). Under the Texas Financial Code, the postjudgment rate is equal to

"the prime rate as published by the Board of Governors of the Federal Reserve System on the date of computation" or "five percent a year if the prime rate as published by the Board of Governors of the Federal Reserve System . . . is less than five percent." TEX. FIN. CODE ANN. § 304.003(c)(1)–(2). At the time of this order, the Texas Office of Consumer Credit Commissioner published a judgment rate of 5.00%. *See* http://occc.texas.gov/publications/interest-rates (last visited Sept. 15, 2015).

Prejudgment interest accrues "during the period beginning on the earlier of the 180th day after the date the defendant receives written notice of a claim or the date the suit is filed and ending on the day preceding the date judgment is rendered." TEX. FIN. CODE ANN. § 304.104. In the present case, the earlier of these two dates July 28, 2014, the day that Dickey's filed suit. One-hundred and eighty days after notice, which occurred on July 16, 2014 (Dkt. # 30-8), is the much later date of January 12, 2015.

The court, therefore, will award pre-judgment interest on Dickey's $5,463.00 damages award in an amount of 5.00% per annum, simple interest from July 28, 2014 to the filing of this judgment.

IV. Dickey's Motion for a Permanent Injunction Is Granted

This court previously granted Dickey's a preliminary injunction based on Mr. Neighbors's infringement of Dickey's trademarks. (Dkt. # 21). Dickey's now moves for a permanent injunction.

The party seeking a permanent injunction must demonstrate the following:

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

eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006). Plaintiff bears the burden to prove all four requirements. *Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 506 (5th Cir. 2009).

Dickey's has established all four requirements. Dickey's has suffered irreparable injury due to past trademark infringement by Mr. Neighbors. *See Mary Kay, Inc. v. Weber*, 661 F. Supp. 2d 632, 640 (N.D. Tex. 2009) ("if one trademark user cannot control the quality of the unauthorized user's goods and services, he can suffer irreparable harm") (internal citations and quotations omitted). The fact that Mr. Neighbors has refused to return Dickey's proprietary information raises the specter of future irreparable injury, as well. *See* Dkt. # 13, at 2 ("All proprietary items including pictures, signage, artwork etc have been removed and are available for repurchase to anyone that would like to buy them back from me since I paid hard earned cash for them in the first place."). The "irreparable injury" factor, then, favors entry of a permanent injunction.

Regarding the second factor, courts have held that monetary damages for trademark infringement are inadequate because the loss in goodwill associated with trademark infringement is difficult to quantify. *See Coach Inc. v. Sassy Couture*, No. SA-10-CV-601-XR, 2012 WL 162366, at *12 (W.D. Tex. Jan. 19, 2012) ("Moreover, there is no adequate legal remedy because the damage to Plaintiffs' goodwill and reputation cannot be easily quantified."); *Mary Kay*, 661 F. Supp. 2d at 640 (agreeing that "an accounting of the defendants' profits is insufficient to compensate Mary Kay because damage to goodwill and brand name is not easily quantified"). As Mr. Neighbors has infringed Dickey's trademarks and has the ability to do so again, this factor also favors the entry of a permanent injunction.

Courts have held that the third factor, the "balance of hardships," favors the entry of a permanent injunction where the plaintiff will suffer irreparable harm and the defendant's only

hardship is complying with federal trademark law. *See, e.g.*, *Coach Inc.*, 2012 WL 162366, at *12 (holding that the balance of hardships favors entry of a permanent injunction where "Plaintiffs will suffer irreparable harm if Defendants once again begin selling counterfeit Coach products" but "a permanent injunction only requires Defendants to bring their business into compliance with federal law"). These very circumstances are present in this case, as Dickey's has suffered irreparable harm and Mr. Neighbors's only hardship will be the inability to sell barbecue under Dickey's brand. This favors the entry of a permanent injunction.

Finally, courts have held that protecting trademark rights serves the public interest by allowing consumers to distinguish between various competing products. *See Coach Inc.*, 2012 WL 162366, at *12; *Mary Kay*, 661 F. Supp. 2d at 640. This factor also favors entry of a permanent injunction.

Dickey's, therefore, has established that it is entitled to a permanent injunction.

V. Mr. Neighbors's Counterclaims and Affirmative Defense Are Dismissed

As Mr. Neighbors is proceeding pro se, his court submissions are construed more liberally than submissions of attorneys. *Boag v. MacDougall*, 454 U.S. 364 (1982); *Perez v. United States*, 312 F.3d 191, 194–95 (5th Cir. 2002).

In addressing any potential counterclaims brought by Mr. Neighbors, the relevant part of his answer reads as follows:

> The fact that there was insufficient training coupled with the inherent stress of being underfinanced, excessive construction cost, misleading sales strategy, unfair inspection criteria, threatening accusations and slanderous attempts at discrediting me by making false statements as they relate to the application and the overwhelming lack of leadership, ongoing support and overall dishonesty of Dickey's and individuals associated with Dickey's and their continued actions I am respectfully requesting that any and all legal actions against me be dismissed. I further allege that Dickey's through their practice of misleading and misrepresenting their services, products, training, support and business methods should fully reimburse me for my initial investment, excessive construction cost,

> outstanding food cost, equipment cost and all other debt as it relates to the operation of my franchise. I further request reimbursement for lost wages and all original investments.

(Dkt. # 13, at 17).

In this paragraph, the court identifies counterclaims for (1) negligent misrepresentation, based on Dickey's "practice of misleading and misrepresenting their services . . ." and (2) defamation, based on "slanderous attempts at discrediting [Mr. Neighbors] by making false statements." Under Federal Rule of Civil Procedure 8(c), fraudulent inducement, based on "misleading sales strategy," can be classified as an affirmative defense. The court also recognizes a motion to dismiss in Mr. Neighbors's "request[] that any and all legal actions . . . be dismissed."

A. Dickey's Is Released From the Counterclaim of Negligent Misrepresentation and the Affirmative Defense of Fraudulent Inducement.

Fraudulent inducement and negligent misrepresentation both require that a false representation be made. For fraudulent inducement, the first two elements require that the accused make "a material misrepresentation . . . that is false." *Kevin M. Ehringer Enters., Inc. v. McData Servs. Corp.*, 646 F.3d 321, 325 (5th Cir. 2011). Similarly, negligent misrepresentation requires that the accused "supplies 'false information' for the guidance of others in their business." *LHC Nashua P'ship, Ltd. v. PDNED Sagamore Nashua, L.L.C.*, 659 F.3d 450, 465 n.8 (5th Cir. 2011).

"To state a claim for fraudulent inducement under Texas law, a plaintiff must prove the basic elements of fraud." *Ehringer*, 646 F.3d at 325. "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Under this particularity requirement, the pleader must set forth the "who, what, when, where, and how" of the fraud alleged. *United States v. Bell Helicopter Textron, Inc.*, 417 F.3d 450, 453 (5th Cir. 2005).

Where the same set of facts is urged as the basis of both a claim of fraud and negligent misrepresentation, the heightened pleading requirements apply to both sets of facts. *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 n.3 (5th Cir. 2010).

Mr. Neighbors relies on the same set of circumstances for both fraud and negligent misrepresentation and provides sufficient particularity to satisfy the requirements of Rule 9(b). In alleging these counterclaims, he points primarily to statements made by Mr. Jerrel Denton, stating that Mr. Denton "has made it a normal business practice of misleading unknowing and trusting people into making the wrong decisions." (Dkt. # 13, at 12). Specifically, Mr. Denton allegedly: (1) Told Mr. Neighbors that Dickey's had "a whole team to find financing for [Mr. Neighbors];" (2) Told Mr. Neighbors that SBA financing would be "too slow and it would delay [the] opening in three months;" (3) "persuaded [Mr. Neighbors] to not pursue financing when [he] had money in the bank and creditworthiness;" and (4) "misled [Mr. Neighbors] on equipment financing stating that Dickey's kept the startup cost low due to financing 100% of the equipment cost." (Dkt. # 13, at 10–12). The court notes that these facts do not state the "when" or "where" of the misrepresentation. Despite these deficiencies, the pleadings are sufficient for a pro se defendant.

However, according to the terms of the Franchise Agreement, Dickey's is released from these causes of action. In authorizing Dickey's to find a prospective buyer for his franchise, Mr. Neighbors signed a disclaimer that reads as follows:

> You agree that any claims, rights or causes of action that you have or may have in the future against Dickey's (and/or any of its affiliates, shareholders, officers, directors, agents, attorneys, successors and assigns) for any action, omission, liability, losses or damages of any nature whatsoever relating to your purchase and operation of your Dickey's Barbecue Pit® restaurant and your franchise with Dickey's, including without limitation any action taken or not taken by Dickey's pursuant to or under authority of this letter, are and will be deemed to be fully, forever and irrevocably released, waived and discharged. This release is intended to be broad and all-encompassing, and includes claims arising out of the negligence or alleged negligence of Dickey's or its representatives.

(Dkt. # 30-10). This "broad and all-encompassing" release applies to misrepresentations "relating to [the] purchase **and** operation" of the restaurant. *Id*. (emphasis added). It therefore bars a fraudulent inducement claim relating to financing misrepresentations made by Mr. Denton before and after the signing of the Franchise Agreement. A counterclaim for negligent misrepresentation is also barred, in that the disclaimer "includes claims arising out of . . . negligence or alleged negligence." *Id*.

Also, the Franchising Agreement that Mr. Neighbors signed made it clear that Dickey's is not a guarantor of financing. One of the documents that Dickey's includes as part of its Franchise Agreement is the "Franchise Disclosure Document." (Dkt. # 27-2, at 22–91 of 334). Mr. Neighbors acknowledged receipt of the Franchise Disclosure Document. (Dkt. # 30-5, at 54 of 78). Item 10 of the Franchise Disclosure Document reads as follows:

> Dickey's does not offer direct or indirect financing. Upon request, Dickey's will refer you to independent lenders who may finance some portion of your initial investment, but Dickey's makes no promises that any such financing will be available to you. Dickey's does not receive any consideration for placing financing with any lenders. Additionally, Dickey's does not guarantee your note, lease or any other obligation.

(Dkt. # 27-2, at 45 of 334). Article 25 of the Franchise Agreement further states that the Franchise Agreement, not representations made by Dickey's employees,

> constitute[s] the entire, full and complete Agreement between Dickey's [and Defendant] . . . concerning the subject matter hereof and supersede all prior related agreements (both written and oral) between Dickey's [and Defendant] . . . [and] **no other representations having induced [Defendant] to execute this Agreement**.

(Dkt. # 30-5, at 51 of 78) (emphasis added).

Finally, Mr. Neighbors filled out a questionnaire in which he acknowledged receipt of the Franchise Disclosure Document and agreed that Dickey's had made no financial representations to

him that were different than those contained in the Franchise Agreement. Regarding the Franchise Disclosure Document, he answered the following questions as follows:

1. Have you received and personally reviewed Dickey's Franchise Disclosure Document (the "Disclosure Document") provided to you?

   Yes ✓ No_____

2. Did you sign a receipt for the Disclosure Document indicating the date you received it?

   Yes ✓ No_____

3. Do you understand the information contained in the Disclosure Document?

   Yes ✓ No_____

(Dkt. # 30-3). Regarding the receipt of any additional financial information different from that contained in the Franchise Agreement, he acknowledged the following:

14. Has any employee or other person speaking on behalf of Dickey's made any statement or promise to you or anyone else, other than those matters addressed in your Franchise Agreement, concerning advertising, marketing, media support, market penetration, training, support service or assistance relating to the Franchise that is contrary to, or different from, the information contained in the Disclosure Document?

    Yes_____ No ✓

15. Has any employee or other person speaking on behalf of Dickey's made any promise or agreement that is contrary to, different from, or in addition to, the matters set forth in the Franchise Agreement?

    Yes_____ No ✓

(Dkt. # 30-3).

Dickey's has provided summary judgment evidence that Mr. Neighbors disclaimed claims for fraudulent inducement or negligent misrepresentation. Mr. Neighbors has provided no controverting evidence to the contrary. In light of Dickey's disclaimer and Mr. Neighbors's acknowledgement that he entered into the contract with no representations made outside of the Franchise Agreement, Mr. Neighbors's affirmative defense of fraudulent inducement and negligent misrepresentation counterclaim both fail.

B. Mr. Neighbors's Counterclaim for Defamation Fails.

To prove a counterclaim for defamation under Texas Law, Mr. Neighbors must prove that Dickey's did the following: "(1) published a statement; (2) that was defamatory concerning Mr. Neighbors; (3) while acting with either actual malice, if the plaintiff was a public official or public figure, or negligence, if the plaintiff was a private individual, regarding the truth of the statement." *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998). Regarding the third element, the "negligence" standard applies because Mr. Neighbors is a private individual. *Id*. "A person publishes a slanderous remark if [the person] communicates it to a third person who is capable of understanding its defamatory meaning and in such a way that the person did understand its defamatory meaning." *Thomas-Smith v. Mackin*, 238 S.W.3d 503, 507 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

Mr. Neighbors's Answer contains only one statement by Dickey's that can be considered defamatory. That statement was made in a May 22, 2014 e-mail from Dickey's employee Shannon Armstrong. According to Mr. Neighbors: "In this document Shannon accuses me of lying on my application about my criminal history and credit history all of which I disclosed to Dickey's during phone conversations with Jerrel Denton." (Dkt. # 13, at 9). Mr. Neighbors does not provide a copy of this e-mail with his Answer.

Taking as true that this statement was made, it cannot form a basis for a defamation counterclaim because it was only published to Mr. Neighbors, not a third party. It cannot be said, then, that there is a genuine issue of material fact by which a jury could find in favor of Mr. Neighbors. The defamation counterclaim is therefore dismissed.

VI. Mr. Neighbors's Motion to Dismiss Is Denied

Rule 12(b) of the Federal Rules of Civil Procedure provides the following bases for a motion to dismiss on the pleadings: "(1) lack of subject-matter jurisdiction; (2) lack of personal jurisdiction; (3) improper venue; (4) insufficient process; (5) insufficient service of process; (6) failure to state a claim upon which relief can be granted; and (7) failure to join a party under Rule 19." Fed. R. Civ. P. 12(b)(1)–(7).

In his Answer, Mr. Neighbors requests "that any and all legal actions against me be dismissed." (Dkt. # 13, at 17). Taking this as a motion to dismiss, his bases for this motion include "insufficient training, . . . underfinanc[ing], excessive construction cost, misleading sales strategy, unfair inspection criteria, threatening accusations and slanderous attempts . . .[,] and overall dishonesty of Dickey's and individuals associated with Dickey's and their continued actions." *Id*.

These allegations cannot form the basis of a motion to dismiss under Rule 12(b), even under the most liberal construction. Mr. Neighbors does not contest, and the court sees no defects relating to, subject-matter jurisdiction, personal jurisdiction, venue, or service of process. Therefore, to the extent that Mr. Neighbors's Answer can be construed as a motion to dismiss, this motion is denied. (Dkt. # 13).

VII. Dickey's Is Entitled to Reasonable Attorney's Fees

Under Texas law, a party may recover "reasonable attorney's fees" and "the amount of a valid claim and costs" for breach of contract. Tex. Civ. Prac. & Rem. Code Ann. § 38.001(8). The Fifth Circuit has held that "[t]he award of reasonable attorneys' fees is mandatory under § 38.001 if the plaintiff prevails in his or her breach of contract claim and recovers damages." *Coffel v. Stryker Corp.*, 284 F.3d 625, 640–41 (5th Cir. 2002) (internal citations omitted). The

amount is within the discretion of the trial court. *Id*.

Dickey's is entitled to reasonable attorney's fees under § 38.001 because it has recovered damages for breach of contract. As this is a civil case brought in a federal court under diversity jurisdiction, this court shall follow federal procedure and the substantive and statutory law of the state in which the court sits. *See* 28 U.S.C. § 2071; 28 U.S.C. § 1652; *Shady Grove Orthopedic Assocs. v. Allstate Ins*., 559 U.S. 393, 406–08 (2010), *Mathis v. Exxon Corp*., 302 F.3d 448, 461 (5th Cir.2002). Accordingly, Federal Rule of Civil Procedure 54(d)(2) is the controlling procedure in this case and Texas Civil Practice & Remedies Code § 38.001 is the controlling state law. Dickey's has fourteen days from the entry of judgment to submit a motion for reasonable attorney's fees. *See* Fed. R. Civ. Pro. 54(d)(2).

VIII. Conclusion

It is therefore ORDERED that Dickey's Motion for Summary Judgment regarding Mr. Neighbors's breach of contract shall be GRANTED IN PART and Dickey's shall receive $5,463.00 in unpaid royalty fees plus prejudgment interest on said amount at the rate of 5.00% per annum, simple interest from July 28, 2014 to the filing of this judgment. (Dkt. # 27); (Dkt. # 30).

IT IS FURTHER ORDERED THAT all sums awarded shall include post-judgment interest calculated pursuant to 28 U.S.C. § 1961 from the date of the judgment, until the judgment is satisfied, for all of which sum let execution issue if the judgment is not timely paid.

It is further ORDERED that Dickey's request for a permanent injunction is GRANTED, as set out in a separate ORDER OF PERMANENT INJUNCTION.

It is further ORDERED that Mr. Neighbors's counterclaims are DISMISSED.

It is further ORDERED that Mr. Neighbors's affirmative defense is DISMISSED.

It is further ORDERED that Mr. Neighbors's Motion to Dismiss (Dkt. # 13) is DENIED.

It is further ORDERED that Dickey's is entitled to reasonable attorney's fees. Dickey's has fourteen days from the entry of judgment to submit a motion for reasonable attorney's fees. *See* Fed. R. Civ. Pro. 54(d)(2).

So ordered and signed on

Sep 18, 2015

Ron Clark, United States District Judge