

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION**

EL POLLO LOCO, S.A. de C.V.,	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. L-04-CV-48
	§	
EL POLLO LOCO, INC.,	§	
	§	
Defendant.	§	
	§	
	§	

**DEFENDANT’S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW
OR, IN THE ALTERNATIVE, FOR A NEW TRIAL**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, Defendant El Pollo Loco, Inc. ("EPL-USA") renews the motion that it previously made at the close of El Pollo Loco Mexico’s case for judgment as a matter of law in this action. This renewed motion is timely in that it is being filed no later than 10 days from the entry of judgment in this action. In particular, EPL-USA seeks a judgment that Plaintiff El Pollo Loco S.A. de C.V. ("EPL-Mexico") take nothing on all claims asserted in this action. In the alternative, EPL-USA moves for a new trial in this action and would show this Court as follows.

**I.
PRELIMINARY STATEMENT**

EPL-Mexico asserted various causes of action against EPL-USA, based on EPL-USA's alleged breach of the 1996 Intellectual Property Agreement ("1996 Agreement"), including breach of contract, dolus (or fraudulent inducement), and illicit acts. EPL-Mexico also sued for moral damages which the Court, over objection, submitted as a separate cause of action. However, EPL-Mexico failed to provide legally sufficient evidence to support these claims,

while EPL-Mexico's other claims are precluded by well recognized legal principles. As a result, judgment as a matter of law should be entered in EPL-USA's favor on all of the EPL-Mexico's claims.

II.
APPLICABLE LEGAL STANDARD

Judgment as a matter of law is appropriate when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue."¹ There is no legally sufficient evidentiary basis when "the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict."²

III.
JUDGMENT SHOULD BE ENTERED IN FAVOR OF EPL-USA ON THE BREACH OF CONTRACT CLAIM BECAUSE IT IS BARRED BY THE STATUTE OF LIMITATIONS

The Court held that the Texas four-year statute of limitations applied to EPL-Mexico's breach of contract claims.³ In response to Special Interrogatory No. 2, the jury found that EPL-Mexico first knew – or should have known – of EPL-USA's breach of the 1996 Agreement by November 29, 1997.⁴ Thus, unless accrual of the cause of action were deferred, or if EPL-USA were estopped from raising the statute of limitations defense, EPL-Mexico's breach of contract claim would be time barred no later than November 30, 2001. EPL-Mexico finally filed suit on March 31, 2004, over 6 years after the statute began to run on its breach of contract claim.⁵

¹ Fed. R. Civ. P. 50(a).

² *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 219 (5th Cir. 2001).

³ See Court's January 23, 2007 Memorandum Opinion and Order, p. 24 [Docket Entry No. 118]; see also Court Order Determining Mexican Law, ¶XX [Docket Entry No. 66].

⁴ Jury Interrogatories, p. 3 [Docket Entry No. 157].

⁵ Order Determining Mexican Law, ¶XX [Docket Entry No. 66]; see *Enterprise-Laredo Associates et al v. Hachar's*, 839 S.W.2d 822, 837 (Tex. App.—San Antonio 1992, writ denied)

A. **EPL-Mexico waived an equitable estoppel avoidance to EPL-USA's Statute of Limitations defense.**

In response to Special Interrogatory No. 3, on Plaintiff's equitable estoppel⁶ defense, which was submitted over EPL-USA's objections discussed below, the jury found that EPL-USA had misrepresented material facts to EPL-Mexico through a deceitful promise to perform to induce EPL-Mexico to postpone filing suit and that the misrepresented material facts would be important to a reasonable person in deciding whether or not to file suit.⁷

The Federal Rules of Civil Procedure provide the manner and time in which defenses are raised and when waiver occurs.⁸ According to Federal Rule of Civil Procedure 8(c), "a party shall set forth affirmatively . . . estoppel . . . and any other matter constituting an avoidance or affirmative defense."⁹ All affirmative defenses must be specifically pled or be deemed waived.¹⁰ A question submitted to the jury must have a basis in the party's pleadings. Fed. R. Civ. P. 49(a). (The court may require a jury to return only a special verdict and in that event the submission to the jury must be based on special findings which might properly be made under the pleadings and evidence.)

(recognizing that in a breach of contract action, limitations begin to run from the time of the breach, or from the time the EPL-Mexico knew or should have known of the breach, whichever is the later); *see also Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 567 (Tex. 2001) (determining when a cause of action accrues is a question of law, not of fact); *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996) (recognizing that absent special circumstances, a cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury or the extent of actual damage is not discovered until later).

⁶ At trial, EPL-Mexico abandoned its fraudulent concealment defense and submitted an interrogatory only on the equitable estoppel defense.

⁷ Jury Interrogatories, p. 4 [Docket Entry No. 157].

⁸ *See Funding Systems Leasing Corp. v. Pugh*, 530 F.2d 91, 95 (5th Cir. 1976).

⁹ Fed. R. Civ. P. 8(c).

¹⁰ *Morgan Guaranty Trust Co. v. Blum*, 649 F.2d 342, 345 (5th Cir. 1981); *Phillips v. Phillips*, 820 S.W.2d 785, 789 (Tex. 1991).

Therefore, because of EPL-Mexico's failure to have pled it, Special Interrogatory No. 3 should never have been submitted to the jury and its answer thereto should be disregarded.¹¹

B. Even if equitable estoppel had not been waived, EPL-Mexico was barred from asserting it because (1) the claim of equitable estoppel is determined by Mexican law and (2) Mexican law does not recognize equitable estoppel as a defense to the running of the statute of limitations.

The existence and elements of any avoidance or affirmative defense are a matter of substantive law.¹² It is undisputed that the substantive law of Mexico applies to this case.¹³ Under Mexican law, equitable estoppel does not exist as an avoidance defense to a statute of limitations claim.¹⁴ Therefore, the jury's answer to Special Interrogatory No. 3 should be disregarded.

C. Even if Texas law were applicable, there is no evidence of a representation that would constitute equitable estoppel.

Apparently acknowledging that Mexican law does not recognize "equitable estoppel" as an avoidance defense to statute of limitations, EPL-Mexico asked the Court to submit an equitable estoppel question and instruction under Texas law, to which EPL-USA objected.¹⁵

¹¹ *Id.*

¹² *See Arismendez v. Nightingale Home Health Care, Inc.*, No. 06-40593, 2007 U.S. App. LEXIS 17509 at *17 (5th Cir., July 23, 2007) (stating that an affirmative defense or avoidance is a matter of substantive law that must be pleaded under F.R.C.P. 8(c) or it is waived); *see also Lucas v. U.S.*, 807 F.2d 414, 417 (5th Cir. 1986) (recognizing that whether something constitutes an affirmative defense is determined by looking at the substantive law that governs the case); *McGowne v. Challenge-Cook Bros. Inc.*, 672 F.2d 652, 663 (8th Cir. 1982).

¹³ *See* Court's January 23, 2007 Memorandum Opinion and Order, p. 10 [Docket Entry No. 118].

¹⁴ *See* Cesar De la Garza's Seventh Supplemental Declaration, ¶¶ 6-7, attached to EPL-USA's Objection to EPL-Mexico's Proposed Jury Instruction [Docket Entry No. 128] as Exhibit B. As noted above, because EPL-Mexico abandoned or waived the fraudulent concealment defense, this motion addresses the equitable estoppel defense only. However, EPL-USA's objections asserted in its original Motion for Judgment as a Matter of Law are incorporated herein by reference to the extent necessary. *See* Docket Entry No. 146.

¹⁵ *See* EPL-USA's Objections to Jury Charge, 2:25 – 3:17, a copy of the transcript is attached hereto as Exhibit A.

Under Texas law, a defendant may be estopped from raising the statute of limitations defense if he: (1) makes a knowingly false representation of material facts, (2) intending to induce the plaintiff to delay filing suit, (3) to a plaintiff without knowledge, or the means of obtaining knowledge of the truth, and (4) the plaintiff detrimentally relies upon the misrepresentation by not filing suit.¹⁶ Also, the plaintiff's reliance on defendant's statements must be reasonable, and it has a duty to exercise reasonable care and diligence to discover the truth.¹⁷ The misrepresentation claimed to be the basis for estoppel must also be clear and unequivocal.¹⁸ Assurances that are too indefinite will not suffice as grounds for an estoppel defense.¹⁹

Juan Francisco "Pancho" Ochoa testified that, in 1998, Marcelino Contreras ("Mr. Contreras") told him that he was "going to be the one developing the stores in Mexico" and that that was something EPL-Mexico was "very joyous about."²⁰ This testimony was the complete extent of the evidence EPL-Mexico offered in support of its equitable estoppel defense. It is insufficient as a matter of law to constitute equitable estoppel.

Mr. Contreras' alleged statement and Pancho Ochoa's joyful reaction to it are no evidence of a deceitful promise that induced EPL-Mexico to postpone filing suit.²¹ EPL-Mexico, which bore the burden of pleading and proving this avoidance defense, provided no evidence that EPL-

¹⁶ *Advent Trust Co. v. Hyder*, 12 S.W.3d 534, 541 (Tex. App.-San Antonio 1999, pet. denied).

¹⁷ *Id.* (citing *Arabian Shield Dev. Co. v. Hunt*, 808 S.W.2d 577, 584 (Tex. App.-Dallas 1991, writ denied); *Livesay v. First Christian Church*, 482 S.W.2d 403, 405 (Tex. App.-Beaumont 1972, no writ).

¹⁸ *Livesay*, 482 S.W.2d at 405.

¹⁹ *Gilmartin v. KVTU-Channel 13*, 985 S.W.2d 553, 559 (Tex. App.-San Antonio 1998, no pet.).

²⁰ See Mr. Juan Francisco "Pancho" Ochoa trial testimony, 37:10-15, a copy of Mr. Francisco Ochoa trial testimony is attached hereto as Exhibit B.

²¹ Jury Interrogatories, No. 3 [Docket Entry No. 157].

Mexico was intending to file suit in 1998 or that it was induced by Mr. Contreras to postpone filing a lawsuit for six years. There was no evidence of a promise of a timetable for new stores or the number of stores that would be built. Certainly, there was no evidence of any promise pertaining to the Mexican franchisees. There was no evidence that Mr. Contreras was employed by EPL-USA in any capacity – even as an independent consultant – when he allegedly made the statement. There was no evidence that Mr. Contreras made the alleged statement falsely or with the intent to induce EPL-Mexico not to file a lawsuit. There was no evidence that it would have been reasonable for EPL-Mexico to have relied on the alleged statement in not filing a lawsuit or that EPL-Mexico was without knowledge, or the means of obtaining knowledge of the truth. To the contrary, Pancho Ochoa testified that he saw no action after this alleged conversation²² and both Pancho and Jose Ochoa had prior and ongoing discussions with the Mexican Franchisees, including those who were relatives (uncle, cousin, brother, and sister), continued to sell them marinade, paper supplies, and uniforms through 2005²³, and thereby had immediate, actual, and ongoing knowledge that Mr. Contreras was not "developing" Mexico.²⁴

Pancho Ochoa's limited testimony that he felt "joy" at hearing that Mr. Contreras was "going to be the one developing stores in Mexico" does not constitute evidence of a promise made by EPL-USA, nor of a decision by EPL-Mexico to delay filing suit. The statement, "I am going to be the one developing Mexico" does not mean, "EPL-USA promises to comply with the 1996 Agreement, develop Mexico, and support the Mexican franchisees." The subjective feeling of "joy" is not the same as a "decision to postpone filing this suit." Furthermore, no rational

²² See Juan Francisco Ochoa trial testimony, 38:3-5.

²³ See Jose Ochoa trial testimony, 46:2-23, a copy of the transcript is attached hereto as Exhibit C.

²⁴ See Juan Francisco (Pancho) Ochoa trial testimony, 71:2-6; 82:1-11 (stating that he went to Guadalajara and saw the store was closed in 1998 and continued to call on his brother Jorge); *see also* Jose Ochoa trial testimony, 46:2-23.

inference can be drawn from this testimony that a reasonable person would be entitled to rely upon the mere alleged statement of Mr. Contreras as the basis for not filing suit for almost six years.

Therefore, there is a total lack of evidence to support the jury's answer to interrogatory No. 3 and it should be disregarded.²⁵

IV.
THE STATUTE OF LIMITATIONS BARS EPL-MEXICO'S CLAIMS FOR ILLICIT ACTS AND MORAL DAMAGES

Jose Ochoa testified that he was aware of the damages to EPL-Mexico through the growth of El Pollo Feliz around 1998.²⁶ Pancho Ochoa testified that he was aware that the Guadalajara franchisee had closed down in 1998.²⁷ Because EPL-Mexico's claims were all based on conduct that allegedly caused damages that were known at the latest by 1998, EPL-Mexico's claim for illicit acts and moral damages are barred by the applicable statute of limitations.²⁸ Therefore, the jury's answers to Special Interrogatories Nos. 5 and 9 which were (1) improperly worded, (2) submitted over objection, and (3) completely speculative and unsupported by the evidence, should be disregarded.

V.
THERE WAS NO EVIDENCE TO SUPPORT THE JURY'S ANSWER TO SPECIAL INTERROGATORY NO. 1(a) OF \$1,087,500 IN DAMAGES FROM A BREACH OF CONTRACT

²⁵ See *Gilmartin*, 985 S.W.2d at 559 (dismissing plaintiff's estoppel claim because his "pleadings do not indicate any promises or assurances specific or definite enough upon which reliance can be reasonably made").

²⁶ Jose Ochoa trial testimony 25:18 – 26:3.

²⁷ Pancho Ochoa trial testimony 82:6-8.

²⁸ See Court's Order Determining Mexican Law ¶¶ XX [Docket Entry No. 66]; Von Wobeser Declaration ¶¶ 55, attached to Plaintiff's Brief on Mexican Law [Docket Entry No. 29] as Exhibit B.; Jury Interrogatories, p. 2 [Docket Entry No. 157].

There was no evidence to support the jury's finding of \$1,087,500 as damages for the loss or decrease of the Mexican trademark in response to Special Interrogatory No. 1(a). As discussed below, the only evidence was that the trademark increased in value from \$1 million in 1996 to \$3.2 million in 2006. The only evidence to which the \$1,087,500 found by the jury relates is the cure and buyout provisions of § 12 (b) and § 11(c) of the 1996 Agreement which are not damages, as defined by the Court's instruction to the jury. Therefore, the jury's answer to Special Interrogatory No. 1(a) should be disregarded.

VI.

THERE WAS NO EVIDENCE TO SUPPORT THE JURY'S ANSWER TO SPECIAL INTERROGATORY NO. 4, THAT EPL-USA COMMITTED AN ILLICIT ACT²⁹

To maintain a tort for “civil responsibility” or “illicit acts,” the plaintiff must prove the following elements: 1) illicit behavior by the defendant; 2) the existence of damages and losses suffered by the plaintiff; and 3) that the illicit behavior was the sole, direct, immediate and necessary cause of the damages and losses, *i.e.*, that there is a causal relationship between defendant’s illicit behavior and plaintiff’s damages and losses.³⁰

EPL-Mexico claims that prior to the execution of the 1996 Agreement, Ray Perry failed to disclose to EPL-Mexico that EPL-USA would not be building new stores for the first four or five years of the 10-year agreement and would not "take over" the existing Mexican franchisees.³¹ Even if Mr. Perry's alleged misrepresentations could have been an illicit act under Mexican law, there was no evidence that it was the sole, direct, immediate and necessary cause of any damages. The lack of causation evidence requires that the jury's "yes" answer to Special Interrogatory No. 4 be disregarded.

²⁹ See EPL-USA's Objections to Jury Charge, 3:18 – 4:12.

³⁰ See Courts' Determination of Mexican Law, ¶ XV (citing C.C.F., Art. 1910) [Docket Entry No. 66].

³¹ Jose Ochoa trial testimony 18:23 – 19:8.

The gist of EPL-Mexico's illicit act damages claims is that the "abandonment" of the Mexican franchisees by EPL-USA caused them to go out of business or do poorly, which thereby caused the business of El Pollo Feliz, a competitor, to increase and thereby caused damages to EPL-Mexico. There was a complete lack of evidence to support this claim. Instead, the sole basis for this conclusion was Jose Ochoa's testimony, over objection, that the closure of one El Pollo Loco restaurant in Guadalajara and one in Mexicali, and the switch of an El Pollo Loco to a Pollo Feliz in Mexicali, had "extremely affected" EPL-Mexico's image and damaged EPL-Mexico's reputation by allowing El Pollo Feliz to flourish in Mexico and become the number one grilled chicken restaurant chain in Mexico.³²

First, this testimony was sheer speculation and did not constitute evidence that EPL-USA – much less Ray Perry's alleged illicit act of misrepresentation caused: (1) the franchise in Guadalajara to close, (2) one franchise in Mexicali to close, and (3) another franchise in Mexicali to change to a Pollo Feliz restaurant, which in turn caused El Pollo Feliz's business to grow and which then caused damages to EPL-Mexico. Not a single bit of evidence – either through witnesses or documents – linked the closing of one franchise in Guadalajara and one franchise in Mexicali, and the switch of one El Pollo Loco restaurant to a Pollo Feliz in Mexicali, to any conduct by EPL-USA. Neither Jose Luna (the Mexicali franchisee) nor the Guadalajara franchisee, nor anybody, testified that it was forced to close its operations because of anything EPL-USA did or failed to do. No one testified as to why Mr. Luna changed one of his stores to a Pollo Feliz.

Obviously, many factors could have caused the stores in Mexicali and Guadalajara to close or change franchises: the economy, retirement of the operators, bad management, loss of

³² See Jose Ochoa trial testimony, 27:2-6; 29:21-23; 32:7 – 33:1; 34:3-13.

lease, loss of bank financing, disputes with the Ochoa family, or a better offer from Pollo Feliz. The point is that no one who knows why those events occurred testified and certainly no evidence was presented to the jury from which it could reasonably have concluded that the events resulted from EPL-USA's conduct. The lack of any evidence linking those events to EPL-USA precluded a jury attributing causation to EPL-USA

Second, there is no evidence that the closures of El Pollo Loco restaurants in Mexicali,³³ and Guadalajara,³⁴ and the switch³⁵ in Mexicali had anything to do with the growth of El Pollo Feliz. Mr. Ochoa admitted that he knew nothing about El Pollo Feliz' resources, infrastructure, or operations.³⁶ There are dozens of possible reasons³⁶ for El Pollo Feliz's growth, but the true reasons remain unknown as far as the record of this trial is concerned. Therefore, Mr. Ochoa's inference linking El Pollo Feliz' success to the inference that abandonment of the Mexican franchisees by EPL-USA caused two stores to close and one to switch, was not evidence upon which the jury could have relied in finding causation.³⁷

Finally, the record is devoid of any evidence that the growth of El Pollo Feliz caused damages to EPL-Mexico. No one testified that the trademark was in any way damaged by the alleged increased competition and number of Pollo Feliz stores.

The jury, like Mr. Jose Ochoa, simply guessed that the Guadalajara and Mexicali El Pollo Loco closures and the switch in Mexicali from El Pollo Loco to Pollo Feliz was caused by EPL-USA's actions, and then further guessed that those events allowed Pollo Feliz stores to better

³³ See Jose Ochoa trial testimony, 30:9-15.

³⁴ *Id.* at 29:21-23.

³⁵ *Id.* at 30:9-18.

³⁶ *Id.* at 60: 5-7; 61:2-5.

³⁷ See *Reardon v. Lightpath Tech., Inc.*, 183 S.W.3d 429, 439-440 (Tex. App. – Houston [14th Dist.] 2005, pet. denied) (recognizing that testimony that "piles speculation upon speculation" is not permitted).

compete, and then further guessed that this competition caused damages to EPL-Mexico. Therefore, it was sheer conjecture for the jury to find that the allegedly illicit actions of EPL-USA were the sole, direct, immediate and necessary cause of EPL-Mexico's alleged damages and its answer to Special Interrogatory No. 4 should be disregarded.³⁸

VII.

THERE WAS NO EVIDENCE TO SUPPORT THE JURY'S ANSWER TO SPECIAL INTERROGATORY NO. 4(a) OF \$10,125,500 IN DAMAGES FROM ILLICIT ACTS

The jury was instructed that the damages to be considered in answering Special Interrogatory No. 4(a) were "the loss or decrease of assets suffered as a result of the failure, if any, to comply with the 1996 Agreement."³⁹ The trial record is devoid of any evidence that the trademarks lost or decreased in value at all – much less that they decreased in the amount of \$10,125,500. Therefore, the jury's answer to Special Interrogatory No. 4(a) should be disregarded.⁴⁰

In addition, the jury's answer to Special Interrogatory No. 4(a) irreconcilably conflicts with the jury's answers to Special Interrogatories Nos. 1(a) and 6(a). Special Interrogatories Nos. 1(a), 4(a) and 6(a), were all based on the exact same measure of damages, specifically "the loss or decrease of assets suffered as a result of the failure, if any, to comply with the 1996 Agreement."⁴¹ Not only is the measure of damages for breach of contract, illicit acts and dolus the same in this case, all causes of action were based on identical facts: Ray Perry's alleged representation that "El Pollo Loco U.S.A. was going to develop the 25 stores and also take over

³⁸ *Id.*

³⁹ See Jury Interrogatories, No. 4a [Docket Entry No. 157].

⁴⁰ See *Taylor Publishing Company v. Jostens, Inc.*, 216 F.3d 465, 485 (5th Cir. 2000); *Hollywood Fantasy Corporation v. Zsa Zsa Gabor*, 151 F.3d 203, 213 (5th Cir. 1998) (recognizing that "mere speculation" of lost profits constitutes no evidence).

⁴¹ See Jury Interrogatories, No. 1(a), 4(a) and 6(a) [Docket Entry No. 157].

the franchisees so that they could improve them or decide who was going to stay."⁴² The jury found three completely different amounts in response to these Special Interrogatories: \$1,087,500 to No. 1(a); \$10,125,500 to No. 4(a); and zero to No. 6(a). It is clear that the jury's answers were not based on evidence or it would not have awarded three different amounts to multiple questions of the same measure of damages. Therefore, the inconsistent answers to all three interrogatories require that the jury's answer to Special Interrogatory No. 4(a) be disregarded.⁴³

VIII.
THERE WAS NO EVIDENCE TO SUPPORT THE JURY'S ANSWER TO SPECIAL INTERROGATORY NO. 8 OF MORAL DAMAGES TO EPL-MEXICO RESULTING FROM EPL-USA'S CONDUCT

There was no evidence that any actions of EPL-USA caused any harm to EPL-Mexico's decorum, honor, reputation, image or public perception in the opinion of others.

Renowned Mexican law expert, Jorge A. Vargas, whose law review article was quoted by the Court in its January 23, 2007 Order, notes:

[W]hen an illicit act or omission produces moral damage, the responsible person is obliged to repair it through a monetary indemnification, independently of the material damage that may have been caused, whether in contractual or extra-contractual liability. Pursuant to Article 1916-Bis [of the Civil Code for the Federal District] when a complaint is filed for the reparation of a moral damage resulting from contractual or extra-contractual liability, the illicit act of the defendant and the damage which directly resulted from said act must be fully proved.⁴⁴

⁴² See Jose Ochoa trial testimony, 18:5-11.

⁴³ *R.B. Co. v. Aetna Ins. Co.*, 299 F.2d 753, 760 (ordering a retrial based on conflicting jury answers that could not be reasonably reconciled).

⁴⁴ See Jorge A. Vargas, *Moral Damages Under the Civil Law of Mexico. Are these Damages Equivalent to U.S. Punitive Damages?*, 35 U. Miami Inter. – Am. L. Rev. 183, 248 (2004), attached to EPL-USA's Trial Brief [Docket Entry No. 142], as Exhibit F.

Thus, while the amount of moral damage may be left to the discretion of the trier of fact, the fact of moral damages must still be proven as being directly caused by EPL-USA's illicit act.⁴⁵

The Court overruled EPL-USA's objection and request that the jury be instructed in accordance with this statement of the law. However, Special Interrogatory No. 8, submitted by the Court, at the very least required EPL-Mexico to prove that the moral damages "resulted" from EPL-USA's conduct and as established through the opinion of others.

A "yes" answer to Special Interrogatory No. 8, therefore, required the jury to find evidence, through the opinion of others, that the Guadalajara franchisee closed, one Mexicali franchisee closed and one became an El Pollo Feliz, because they were "abandoned" by EPL-USA, that those two closures and one switch caused El Pollo Feliz to become the number one grilled chicken restaurant in Mexico and that El Pollo Feliz's growth and competition resulted in damages to EPL-Mexico. There was no evidence to support a "yes" answer to Special Interrogatory No. 8.

In this case, EPL-Mexico presented no evidence that other people's opinion of EPL-Mexico had decreased at all, much less that there was a decrease resulting from the conduct of EPL-USA as opposed to any other reason. Instead, Jose Ochoa testified, over objection, that the closures of El Pollo Loco restaurants in Guadalajara and Mexicali and the switch of an El Pollo Loco to a Pollo Feliz in Mexicali had "extremely affected" EPL-Mexico's image and damaged EPL-Mexico's reputation by allowing El Pollo Feliz to flourish in Mexico and become the number one grilled chicken restaurant chain in Mexico.⁴⁶

⁴⁵ See Court's January 23, 2007 Memorandum Order and Opinion, p. 38 [Docket Entry No. 118].

⁴⁶ See Jose Ochoa trial testimony, 27:2-6, 29:21-23, 32:7 – 33:1, 34:3-13, 42:12-15.

As pointed out in greater detail previously in Section VI. above, this testimony was no evidence that EPL-USA caused any of the events described by Jose Ochoa **or** that those events had anything to do with the alleged success and growth of El Pollo Feliz. No one testified that Mexican franchisees were forced to shut their operations because of anything EPL-USA did or failed to do. No one testified why an El Pollo Loco store became a Pollo Feliz store. The Ochoas could not testify that these events resulted from EPL-USA's conduct because they had no personal knowledge of the events and would be simply guessing.

Since no evidence was presented to the jury from which it could reasonably have concluded that EPL-USA's conduct resulted in damages, the jury, like Mr. Ochoa, could only guess that there was a causal connection. Therefore, there was no evidence for the jury's "yes" answer to Special Interrogatory No. 8, and it must be disregarded.

IX.
THERE WAS NO EVIDENCE TO SUPPORT THE JURY'S ANSWER TO SPECIAL INTERROGATORY NO. 8(a) OF \$10,125,500 AS MORAL DAMAGES

There was also no evidence to support the jury's award of \$10,125,500 in moral damages.

Special Interrogatory No. 8(a) asked the jury "what sum of money, if any, paid now in cash, would fairly and reasonably compensate Pollo Loco Mexico for the damages caused to its decorum, honor, reputation, image or public perception in the opinion of others?"

EPL-Mexico's only designated expert witness on amount of damages, Dr. Safir, testified solely to damages allegedly caused by EPL-USA's breach of the 1996 Agreement and to the El Pollo Loco trademark. His opinions had nothing to do with any alleged damages to EPL-Mexico's image, honor, reputation or public perception. Therefore, his testimony and opinions

could not have properly been considered by the jury as evidence on this issue.⁴⁷ Therefore, the only testimony that could possibly relate to moral damages came from Mr. Jose Ochoa, over EPL-USA's timely objection.⁴⁸

Jose Ochoa, who was never identified as an expert on any issue in this case, opined that to compete with El Pollo Feliz and "take back" the plazas and cities where El Pollo Feliz was ahead would require spending millions of dollars, investing "a whole lot" in advertising and giving away product.⁴⁹ This is not evidence of an amount of damages much less damage to reputation, image or public perception, but merely speculation on how Mr. Ochoa felt he would need to deal with a competitor in the chicken fast food business. Nor was Mr. Ochoa's testimony specific with respect to the amount of money that would have to be spent, whether the money would have to be spent outside the Ochoa Territory or in the Ochoa Territory (where EPL-USA never had obligations or responsibility), or how the money he felt needed to be spent compared with what he would routinely spend on advertising and product promotions.

Mr. Jose Ochoa testified that he felt very sad to see that an El Pollo Feliz store took over one Pollo Loco store in Mexicali and that he was ashamed to write his company name when he registered at hotels.⁵⁰ Presumably this testimony was elicited in connection with EPL-Mexico's

⁴⁷ For the reasons discussed below, moreover, Dr. Safir's valuation of the trademark outside the Ochoa territory was completely irrelevant to the proper measure of damages and must be disregarded in its entirety. *See* Section X.

⁴⁸ *See Vadie v. Mississippi State University*, 218 F.3d 365, 378 (5th Cir. 2000) (vacating the jury's award of \$350,000 for "emotional pain, suffering or mental anguish" and remanding the case for a new trial after determining that based on the evidence, which consisted solely of Plaintiff's own testimony, an award of greater than \$10,000 would be excessive); *see also Salinas v. O'Neill*, 286 F.3d 827, 833 (5th Cir. 2002) (reducing the jury's damage award from \$300,000 to \$150,00 after finding the award was "clearly excessive" based on the evidence presented).

⁴⁹ *See* Jose Ochoa trial testimony, 35:2-10.

⁵⁰ *See* Jose Ochoa trial testimony, 32:25-33:1; 34:24-35:2.

claims for moral damages. However, this testimony no more supports the jury's answer to Special Interrogatory No. 8(a) than the evidence of advertising necessary to compete with El Pollo Feliz. The subjective feelings of one principal of EPL-Mexico as to how he felt does not meet the burden of proof required to answer the question put to the jury, not the least of which is the requirement of evidence of the opinion of others regarding damage to the reputation, image and public perception of EPL-Mexico. Thus, the jury's response of \$10,125,500 in response to Special Interrogatory No. 8(a) was not supported by any evidence in this case and should be disregarded.

Additionally, although the jury was instructed that the measure of damages for Special Interrogatories Nos. 8(a) and 4(a) were different, it awarded the identical amount, \$10,125,500, in response to both interrogatories.

There was no evidence to support either type or method of damages. The jury's finding of the same amount in response to both questions demonstrates that it did not follow the Court's instruction in this regard. Therefore, the jury's answer to Special Interrogatory No. 8(a) should be disregarded.

X.
THERE WAS NO EVIDENCE OF DAMAGES TO EPL-MEXICO'S PROPERTY
WHICH WAS NECESSARY FOR SPECIAL INTERROGATORIES NOS. 1, 1(a), 4, 4(a),
8 AND 8(a)

El Pollo Loco Mexico sold, assigned, and transferred the Mexican trademarks to EPL-USA in the 1996 Agreement.⁵¹ This fact was admitted by EPL-Mexico in the First Amended Joint Pretrial Order, in discovery, and at trial.⁵² After the assignment, EPL-Mexico was merely a licensee of the owner of the trademark, EPL-USA, and had an exclusive license to use EPL-

⁵¹ See 1996 Agreement, Schedule C.

⁵² See Pancho Ochoa trial testimony, 64:20, 65:5.

USA's trademark within the Ochoa Territory.⁵³ Since EPL-Mexico sold, assigned, and transferred the trademark outside the Ochoa Territory to EPL-USA, damages to the trademark outside the Ochoa Territory could not be recovered by EPL-Mexico because the trademark outside the Ochoa Territory was not EPL-Mexico's property. EPL-Mexico failed to produce any evidence as to what the damage was to the EPL brand within the Ochoa territory, either in 1996 or at any time afterwards, or of damages to its property, or to its license, or to its rights to use the trademark within the Ochoa territory. Instead, the only damages analysis EPL-Mexico presented, through its expert Dr. Safir, was what the value of the trademark was or should have been outside the Ochoa Territory. This analysis was based on the erroneous assumptions that the Mexican franchisees had not been sold, assigned, and transferred to EPL-USA, belonged to EPL-Mexico, and that the value of their revenue stream would have benefited EPL-Mexico. Specifically, Safir evaluated what the trademarks would have been worth outside the Ochoa Territory if EPL-USA had (1) "supported" the Mexican franchisees in some unspecified manner not required by the franchise agreements, and (2) built twenty-five stores – neither of which EPL-USA was obligated to do.

In addition, Dr. Safir calculated damages based on the assumption that, had EPL-USA performed its obligations under the 1996 Agreement, the value of the trademarks outside the Ochoa Territory would increase to approximately \$30 million. Putting aside for a moment the sheer speculation behind his calculations, Dr. Safir ignored the basic flaw of his damages model – that there is some scenario by which EPL-USA would perform its obligations under the 1996 Agreement (resulting in an enormous increase in value to the trademarks) AND EPL-Mexico would end up with ownership of the trademarks and benefit of the increased value. It goes

⁵³ See 1996 Agreement at 11(c).

without saying that if EPL-USA or any other contracting party, performed as agreed, EPL-Mexico would have no basis for terminating the Agreement and getting the marks back and EPL-USA's property would remain EPL-USA's property. Thus, EPL-Mexico could never have any expectation of receiving a benefit of multiple millions of dollars since that benefit would always belong to the assignee, EPL-USA.

Under Mexican law, the measure of damages is to compensate the injured party for the damage caused to its property. Therefore, the only damages that EPL-Mexico could have recovered would have been actual damages and/or losses to EPL-Mexico's property, the EPL trademark in the Ochoa Territory, directly and immediately arising from defendant's misconduct. Mexican law would not allow EPL-Mexico to recover damages based on the value of the EPL trademark outside the Ochoa Territory (not EPL-Mexico's property).⁵⁴

No evidence was presented of lost business or damage to EPL-Mexico in the Ochoa Territory, from the failure to "exploit," promote, advertise, train, or otherwise "institutionalize" the existing franchisees. To the contrary, the undisputed evidence was that EPL-Mexico's business in the Ochoa Territory increased with tremendous expansion of sales and stores.⁵⁵ Due to the lack of evidence of any damage to EPL-Mexico's property, the jury's answers to Special Interrogatories Nos. 1, 1(a), 4, 4(a), 8, and 8(a) must be disregarded.

⁵⁴ See Claus Von Wobeser at p. 3 § 4c; § 4d, a copy of which is attached to Plaintiff's Brief on Mexican Law [Docket Entry No. 29] as Exhibit B.

⁵⁵ See Jose Ochoa trial testimony, 23:1-22, 44:1-21.

XI.
THERE WAS NO EVIDENCE TO SUPPORT THE JURY'S ANSWER TO SPECIAL INTERROGATORY NO. 1 FINDING A MATERIAL BREACH OF THE 1996 AGREEMENT

The jury's finding in Special Interrogatory No. 1 that EPL-USA breached the 1996 Agreement was not supported by any evidence and should be disregarded for the following reasons.

The jury was instructed that EPL-Mexico's breach of contract claim was that EPL-USA failed to comply with paragraphs 6(a), (b) **and** (c) of the 1996 Agreement.⁵⁶

Paragraph 6(a) of the 1996 Agreement states that "EPL-USA will undertake to open a minimum of twenty-five (25) new franchised or company-owned stores for operation in Mexico within ten (10) years from the execution date of this Agreement."⁵⁷ As this Court previously determined, "where a contractual obligation is subject to a certain period of time, liability for failure to perform under the contract shall commence upon the expiration of the time specified in the contract."⁵⁸ Therefore, EPL-USA could not have been in breach of § 6(a) until February 22, 2006, when the 1996 Agreement expired. In addition, the 1996 Agreement allowed EPL-USA to cure its failure to open stores by tendering within 90 days after expiration of the 1996 Agreement a \$3,500 per store payment for each of the 25 stores that were not opened.⁵⁹ It is undisputed that EPL-USA actually tendered this amount to Plaintiff and, when rejected, deposited it into the registry of the Court before the 1996 Agreement's 10-year term expired on February 22, 2006.

⁵⁶ See Court's Instructions to the Jury, p. 5 [Docket Entry no. 158].

⁵⁷ See 1996 Agreement, Section 6(a), a copy of which is attached to EPL-USA's Motion for Summary Judgment [Docket Entry No. 86], as Exhibit D.

⁵⁸ See Court's Order Determining Mexican Law , ¶ VI, citing F.C.C. Art. 2104 [Docket Entry No. 66].

⁵⁹ See Section 12(b) of the 1996 Agreement.

Therefore, no evidence supported the jury's finding that EPL-USA breached § 6(a) of the 1996 Agreement.

Since the jury was instructed that Plaintiff's claim of breach was based upon Defendant's failure to comply with § 6(a), § 6 (b), and § 6(c), the lack of evidence to support a finding of any one of these sections entitles EPL-USA to have the entire answer disregarded. Consequently, the lack of evidence to support a finding that § 6(a) was violated requires that the "yes" answer to Special Interrogatory No. 1 be disregarded in its entirety.

Moreover, there is no evidence that EPL-USA failed to comply with § 6(b), which states that “EPL-USA represents and warrants to EPL-Mexico that it presently has the expertise and business contacts necessary to exploit the Intellectual Property in Mexico and covenants and agrees to use its commercially reasonable efforts to do so.” In this case, the vague term "exploit" was never defined in the 1996 Agreement, nor was it ever discussed, negotiated, or even mentioned prior to the 1996 Agreement being signed. Without a definition or understanding by the parties of what this term meant, it cannot be the basis for a breach of contract action.⁶⁰

In denying EPL-USA's motion for summary judgment on this issue, the Court referred to sections of Mexico's Federal Civil Code dealing with contractual ambiguities and held that ambiguous contracts, capable of more than one meaning, can be defined by reference to its literal meaning or by uses and customs.⁶¹ However, neither party has ever argued that the term "exploit" is ambiguous – capable of more than one meaning – but only that it is vague – not clearly expressed so as to enable EPL-USA to know what obligations are imposed on EPL-USA

⁶⁰ See *Bendalin v. Delgado*, 406 S.W.2d 897, 899 (Tex. 1966) (holding that "to be enforceable, a contract must be sufficiently certain to enable the court to determine the legal obligations of the parties thereto"); see also Eighth Supplemental Declaration of Cesar De La Garza, ¶ 11, attached to EPL-USA's Trial Brief [Docket Entry No. 142], as Exhibit D.

⁶¹ See Court's January 23, 2007 Memorandum Order and Opinion, p. 22 [Docket Entry No. 118].

by the term. No legal authority supports EPL-Mexico's argument that it was understood or agreed that the word "exploit" in § 6(b) meant that EPL-USA would develop Mexico in a manner other than as expressly stated in § 6(a), *i.e.*, build 25 new stores in 10 years or pay the cost to cure, or "support" the Mexican franchisees other than as provided in the franchise agreements assigned to EPL-USA – which imposed no such obligations.

Moreover, EPL-Mexico's interpretation of the general term "exploit" in § 6b would contradict the express and specific terms of the 1996 Agreement.⁶² Specifically, the 1996 Agreement expressly gave EPL-USA the option to either open 25 stores at any time during its 10-year term or to pay \$3,500 for each unopened store.⁶³ The 1996 Agreement also gave EPL-USA the unconditional option to terminate all obligations by exercising a \$1 million dollar buy-out clause at any time within the 10-year period.⁶⁴ These specific provisions gave EPL-USA the sole discretion and control over the timing and amount, if any, of development in Mexico.

EPL-Mexico provided no authority that would allow general vague "boilerplate" terms to contradict clearly specified contractual requirements. To the contrary, under Mexican law, vague, general contractual provisions are typically regarded as ancillary in nature and do not impose any separate or independent obligations upon the obligor that would support a breach of contract action.⁶⁵

Furthermore, ancillary obligations also may not be interpreted in a way that contradicts the main obligation; they are to be supportive, not contrary to the main obligation.⁶⁶ An

⁶² See Juan Francisco "Pancho" Ochoa trial testimony, 30:24 – 31:13; 84:14-24.

⁶³ See 1996 Agreement § 6(a) and 12(b), a copy of which is attached to Defendant's Motion for Summary Judgment [Docket Entry No. 86] as Exhibit D.

⁶⁴ See 1996 Agreement § 11(c).

⁶⁵ See Cesar De la Garza's Eighth Supplemental Declaration, ¶ 11, a copy of which is attached to Defendant's Trial Brief [Docket Entry No. 142 as Exhibit D.

⁶⁶ *Id.*, ¶ 12.

interpretation that attempts to contradict the main obligation with ancillary obligations is improper and should not be given any legal effect.⁶⁷ This concept is the same under Texas law.⁶⁸

When a contractual provision is so vague, that it becomes impossible to determine what the parties intended, that obligation is null and cannot be enforced.⁶⁹ The Texas Supreme Court has also long recognized the concept that a contract must specify with certainty the obligations sought to be enforced thereunder:

A court cannot enforce a contract unless it can determine what it is. It is not enough that the parties think that they have made a contract; they must have expressed their intentions in a manner that is capable of understanding. Thus, to be enforceable, a contract must be sufficiently certain to enable the court to determine the legal obligations of the parties thereto.⁷⁰

Accordingly, EPL-USA is entitled to judgment as a matter of law on EPL-Mexico's breach of contract claim because the term "exploit" is too vague to be enforced.

In addition, there was no evidence that either Section 6(b) or the term "exploit" was material. "The jury was instructed that a 'material breach' is a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract."

⁶⁷ *Id.*

⁶⁸ See *Millgard Corp v. McKee/Mays*, 49 F.3d 1070, 1073 (5th Cir. 1995) (recognizing that it is a fundamental axiom of contract interpretation that "when two provisions of a contract conflict, the specific trumps the general"); *Dewitt County Elec. Coop., Inc. v. Parks*, 1 S.W.3d 96, 102 (Tex. 1999); see also *Baton Rouge Oil & Chem. Workers Union v. Exxonmobil Corp.*, 289 F.3d 373, 377 (5th Cir. 2002) (citing the RESTATEMENT (SECOND) OF CONTRACTS § 203(c) for the principle that "specific provisions control general provisions").

⁶⁹ See Sixth Supplemental Declaration of Cesar De La Garza, ¶¶ 6-7, a copy of which is attached to EPL-USA's Motion for Summary Judgment as Exhibit J [Docket Entry. No. 86-12].

⁷⁰ *Bendalin v. Delgado*, 406 S.W.2d 897, 899 (Tex. 1966) (internal citations omitted); see also *In re: United States Brass Corp.*, 277 B.R. 326 (E.D. Tex. 2002); *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992) (holding that an alleged contract failed for indefiniteness due to the lack of evidence to show the "interest rate of the alleged loan or the repayment terms").

Pancho Ochoa and Jose Ochoa both testified that there were no discussions concerning either of these provisions.⁷¹ Bob Higgins testified that they were merely boilerplate inserted by the lawyers.⁷² Matt McGuinness, who took over the contract negotiations after Ray Perry left, testified that exploit was not a word he ever used.⁷³ No witness has testified that the word "exploit" was important or material. Accordingly, the total lack of any evidence regarding the materiality of § 6b entitles EPL-USA to judgment on EPL-Mexico's breach of contract claim.

Finally, there is also no evidence that § 6(c) of the 1996 Agreement was breached. Section 6(c) required EPL-USA to "take commercially reasonable efforts to maintain and enforce its rights under the intellectual property so that it loses none of its current value in the marketplace."⁷⁴ To find a breach of § 6(c), therefore, the jury had to find that the current value [in 1996] of the trademark was higher in [1996] than in 2006 and that, therefore, the trademark had lost its then current 1996 value in the marketplace. EPL-Mexico presented absolutely no evidence of what the value of the trademark was in 1996. The only evidence regarding the value of the trademark in Mexico in 1996 was that EPL-Mexico agreed that EPL-USA could buy the trademark outright for \$1 million..⁷⁵ EPL-Mexico's expert, Dr. Safir, testified that the same trademark was worth \$3.2 million at the end of 2006. Therefore, the only evidence before the jury was that the trademark increased in value from \$1 million in 1996 to \$3.2 million in 2006.

⁷¹ See Juan Francisco "Pancho" trial testimony, 87:6-19; *see also* Jose Ochoa trial testimony, 51:17-25.

⁷² See Robert Higgins trial testimony by deposition, 75:10 – 76:13, a copy of which is attached hereto as Exhibit D.

⁷³ See Matt McGuinness trial testimony by deposition, 38:2-18, a copy of which is attached hereto as Exhibit E.

⁷⁴ See 1996 Agreement, Section 6(c).

⁷⁵ See 1996 Agreement, Section 11(c).

Accordingly, the jury's answer to Special Interrogatory No. 1 should be disregarded and judgment should be entered in favor of EPL-USA.

XII.
IN THE ALTERNATIVE, EPL-USA MOVES FOR A NEW TRIAL

As more fully explained above and herein, EPL-USA is entitled to a new trial because the Court committed prejudicial errors of law in instructing the jury erroneously on applicable Mexican law and in submitting jury interrogatories not supported by applicable law, and the error was sufficiently serious that it tainted the deliberation process. In addition, the court committed prejudicial error by admitting improper testimony and exhibits. Finally, the jury's answers to certain Special Interrogatories are irreconcilably in conflict.

A. The Court erred in submitting Special Interrogatories Nos. 5 and 9 because, as worded, they were an incorrect statement of Mexican law.

Special Interrogatories Nos. 5 and 9, which followed Special Interrogatories in which the jury found illicit acts and moral damages, asked the jury, "When did the resulting damage cease?" As discussed further below, this language was an incorrect statement of Mexican law.

On November 30, 2005, this Court ordered that "a two year statute of limitations applies to claims for damages and/or losses arising from "illicit acts" or "dolus", i.e. such claims expire two years after the date when the damages and/or losses were caused."⁷⁶ In reliance on the Court's order, and in accordance with its statute of limitations defenses for each of those claims, EPL-USA submitted proposed Special Interrogatories Nos. 4(b), 6(b), and 8(b) on June 25, 2007, which read "When were the resulting damages, if any, first caused?"⁷⁷ The Court circulated a draft of its proposed charge on the third day of trial, July 25, 2007, which included EPL-USA's

⁷⁶ See Court Order Determining Mexican Law, ¶XX [Docket Entry No. 66].

⁷⁷ See Joint Jury Instructions and Charge, Nos. 4b and 8(b) [Docket Entry No. 126].

proposed interrogatories as worded, in connection with each of EPL-Mexico's Mexican causes of action.

At the formal charge conference on the next day, July 26, 2007, however, the Court distributed to the parties a revised charge that substituted the language in Special Interrogatories Nos. 5, 7⁷⁸ and 9 for the language EPL-USA had requested. EPL-USA objected to the submission of all three interrogatories as being an incorrect statement of Mexican law and requested that properly worded jury interrogatories, as previously submitted, be used instead.⁷⁹

EPL-USA's objections were based on the Court's prior ruling, the law cited by the Court in its previous Order, and on the declarations previously submitted by the Mexican law experts for both EPL-Mexico and EPL-USA.⁸⁰ In fact, in its Brief on Mexican Law, submitted to this Court on December 7, 2004, EPL-Mexico argued that "the statute of limitations for these tort actions [dolus, illicit acts and moral damages] is two (2) years from the date of the act causing the damage or loss."⁸¹ In its brief, EPL-Mexico relied on ¶ 55 of the declaration of its expert, Claus Von Wobeser, the same authority EPL-USA relied on at the charge conference.

⁷⁸ As the jury found no damage to the dolus Special Interrogatory No. 6(a) it never answered Special Interrogatory No. 7, which was also incorrectly worded and to which EPL-USA also objected.

⁷⁹ See EPL-USA's Objection to Jury Charge, 4:17 – 5:24, 6:15-22, 7:12-22.

⁸⁰ See Mexican Federal Civil Code, Art. 1934, a copy of which is attached hereto as Exhibit F, (stating that "a cause of action for damages resulting from any acts referred to in this chapter shall be barred after two years from the date that the damage occurred"); Affidavit of EPL-Mexico's expert Claus Von Wobeser ¶ 55, attached to Plaintiff's Brief on Mexican Law [Docket Entry Nos. 26 and 29] as Exhibit B (stating that "under Mexican law, claims for damages and/or losses arising from illicit behavior expire two years after the date when the damage and/or loss was caused. Accordingly, under Mexican law, EPL-Mexico would not be entitled to bring any claims for damages and/or losses occurred more than 2 years before the date when EPL-Mexico filed its Petition); *see also* Mexican Federal Civil Code, Art. 1161V, a copy of which is attached hereto as Exhibit G, which states "the period of limitations [for torts] begins from the day the acts were committed."

⁸¹ See EPL-Mexico's Brief on Mexican Law [Docket Entry Nos. 26 and 29], p.4.

The Court apparently relied on the declaration of EPL-Mexico's other expert, Felipe de Jesus Torres Gonzalez filed on the last business day before trial, July 20, 2007 ("Torres July 20, 2007 Declaration") in changing the special interrogatories to ask the jury to determine when did the damages "cease".⁸² The Court's reliance was misplaced and its submission was erroneous.

The Torres July 20, 2007 Declaration provided no support for the Court's conclusion that, under Mexican law, the statute of limitations for illicit acts and moral damages begins to run when "the resulting damages, if any, cease." Instead, after reaffirming that the statute of limitations for dolus, illicit acts, and moral damages is two years from the date of the act causing the damage or loss, Torres then opines that in construction cases, which have no relevance to this case and in which damages are ongoing, the statute of limitations begins to run when the damages are last caused.⁸³

Nowhere does the Torres July 20, 2007 Declaration state that statute of limitations begins to run when damages "cease," as the jury was instructed. Indeed, as worded, Special Interrogatories Nos. 5 and 9 could allow a jury to find that a claim could never be time barred so long as damages still existed or, even more literally, so long as damages remained unpaid (a debt does not "cease" until it is paid or extinguished). Such a nonsensical result is completely

⁸² A copy of which is attached to EPL-Mexico's Trial Brief [Docket Entry No. 143] as Exhibit 3. The Torres July 20, 2007 Declaration, submitted the Friday before trial began on Monday, violated Federal Rule of Civil Procedure 44.1, which states "a party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice." In this case, the submission of a Declaration on the last business day before trial cannot possibly be considered "reasonable notice." Therefore, the Court should not even have considered the Torres July 20, 2007 Declaration. While the Torres July 20, 2007 Declaration alternatively also argued that a ten year statute of limitation applied, this argument was rejected by the Court months before the trial began.

⁸³ See Torres July 20, 2007 Declaration, ¶ 35 (citing F.C.C. Art. 1934); see also Cesar De La Garza's Ninth Supplemental Declaration, ¶¶ 7-11, a copy of which is attached hereto as Exhibit H.

unsupported by Mexican law. Thus, the Court's error in the submission of Special Interrogatories Nos. 5 and 9 as worded entitles EPL-USA to a new trial.

The language in the special interrogatories requested by EPL-USA was proper because this case did not involve continuing torts or injuries. To the contrary, in this case, all of the causes of action were based on an identical claim: Ray Perry's alleged representation that "El Pollo Loco U.S.A. was going to develop the 25 stores and also take over the franchisees so that they could improve them or decide who was going to stay."⁸⁴ In fact, when EPL-USA's motion for summary judgment was denied, the Court identified this statement as the possible illicit act to be decided by the jury.⁸⁵

According to EPL-Mexico, this statement occurred in 1995/1996 and EPL-Mexico knew that EPL-USA had failed to "develop Mexico" by 1997. At that time, EPL-Mexico's president, Pancho Ochoa, discussed his complaint and the alleged damage with Mr. Contreras and stated the problems he perceived in his November 29, 1997 draft letter to EPL-USA's then-president, Mr. Nelson Marchioli.⁸⁶ In fact, Pancho Ochoa's complaints of "competitors continue to develop" and "continued diluting of El Pollo Loco image/brand" were included in Mr. Contreras' PowerPoint, which was presented to EPL-USA's board of directors in 1998.⁸⁷

Based on the facts of this case, specifically that the wrongful act was a representation made in 1995, even Torres agrees that "the action demanding reparation must be carried out within a term of two years, which shall begin to run from the date on which the damage was

⁸⁴ See Jose Ochoa trial testimony, 18:5-11.

⁸⁵ See Court's January 23, 2007 Memorandum Order and Opinion, p. 30 [Docket Entry No. 118] (stating that a "representation and lack of intent to develop Mexico could very well amount to intentional illicit behavior").

⁸⁶ See 1997 Letter from Francisco Ochoa to Nelson Marchioli, admitted into evidence as Defendant EPL-USA's Exhibit 10. The letter actually sent is Defendant' Exhibit 28, dated December 8, 1997.

⁸⁷ See PowerPoint presentation, p. 1188, admitted into evidence as Plaintiff's Exhibit 22.

caused."⁸⁸ The fact that damages may have increased or worsened does not mean that the statute of limitations does not run until the damages end. Neither Texas nor Mexican law would allow deferral of accrual until the damages are determined to have ended.⁸⁹ Therefore, the Court erred in refusing to submit EPL-USA's interrogatories asking "when were the resulting damages, if any, first caused" and submitting over EPL-USA's objection, Special Interrogatories Nos. 5 and 9 asking the jury to find when did the damages "cease".

B. The Court erred in submitting moral damages as an independent cause of action.

As EPL-Mexico's expert correctly notes, "two elements are required for creating an obligation to repair moral damages; the first consists in demonstrating that the damage was caused and, the other depends on such damage being the consequence of an illicit act."⁹⁰

Moral damages can only be recovered as damages for illicit acts.⁹¹ Under Mexico's Civil Law, "extra-contractual" liability cases may be described as tort law cases.⁹² The author of the tortious act is obliged to repair said damage, as prescribed by Article 1910 of the Federal Civil Code.⁹³

Regarding damages and losses, and the resulting civil liability for a tortious act, the Supreme Court of Mexico in a *Jurisprudencia* published in 1941, wrote:

Civil liability for damages and losses, according to our Civil Law, may arise out of contractual and extra-contractual facts, [legal] acts and omissions; however,

⁸⁸ See Torres July 20, 2007 Declaration, ¶ 44.

⁸⁹ See Cesar De La Garza's Ninth Supplemental Declaration, ¶¶ 10-11, *see also SV v. RV*, 933 S.W.2d 1, 4 (Tex. 1996).

⁹⁰ See Torres Declaration II, ¶ 11, dated June 10, 2006, attached to EPL-Mexico's Trial Brief [Docket Entry No. 143] as Exhibit 6.

⁹¹ See Jorge A. Vargas, *Moral Damages Under the Civil Law of Mexico. Are these Damages Equivalent to U.S. Punitive Damages?*, 35 U. Miami Inter. – Am. L. Rev. 183, 245 (2004), attached to EPL-USA's trial brief as Exhibit F.

⁹² *Id.* at p. 245.

⁹³ *Id.*

said Civil law expressly reserves questions pertaining to "moral damage" only to extra-contractual liability cases; namely those civil liabilities whose obligatory nature derives from illicit acts.⁹⁴

In the second *Ejecutoria*, discussing the *requisite elements of moral damages*, in 2001 the Third Collegiate Court on Civil Matters of the First Circuit wrote:

In Mexico, the goal of the legislature in amended Articles 1916 and 1916-Bis of the Civil Code for the Federal District ... was to make liable any individual who ... injures other individuals attacking their morality, public peace, the rights of third parties, including those who exercise their right of expression through the mass media, or when [an individual] commits a criminal offense or disturbs the public order, which are precisely the limits clearly established by Articles 6 and 7 of the General Constitution of the Republic ... Therefore, *for moral damages to take place it is required: a) that a damage is inflicted on a person in any of the legally protected rights enunciated by Article 1916 of the Civil Code; b) that said injury is the consequence of an illicit act; and c) that there is a causal relationship between both situations.*⁹⁵

Because there was no evidence of conduct that would be recognized as an illicit act under Mexican law,⁹⁶ moral damages could not have been recovered in this case.

Moreover, EPL-Mexico's ability to recover moral damages, if any, should have been predicated on a finding of illicit acts, as requested by EPL-USA.⁹⁷ The Court's submission of Special Interrogatories Nos. 8 and 8a was, therefore, error.

C. The Court erred in its determination of Mexican law applicable to the case.

The Court's determination of Mexican law was erroneous insofar as it permitted EPL-Mexico to (1) pursue damages for EPL-USA's alleged breach of the 1996 Agreement, (2) seek moral damages, (3) assert claims that were clearly time barred, (4) seek attorneys' fees, (5) assert claims for illicit acts based on nondefamatory oral representations, and (6) submit defenses not recognized under Mexican law. The Court rejected the following correct propositions of

⁹⁴ *Id.*

⁹⁵ *Id.* at 259.

⁹⁶ *See* Section VI. above.

⁹⁷ *See* EPL-USA's Objections to Jury Charge, 6:23 – 7:11.

Mexican law, timely requested in writing by EPL-USA and supported by the declarations of EPL-USA's Mexican law expert, Mr. Cesar De La Garza, as the substantive law of this case.

1. From Mr. De La Garza's First Declaration, submitted on December 20, 2004, as Exhibit 1 to EPL-USA's Brief on Mexican Law [Docket Entry No. 31], the Court erred in rejecting the following:

"[T]here cannot be a breach of contract if the time for performance under the agreement has not expired." (¶ 17.)

"Civil liability may be regulated by agreement of the parties, except in those cases where the law expressly provides otherwise." (¶ 27.)

"Contracting parties may stipulate to a certain payment as a penalty in case the obligation is not rendered or performed in the agreed manner. If such stipulation is made, damages and losses may not be additionally claimed." (¶ 28.)

"In other words, the parties can agree upon the amount of damages or losses that will cure or compensate the other party in the event of a breach or that will otherwise fulfill the non-performing party's obligations under the contract. In such cases, the plaintiff cannot claim or recover damages or losses in addition to the contractually specified amount. This is important to note since the parties made such a stipulation in the Intellectual Property Acquisition Agreement between EPL-MEX and EPL-USA (see § § 11.c and 12.b of the Intellectual Property Acquisition Agreement between EPL-MEX and EPL-USA)." (¶ 29.)

"Borga Soriano considers that a conventional penalty provision such as described by articles 2117 and 1840 cited above 'substitutes indemnification of damages and losses'. [Footnote omitted.] Likewise, Bejarano Sanchez has stated that 'since the conventional penalty compensates for damages and losses, these may not be compensated again and any claim to this effect would be inadmissible.' This is also important because it may indicate the parties' reasonable expectations as to any damages and losses or 'lost gains' by virtue of the amount agreed as penalty." (¶ 30.)

"Hence, under Mexican law the extent of any recoverable damages and losses would be viewed under the light of the previously referred circumstances, i.e. a conventional penalty would bar any additional claim for damages or losses." (¶ 31.)

"Under Mexican law, anytime there is a controversy as to the interpretation or performance of a contract, the proper authority to resolve such controversy is a judicial tribunal. This is especially true when there is a controversy as to the subsistence of a contract after one of the parties has exercised a termination prerogative as contained in the agreement. Though agreeing on the terms of termination of a contract is recognized under Mexican Law, when there is a dispute as to the validity of the cause that brought about a decision to terminate, it may not be left to the discretion of one of the parties to a contract to unilaterally decide whether a purported breach is sufficient to terminate the contract. Article 1979 of the Civil Code provides that:

The validity and performance of a contract may not be left to the unilateral discretion of one of the parties.

(¶ 51.)

"This means that when there is disagreement between the parties to a contract as to the level of performance needed in order for a contract to subsist, one of the parties may not effect the termination unilaterally, and the only way to resolve the controversy will be to access the judicial system. Until there is a judicial decision declaring the validity of the cause of termination (i.e. a breach of contract), the contract remains in full force." (¶ 52.)

"Under Mexican law, claims for damages and losses are barred if the parties to a contract agree to a conventional penalty. A conventional penalty may take any form as long as it is designed to compensate for any form of non-performance of the obligation, whether failure to perform is absolute or performance is not rendered in the form and terms agreed upon. The parties can agree upon the amount of damages or losses that will cure or compensate the other party in the event of a breach or that will otherwise fulfill the non-performing party's obligations under the contract. In such cases, the plaintiff cannot claim or recover damages or losses in addition to the contractually specified amount." (¶ 56.3.)

2. From Mr. De La Garza's Third Supplemental Declaration, submitted on June 24, 2005, as Exhibit 1 to EPL-USA's Post-hearing Brief on Mexican Law [Docket Entry No. 53]:

"Thus, even if the parties agree to a termination provision in a contract, in order for the rescinding effect to be automatic, there must be an 'acceptance' (i.e. non-opposition) by the purportedly breaching party. The corollary to this statement of law is that, **if the breach is not accepted by the other party**, then the rescinding effect is **not** automatic and the courts must intervene to resolve the dispute and determine the status of the parties' contract." (¶ 50.)

"I do not agree with Mr. Torres' conclusion that the Mexican Supreme Court has decided 'unequivocally that a party can terminate a contract for material breach whether or not the other side agrees that there was a breach and without the need to go to a court to prove that the other party in fact committed a breach' (see Mr. Torres supp. declaration p. 2 at ¶ 3), because the Mexican Supreme Court decision never arrives at such a conclusion. On the contrary, as stated before, the Mexican Supreme Court has found that '[t]he parties may agree to the termination of the contract because of a breach by any one of them of any of their acquired obligations under the contract, in a manner such that once the breach is accepted by the other party, the rescinding effect is automatic and produces the total or partial extinction of the contract without the need for a judicial declaration" (see ¶ 49 *supra*), and that '[t]he determining fact that triggers the exercise of the termination option, acquired by the contract, is the unjust default of one of the parties in its obligations. From this perspective, it would certainly not suffice that the party that considers itself affected affirms the existence of an illegal action to impose on the other, unilaterally, the factual and legal consequences inherent to the rescission.' (see ¶ 51 *supra*)." (¶ 50.)

"A recent Mexican Supreme Court decision has found that business entities may collect moral damages, as said concept is described in article 1916 of the Federal Civil Code, Article 1916 provides that:

'1916. The injuries caused to a person's feelings, affections, beliefs, decorum, honor, reputation, privacy, image and physical appearance or public perception in the opinion of others, shall be considered moral damages.'

(¶ 67.)

"However, it should be noted that the Mexican Supreme Court found that these entities may only collect for said damages where their reputation or public perception in the opinion of others is affected. To this effect, the Mexican Supreme Court has stated that 'by analogy, it must be concluded that the concepts related to reputation of a person and the consideration that others have of themselves, as mentioned in article 1916, must also be applicable to collective (corporate) persons' (see Exhibit B to Mr. Torres' declaration, Mexican Supreme Court Contradiction Thesis Decision of December 1, 2004 at p. 66). This means only that those acts that harm a corporation's reputation or public perception – as conceived by others --, will be construed as moral damages." (¶ 68).

"The Court then goes on to express that 'as an example, based on the detriment that those values (reputation, public perception) might suffer, a corporate entity may claim moral damages from anyone that attacks the good reputation and standing that the entity has gained in the social,

cultural or commercial fields' (see Exhibit B to Mr. Torres' declaration, Mexican Supreme Court Contradiction Thesis Decision of December 1, 2004 at p. 69). The Court then gives an example of just how a corporate entity would receive such an attack, by referring to a civil entity that obtains a grant from a television company to transmit a cultural event for free, but a few days before transmission of the event, the entity is slandered in different media outlets, to the point that the television company decides to withdraw its offer of the free transmission (see Mexican Supreme Court decision p. 76). Though the Court states that in this case the damage may not be present, because the transmission was free and the entity is of a non-profit nature, the method used to affect the entity's reputation (slander through the media) is indicative of what the Court considers to be an "attack on the good reputation and public consideration" of corporate entities." (§ 69.)

"Therefore I must conclude that, through the Supreme Court now recognizes business entities as subject to moral damages, said damages will be limited when affecting the entity's reputation or perception held by others in society, and only when these are attacked through illicit actions such as slander or defamation." (§ 70.)

"It is important to address certain comments made by counsel for EPL-MEX at the May 13, 2005 hearing that 'there's always [the] discovery rule and fraudulent concealment under Mexican law' (see Hearing Transcript p. 64, lines 19-20), as related to statutes of limitations. I must say, however, that there are no such rules that would delay the accrual of or otherwise toll the applicable statutes of limitations under Mexican law." (§ 72.)

3. From Mr. De La Garza's Fourth Supplemental Declaration, submitted on January 12, 2006, as Exhibit 1 to EPL-USA's Reply to EPL-Mexico's Response to EPL-USA's Motion to Dismiss EPL-Mexico's Second Amended Complaint [Docket Entry No. 76]:

"Claims for damages/losses derived from dolus or illicit acts expire in a term of two years after the damages/losses were caused. The decisions cited by Mr. Torres, in the case of 'continued damages,' do not constitute binding precedent for the reasons previously explained." (§ 8.)

"Regardless, the matter at hand would be to determine if any damages claimed are of a 'continued' nature. For example, the present case of 'dolus' is a particular action traceable to a specific date, so the damages are caused by one particular and time determined event, entering into the agreement." (§ 9.)

4. From Mr. De La Garza's Sixth Supplemental Declaration, submitted on June 24, 2006, as Exhibit J to EPL-USA's Motion for Summary Judgment [Docket Entry No. 86]:

"Attorney's fees Under Mexican law are a part of what is known as *costas judiciales* or judicial costs. They are a procedural concept regulated by the Federal Code of Civil Procedure." (¶ 8.)

"Article 7 of the Federal Code of Civil Procedure provides that:

The party that loses must reimburse procedural costs to its counterpart.

A party loses when the court finds, totally or partially in accordance to its counterpart's claims.

If both parties lose reciprocally, the court may exonerate them, totally or partially, of complying with provisions contained in the first paragraph. But the court may impose a partial refund against one of the parties, proportionate to the amount of the loss.

Procedural costs consist of a sum of money that, in accordance to the court's appraisal and pursuant to any fee provisions, the prevailing party expended or must have expended, with exception of any superfluous act or form of defense."

(¶ 9.)

"Therefore, it is clear that any valuation and imposition of a judgment that includes attorney's fees is regulated by Mexican procedural rules. In fact, Mexico's body of substantive civil law (the Federal Civil Code), refers to procedural rules when providing the concept of attorneys fees. Article 2118 of the Mexican Federal Civil Code provides that:

'2118. The payment of judicial costs shall be imposed against the party that failed to perform an obligation, pursuant to provisions established by the Code of Civil Procedures.'"

"Hence, any matter related to judicial or procedural costs or expenses (including attorney's fees) will be resolved pursuant to applicable rules of procedural law." (¶ 10.)⁹⁸

⁹⁸ On January 23, 2007, the Court issued an order stating that "assuming EPL-Mexico prevails in its contractual claim based on EPL-USA's alleged breach of the Agreement, EPL-Mexico will be allowed to seek an award of reasonable attorney's fees" based on Texas Civil Practice and Remedies Code § 38.001. EPL-USA asserts that this ruling was in error, because as the Court also determined, "Mexican substantive law and U.S. procedural law govern the instant

"However, I do not agree that 'moral damages' are a form of punitive damages. Under Mexican law moral damages are of a compensatory nature, not of a punitive nature. Prominent doctrinal author Manuel Borja Soriano has stated that 'a moral reparation is not a penalty inflicted on the transgressor, even if it results (as with a fine) in a diminution to his properties. In fact, the object of a 'moral repair' is not to inflict a loss to the perpetrator, but to procure the victim with an increase in his assets.' [footnote omitted]. According to Borja Soriano, any award for moral damages is a means of 'compensating or counterbalancing' [footnote omitted] any loss to an individual's 'moral assets'. [Footnote omitted]." (§ 13.)

"Furthermore, the case cited by Mr. Torres (see Torres declaration at §§ 30, 31) refers and applies to damages caused as a result of a felony, which is a different concept altogether. In the case cited by Torres the Mexican Supreme Court refers to the concept of 'damage repair', when such damages are a result of a felony action. The Court rightly stated that any imposition to repair the damages is part of the penalty imposed to the accused once he is found guilty of the crime in question. Hence, the obligation to repair damages falls into the 'public penalty' category, in that it is part of the general legal consequences of committing a crime (i.e. imprisonment). Notice that the cited case stems from the Criminal Law Chamber of the Mexican Supreme Court. But this concept differs quite strongly to a civil law award for moral damages; there is no such thing as civil punitive damages equal to that in the United States under Mexican law." (§ 15.)

"As to the general implications of the concept of moral damages where a corporation or entity is involved, the Mexican Supreme Court decision cited by Mr. Torres in his declaration (see Torres declaration at §§ 24, 25) states that these entities may only collect for said damages where their reputation or public perception in the opinion of others is affected. To this effect, the Mexican Supreme Court found that 'by analogy, it must be concluded that the concepts related to reputation of a person and the consideration that others have of themselves, as mentioned in article 1916, must also be applicable to the collective (corporate) persons' (see the Mexican Supreme Court Contradiction Thesis Decision of December 1, 2004 at p. 66). This means that only those acts that harm a corporation's reputation or public perception –as perceived by others–, will be construed as moral damages." (§ 16.)

dispute. This means Mexican law controls the substantive issues." Accordingly, the availability of an attorney's fees award is an issue of substantive law, that should be determined under Mexican substantive law and recovery of attorney's fees pursuant to the Texas Civil Remedies Code, should not be permitted. In this case, recovery should not be permitted at all, since attorney's fees is not a matter of substantive law in Mexico.

"The Court then goes on to find that "as an example, based on the detriment that those values (reputation, public perception) might suffer, a corporate entity may claim moral damages from anyone that attacks the good reputation and standing that the entity has gained in the social, cultural or commercial fields" (see the Mexican Supreme Court Contradiction Thesis Decision of December 1, 2004 at p. 69). The Court then gives an example of just how a corporate entity would receive such an attack, by referring to a civil entity that obtains a grant from a television company to transmit a cultural event for free, but a few days before transmission of the event, the entity is **slandered** in different media outlets, to the point that the television company decides to withdraw its offer of the free transmission (see the Mexican Supreme Court Contradiction Thesis Decision of December 1, 2004 p. 76). Though the Court states that in this case the damage may not be present, because the transmission was free and the entity is of a non-profit nature, the method used to affect the entity's reputation (slander through the media) is indicative of what the Court considers to be an 'attack on the good reputation and public consideration' of the corporate entities." (§ 17.)

"Therefore I must conclude that, when business entities are subject to moral damages, said damages will be limited when affecting the entity's reputation or perception held by others in society, and **only when these are attacked through illicit actions such as slander or defamation.**" (§ 18.)

5. From Mr. De La Garza's Seventh Supplemental Declaration, submitted on June 18, 2007, as Exhibit B to EPL-USA's Objection to EPL-Mexico's Proposed Jury Instruction [Docket Entry No. 128]:

"I have reviewed the EPL-Mexico's arguments and supporting documentation on the doctrine of equitable estoppel, and the Court's order which includes a discussion on this topic. After analyzing the elements of this concept –as it is referred in the present case and in broader definitions as in *estoppel* in general–, I must conclude that this doctrine does not find an equivalent under Mexican law. As with many doctrines and institutions found in the English equity tradition, the Roman-Civil tradition (of which Mexico forms part) simply does not contemplate the concept of equitable estoppel. This being said I must clarify that, while Mexican law does provide for relief in case of error, *dolus*, illicit acts, etc. (as has been amply discussed throughout this case), and I would agree that some of these institutions may contain elements of the estoppel doctrine (i.e. false representations, reliance on false or concealed information, etc.) none of these doctrines compares to the concept of estoppel in that none of them may, in and of themselves, bar an action, a defense or exception in court." (§ 5.)

"Therefore, the doctrine of "equitable estoppel", considered as the possibility of barring a debtor's (defendant) statutes of limitation defense, if the creditor (plaintiff) did not exercise the available legal action within the time frame provided by law, based on alleged reassurances from the debtor that he was going to pay the debt before the statute of limitations expired, does not exist in the Mexican Civil law tradition; nor is it applicable in any other circumstance: Mexican law does not provide for it." (¶ 6.)

"The fraudulent concealment" defense also does not exist under Mexican law. Under Mexican law, it is presumed that the plaintiff will know when his rights become enforceable (i.e. the date when an obligation is to be performed; the date when a condition is met; date of maturity; date when damages occurred). The term by which preclusion of legal actions is defined under Mexican law is *prescripcion negativa* or "negative prescription"; it operates by the simple passing of time and the creditor/plaintiff's inactivity in enforcing his rights. CCF Article 1158 provides that:

'1158. Negative prescription is verified by the simple elapsing of the term provided by law.'

(¶ 7.)

"Considering that under Mexican law statutes of limitations accrue from the moment an obligation becomes enforceable, and that the creditor to said obligation must be aware of such a moment in order to enforce his rights, a fraudulent concealment defense to the expiration of the statute of limitations has no basis under Mexican law." (¶ 8.)

6. From Mr. De La Garza's Eighth Supplemental Declaration, submitted on July 20, 2007 as Exhibit D to EPL-USA's Trial Brief [Docket Entry No. 142], the Court erred in omitting the following:

"I must venture to say that under Mexican Civil Law, representations before or during the execution/performance of the Agreement that are contrary to the written letter of the Agreement would hardly be of any material effect given the clearness with which the intent of the parties is expressed in the Agreement. Again, following the provision contained in CCF article 1851: "[i]f the terms of a contract are clear and unequivocal as to the intent of the parties, it shall be construed pursuant to the literal meaning of its clauses". Hence, based on the clear language of the agreement, there can be no justifiable reliance on alleged oral representations. Furthermore, and given the train of thought expressed above, a party cannot claim reliance on statements that are expressly

contradicted by the literal contents of the Agreement. In other words, EPL-Mexico entered into an agreement which essentially gave EPL-USA the option of either opening 25 stores or paying a \$3,500 per store penalty (see section 12.b of the Agreement); it cannot now claim that despite the clear language, EPL-USA promised to support the franchisees, immediately begin developing, etc., because the parties' intentions as expressed in the Agreement are clear and do not require any of these additional obligations. There should especially be no reliance in the alleged statements in this case, because section 14 of the Agreement expressly states that the Agreement supersedes all previous agreements and may not be modified unless by written agreement and because both parties were represented by legal counsel that had a duty to read what they signed and to be bound by the express text of the document, not the contradictory statements that EPL-USA allegedly said. Otherwise it would mean that no contract would ever be enforceable because one of the parties could always claim that despite the language in the contract, it was promised something else. This is the precise reasoning behind the provision contained in FCC article 1852: "[i]f the terms of a contract are clear and unequivocal as to the intent of the parties, it shall be construed pursuant to the literal meaning of its clauses". Furthermore, FCC article 1832 provides that "in civil contracts each party is obligated as it appears the party intended to be bound", in which case the text of the Agreement offers much light as to the intention of the parties, especially considering its provisions described in this paragraph. " (¶ 13.)

D. The Court erred in submitting special interrogatories not supported by applicable law.

For the reasons discussed in Section III. above, it was error for the Court to have submitted a special interrogatory on EPL-Mexico's equitable estoppel avoidance defense. Accordingly, EPL-USA is entitled to a new trial on those grounds for the reasons discussed in Section III. above. This error was not harmless, but prejudicial. Accordingly, EPL-USA is entitled to a new trial on these grounds.

For the reasons discussed in Section V. above, it was error for the Court to have submitted a special interrogatory on illicit acts because under Mexican law "illicit acts" cannot be based on oral representations – unless defamatory – but are torts based on acts, actions, or behavior that cause damage. This error was not harmless, but prejudicial. Accordingly, EPL-USA is entitled to a new trial on those grounds.

For the reasons discussed in Section XI. above, it was error for the Court to have submitted a special interrogatory on breach of contract without first submitting a special interrogatory on the meaning of the word exploit. This error was not harmless, but prejudicial. Accordingly, EPL-USA is entitled to a new trial on those grounds.

E. The Court committed prejudicial legal error in admitting the testimony of Andrew Safir and Jose Ochoa on the issue of damages.

It was error to admit the testimony of EPL-Mexico's expert, Dr. Safir, on economic damages, over EPL-USA's objection. This error was sufficiently prejudicial to affect the result of the trial. In this case, Dr. Safir testified that the value of the trademarks if EPL-USA had performed under the contract would have been \$29.5 million ("but for" value). According to Safir, the trademarks instead are worth only \$3.2 million because of EPL-USA's breach. EPL-USA objected to the testimony of Dr. Safir because his opinions: (1) were not based on independent investigation and research or adequate data and consisted of sheer speculation; (2) assumed false facts; (3) were fallacious and illogical on its face; and (4) were a mere conduit for hearsay.⁹⁹

First, Dr. Safir failed to do any independent investigation. In arriving at his "but for" value of the trademarks, Dr. Safir assumed value based on an income stream from 4% royalty rates being paid by the Mexican franchisees.¹⁰⁰ Safir did not review any of the existing franchise agreements and did not know what royalty rates were actually in the franchise agreements with

⁹⁹ See *Seatrax, Inc. v. Sonbeck Int'l, Inc.*, 200 F.3d 358, 372 (5th Cir. 2000) (recognizing that under Fifth Circuit law, experts **must** independently investigate the information given to them, and any underlying assumptions used in their opinion, for that opinion to be admissible) (emphasis added).

¹⁰⁰ See EPL-USA's Motion to Strike the Expert Testimony of Andrew Safir, p. 10 [Docket Entry No. 89].

the franchisees at issue.¹⁰¹ This is especially important since all of the franchisees were under contract with EPL-Mexico when the 1996 Agreement was entered into and most of the franchise agreements were produced in the lawsuit and introduced into evidence, with English translations, as Defendant's Exhibits 14 through 26 and 14A through 26A."¹⁰² In fact the royalty rates in those agreements generally ranged from 1.5 to 2%, and were not the 4% rate Safir "assumed" and used in his opinion.¹⁰³ Dr. Safir also: (1) did not conduct any independent investigation to compare the traditional sales data between the EPL stores from which he gathered his data, and the stores outside the Ochoa territory, whose sales data he projected;¹⁰⁴ (2) did not visit or consider the location or size of the stores, the management, or any other factors that might influence a particular store's sales,¹⁰⁵ (3) did not visit any of the alleged competitors (in particular El Pollo Feliz) of El Pollo Loco,¹⁰⁶ (4) received the 1993 sales data from which he based most of his calculations from EPL-Mexico's counsel and could not vouch for its accuracy,¹⁰⁷ (5) assumed that the actual 2006 sales per store data for 10 stores was simply the 1993 sales data for fewer stores increased over 13 years by the annual rate of inflation for the county of Mexico, and (6) neither researched nor reviewed any statistical, economic, or other financial data to determine what impact, if any, El Pollo Feliz's growth had on the value of EPL-Mexico's trademark,¹⁰⁸ before simply concluding that EPL-Mexico had been damaged due to EPL-USA's actions.

¹⁰¹ *Id.* at p. 11.

¹⁰² *Id.*

¹⁰³ *See* Defendant's Exhibits Nos. 14 through 26.

¹⁰⁴ *See* EPL-USA's Motion to Strike the Expert Testimony of Andrew Safir, p. 11 [Docket Entry No. 89].

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

EPL-USA also objected to Dr. Safir's complete lack of actual sales data upon which to calculate the 2006 royalties, which he then projected into the future. In coming to his initial conclusion, the only sales data that Safir reviewed for the El Pollo Loco stores outside the Ochoa territory was from 1993.¹⁰⁹ After completing his initial report, he revised his calculations based on 2005 sales data he subsequently received for two of the stores.¹¹⁰ Although he initially stated that sales data from 1996 to 1999 would not be relevant to his calculations,¹¹¹ he later contradicted himself and admitted that it would have been "better to have actual [yearly] sales data" for the stores outside the Ochoa territory from 1996 to 2006.¹¹² Yet, he did not ask EPL-USA or the franchisees for this information.¹¹³ With such a limited amount of actual sales data from 1996 to 2006 for any of the stores, Safir did not have a sufficient amount of information to make reliable conclusions and therefore these conclusions should have been excluded pursuant to Fed. R. Evid. 702.

EPL-USA also objected to Dr. Safir's attempt to increase damages by using an exaggerated growth rate. Safir based most of his opinion on the information contained in the Euromonitor report. However, in an attempt to maximize potential damages, Safir deviated from the report when he calculated the anticipated growth rate for EPL stores.¹¹⁴ In his initial report, Safir included an estimated annual growth rate of .81%, based on indicators utilized in other parts of his report, such as Mexico's annual average GDP (3.7%) and the historical annual

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

growth rate of chicken fast food sales (5%).¹¹⁵ However, in his revised calculations, Safir decided to use a projected 12% growth rate for the stores that were not opened, despite the Euromonitor's projected 3.5% growth rate within the chicken fast food industry.¹¹⁶ Safir provided no rational basis for such a large adjustment.

The Mexican trademarks were to remain the property of EPL-USA until – and unless – they were assigned back to EPL-Mexico. To this date, the Mexican trademarks have never been re-assigned to EPL-Mexico. Accordingly, El Pollo Loco USA also objected to the relevance and reliability of Dr. Safir's damages opinion on the basis that he assumed that 25 stores were required to be opened by 2006, an additional 10 stores needed to be opened thereafter at 2 ½ year intervals, and ignored the fact that the Mexican trademarks outside the Ochoa territory belonged to EPL-USA and were not EPL-Mexico's property. Finally, EPL-USA objected to Safir's "but for" calculation of damages as not allowed under Mexican law. All of EPL-USA's objections were overruled.

Dr. Safir offered his expert opinion without conducting an independent evaluation, without obtaining the necessary sales data and by manipulating the data in order to maximize damages. His opinions were based on erroneous assumptions as to the rights and obligations under the 1996 Agreement. Accordingly, it was error for the Court to admit the testimony of Dr. Safir over EPL-USA's proper and timely objection.

It was also error to allow Jose Ochoa to testify, over timely objections based on speculation, lack of foundation, and not having been designated as an expert witness, on the issues of the economy of Mexico, damages to EPL-Mexico, and the cost to restore EPL-Mexico's

¹¹⁵ *Id.*

¹¹⁶ *Id.*

image. Mr. Ochoa was never designated as an expert and never submitted an expert report as required by Fed. R. Civ. Proc. 26(a)(2)(B).

Accordingly, EPL-Mexico was surprised and prejudiced by his testimony on this issue for which EPL-USA was not prepared and which the Court should not have allowed.

F. The jury's answers to Special Interrogatories Nos. 1(a), 4(a), and 6(a) require a new trial.

1. The verdict is fatally inconsistent in that there is no conceivable way to reconcile the jury's finding of different damage amounts in Special Interrogatories Nos. 1(a), 4(a), and 6(a), when the jury was instructed to apply the same measure of damages to each of them.

2. The verdict is against the great weight of the evidence. The insufficiency of the evidence put on the record on the issue of breach of contract, illicit acts, moral damages, and damages is summarized herein, and this evidence weighs so heavily against the jury's conclusion on these issues that it would be a manifest injustice and an abuse of the court's discretion not to grant a new trial.

3. The amount of moral damages awarded in response to Special Interrogatory No. 8(a) is unreasonably disproportionate and excessive to the damages suffered by the Plaintiff in this matter so as to shock the judicial conscience. The jury was motivated by statements made in EPL-Mexico's closing arguments that Defendant had committed a "sin" and should be punished and that the tenants of the Catholic Church with respect to penitence should be followed as a guideline. As more fully explained above, the damages awarded were excessive because: (1) there was no evidence of an actionable illicit act under Mexican law, that caused actual damages or moral damages to EPL-Mexico; (2) EPL-Mexico flourished in the Ochoa Territory increasing sales from \$5 million to \$25 million and adding eleven new stores;¹¹⁷ (3)

¹¹⁷ See Jose Ochoa trial testimony, 22:17-23:22.

punitive damages are not recognized or permitted under Mexican law,¹¹⁸ and (4) the jury's findings of \$10,125,500 in response to Special Interrogatories Nos. 4(a) and 8(a) bore no relationship to any injury or damage and was clearly the result of bias or prejudice against EPL-USA and an improper intent to punish EPL-USA.¹¹⁹

Under Mexican law, the object of a moral repair is not to inflict loss on the perpetrator but to procure the victim with an increase in his assets.¹²⁰ The jury's answer to Special Interrogatory 8(a) did not comply with this requirement and warrants a new trial.

G. The Court erred in admitting, over objection, the following Exhibits.

Plaintiff's Exhibit No. 22: 1998 Mexico Strategy PowerPoint by Marcelino Contreras. Defendant objected to the admission of this document because it contained inadmissible hearsay, in violation of Fed. R. Civ. P. 801 and 802. Defendant's objection was overruled and the Court admitted the document into evidence.

Plaintiff's Exhibit 41: 1990 Denny's Letter re: Mexicali. Defendant objected to the admission of this document because the contents of this letter were irrelevant to any of the Plaintiff's claims in this lawsuit. Defendant's objection was overruled and the Court admitted the document into evidence.

Plaintiff's Exhibit 43: Pam Milner letter to C. Zaffarini. Defendant objected to the admission of this document because the contents of this letter were irrelevant to any of the Plaintiff's claims in this lawsuit. Defendant's objection was overruled and the Court admitted the document into evidence.

¹¹⁸ See Court's Order Determining Mexican Law ¶ IV. [Docket Entry No. 66].

¹¹⁹ See Court's January 23, 2007 Memorandum Opinion and Order, p. 36 [Docket Entry No. 118].

¹²⁰ See Cesar De La Garza Sixth Supplemental Declaration, ¶ 13, attached to Defendant's Motion for Summary Judgment [Docket Entry No. 86], as Exhibit J.

Plaintiff's Exhibit 45: El Pollo Loco Inc.'s SEC filing. Defendant objected to the admission of this document because the contents of this document were irrelevant to any of the Plaintiff's claims in this lawsuit and any possible probative value was greatly outweighed by the danger of unfair prejudice. Defendant's objection was overruled and the Court admitted the document into evidence.

Plaintiff's Exhibit 46: A Purported Summary of Sales. Defendant objected to the admission of this document on the grounds that these documents are written in Spanish and Plaintiff failed to provide a certified English translation. EPL-USA further objected because this exhibit constituted hearsay under Fed. R. Evid. 801, 802. EPL-USA further objected that this document lacked a proper authentication or identification for admissibility. Fed. R. Evid. 901. EPL-USA further objected that these documents constituted summaries of voluminous writings which were not made available for examination or copying. Fed. R. Evid. 1006. Defendant's objections were overruled and the Court admitted the document into evidence.

Plaintiff's Exhibit 48: Euromonitor Report. Defendant objected to the admission of this document because it contained inadmissible hearsay, in violation of Fed. R. Evid. P. 801 and 802. Defendant's objection was overruled and the Court admitted the document into evidence.

These errors were not harmless but prejudicial.

XIII. **CONCLUSION**

On all of the points raised by this motion, judgment as a matter of law is the appropriate remedy rather than a new trial because EPL-Mexico received numerous warnings of the defects in its proof prior to the submission of this case to the jury and declined to present any proof on crucial issues. This conduct indicates that the plaintiff is unable or unwilling to present any evidence on these issues.

If the Court denies the motion for judgment as a matter of law, EPL-USA should be granted a new trial because the verdict is against the great weight of the evidence on all of the issues discussed above and all of the following jury findings should be disregarded.

XIV.
RECORD ON MOTION

This motion is based on this document, on the attached trial transcripts, the supporting Declaration of Counsel, on all of the pleadings and papers on file in this action, and on the evidence presented at trial in this case.

Respectfully Submitted,

BRACEWELL & GIULIANI LLP

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been delivered to counsel of record by electronic delivery on this the 9th day of August 2007, as follows:

Mr. Edward Snyder
Castillo & Snyder
300 Convent Street, Ste. 1020
San Antonio, Texas 78205.

/s/ Andrew F. Spalding

Andrew F. Spalding

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION**

EL POLLO LOCO, S.A. de C.V.,
EPL-Mexico,

v.

EL POLLO LOCO, INC.,
EPL-USA.

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CIVIL ACTION NO. L-04-CV-48

ORDER GRANTING JUDGMENT AS A MATTER OF LAW

On _____, 2007, El Pollo Loco, Inc. timely renewed its motion for judgment as a matter of law or, in the alternative, motion for a new trial in this matter. The Court has carefully reviewed the evidence presented at the trial of this action in the light most favorable to El Pollo Loco, S.A de C.V. and finds that EL Pollo Loco, Inc. is entitled to judgment as a matter of law in that there is no evidence to support the jury's verdict on the following claims:

- (a) Breach of contract
- (b) Illicit acts
- (c) Moral damages
- (d) Dolus
- (e) Equitable estoppel
- (f) Damages

Therefore,

IT IS ORDERED that:

- (1) The renewed judgment as a matter of law is GRANTED, and El Pollo Loco, Inc. is entitled to a judgment that:
 - (a) El Pollo Loco, S.A de C.V. take nothing by its complaint in this action; and

- (b) El Pollo Loco, Inc. recover its costs of suit in this action as taxed by the Clerk.
- (2) The motion for new trial is conditionally denied on the grounds that judgment as a matter of law has been granted.

Judgment in accordance with the terms of this order will be entered forthwith.

Dated: _____

HONORABLE MICAELA ALVAREZ
UNITED STATES DISTRICT JUDGE