AFFIRM and REVERSE in Part, and Render; Opinion Filed April 21, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00157-CV

CBIF LIMITED PARTNERSHIP, COLUMBIA AIRPORT, LLC, AND STEVE FLORY, Appellants

V.

TGI FRIDAY'S INC., LBD CORPORATION, TGIF/DFW PARTNER, LLC, TGIF/DFW MANAGER, LLC, TGIF/DFW TERMINAL A RESTAURANT, DOMAIN ENTERPRISES, INC., TGIF/DFW RESTAURANT JOINT VENTURE, LOUIS STURNS, NORMA ROBY, ERMA JOHNSON HADLEY, AND RSH CONCESSIONS, LLC, TSQF LIMITED PARTNERSHIP, AND TEXAS STAR QUALITY FOODS, LLC, Appellees

On Appeal from the 68th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-11-04730

MEMORANDUM OPINION

Before Justices Francis, Stoddart, and Schenck
Opinion by Justice Schenck

On the Court's own motion, we withdraw our opinion issued on December 5, 2016 and vacate our judgment of that date. The following is now the opinion of the Court. CBIF Limited Partnership, Columbia Airport, LLC, and Steve Flory appeal a judgment in favor of TGI Friday's Inc., LBD Corporation, TSQF Limited Partnership, Norma Roby, Louis Sturns, and Erma Johnson-Hadley in a suit for (1) judicial dissolution of a joint venture established to operate TGI Friday's restaurants and café bars at DFW International Airport, (2) reformation of the joint venture's agreement, and (3) damages arising from various aspects of the parties' business

relationships.[1] On appeal, one or more of the CBIF parties challenge the legal and factual sufficiency of the evidence to support various jury findings in favor of Friday's, TSQF, and the RSH Group, and argue the trial court erred by (1) denying certain requested jury questions and instructions, (2) dissolving the joint venture pursuant to section 11.314 of the Texas Business Organizations Code, and (3) granting Friday's declaratory judgment relief.

We conclude Friday's is not entitled to relief under the Uniform Declaratory Judgments Act ("DJA"), but is entitled to all other relief awarded. We further conclude TSQF is entitled to all of the relief awarded and the RSH Group is not entitled to recover attorney's fees from CBIF and Columbia, but is entitled to all other relief awarded. Accordingly, we reverse, in part, that portion of the trial court's judgment awarding Friday's relief pursuant to the DJA, and render judgment, in part, that Friday's take nothing on its attendant attorney's fee claim. We further reverse, in part, that portion of the trial court's judgment awarding the RSH Group attorney's fees against CBIF and Columbia, and render judgment, in part, that the RSH Group take nothing on its claim for attorney's fees under chapter 38 of the civil practice and remedies code. We otherwise affirm the trial court's judgment. Because all issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

FACTUAL & PROCEDURAL BACKGROUND

I. DFW AIRPORT ACCEPTS FRIDAY'S BID

In 1995, DFW International Airport (the "Airport") solicited bids for concession spaces in each of its terminals. Friday's submitted a bid proposing a joint venture with a 35%

[1] Herein, CBIF Limited Partnership is referred to as "CBIF," Columbia Airport, LLC is referred to as "Columbia," Steve Flory is referred to as "Flory," TGI Friday's Inc. and LBD Corporation are collectively referred to as "Friday's," TSQF Limited Partnership is referred to as "TSQF," Norma Roby, Louis Sturns, and Erma Johnson-Hadley are collectively referred to as the "RSH Group," and CBIF, Columbia, and Flory are collectively referred to as the "CBIF parties." While TGIF/DFW Manager, LLC, TGIF/DFW Terminal A Restaurant Joint Venture, Domain Enterprises, Inc., RSH Concessions, LLC, and Texas Star Quality Foods, LLC are named appellees in this case, no issues have been presented concerning them. Therefore, we only reference these entities where relevant to the issues presented.

ownership interest reserved for disadvantaged business enterprise ("DBE") partners.[2] The Airport accepted the bid and awarded Friday's five restaurant locations within the Airport. Once the Airport accepted Friday's proposal, Friday's was obligated to secure a 35% DBE ownership interest in the joint venture.

II. CREATION OF TGIFJV

In addition to itself, Friday's selected three partners for the joint venture, two of which were DBEs. The DBE partners were Star Quality Foods ("SQF"), owned by the RSH Group, and DPC/Jackmont. The remaining partner was Columbia Brokerage and Investments, Inc. ("CBI"), a corporation wholly owned by Flory.[3] The four partners formed TGIF/DFW Restaurant Joint Venture ("TGIFJV") in December 1995. Each partner was to receive an equal 25% ownership interest in TGIFJV in exchange for a capital contribution of $1.55 million.

The venture partners entered into a Joint Venture Agreement ("TGIFJV Agreement") to govern the affairs of the joint venture. The TGIFJV Agreement set forth the purpose of the joint venture, "to construct, outfit and operate for profit" five restaurants at specific gate locations in what are now Airport Terminals A, B, C, and E, and specified there must be unanimous consent among the venture partners for major decisions, including modification of the TGIFJV Agreement. In addition to the TGIFJV Agreement, the venture partners entered into a Partnership Management Services Agreement ("PMSA") that authorized Friday's to manage TGIFJV's operations at the Airport and gave Friday's the control and supervision over its brands and trademarks.

---

[2] In 1983, Congress and the United States Department of Transportation established the disadvantaged business enterprise DBE program to assure state and local governments, public transit, and airport agencies competing for federally-assisted contracts are not disadvantaged by unlawful discrimination. No party to this appeal questions these provisions or challenges their application to the agreements between them.

[3] CBI subsequently assigned its interest in TGIFJV to CBIF, a company owned by Columbia, Flory and others. Columbia is the general partner of CBIF and is managed by Flory and Carlos Canseco ("Canseco").

III. CREATION OF TSQF

Both DBE partners had trouble obtaining the funds necessary to fully satisfy their capital requirements. DPC/Jackmont was ultimately unable to participate in the venture. Flory offered to loan the RSH Group money to fund 51% of SQF's capital contribution in exchange for an opportunity to obtain a 49% interest in SQF. Ultimately Flory, through CBIF, and the RSH Group formed TSQF which acquired SQF's 25% interest in TGIFJV. Texas Star Quality Foods, LLP ("Texas Star"), managed by Columbia (Flory) and Norma Roby ("Roby"), was the general partner of TSQF, and CBIF and the RSH Group were the limited partners of TSQF.[4]

The TSQF Limited Partnership Agreement ("TSQF LP Agreement") contained a super-majority voting requirement, and the Regulations of TSQF's general partner, Texas Star, contained a majority-of-two provision. With this structure, the RSH Group could not act without Flory's consent, even though it individually and through Texas Star owned 51% of the partnership. As a condition of the loan to the RSH Group, Flory required that CBIF's general partner, Columbia, handle TSQF's finances under a management services agreement ("TSQF MSA").

IV. OWNERSHIP INTEREST IN TGIFJV

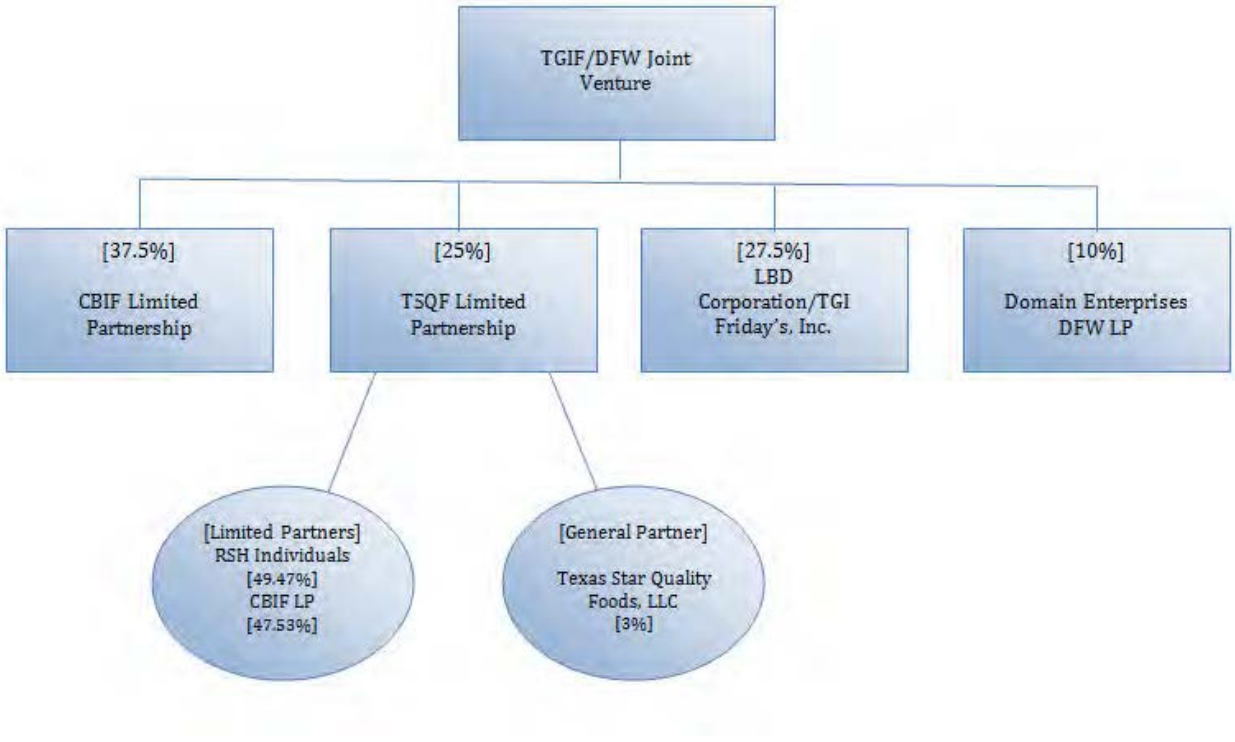
As a result of DPC/Jackmont's failure to fund its capital requirements, CBIF and Friday's exercised their rights of first refusal to acquire a portion of DPC/Jackmont's defaulted interest. TSQF did not exercise its right. Thus, CBIF and Friday's each owned a 37.5% interest in TGIFJV, and TSQF, the sole DBE partner, owned 25%.

Friday's suggested that CBIF and Friday's each sell 5% of their interests in TGIFJV to a qualified DBE in order to meet TGIFJV's 35% DBE commitment to the Airport. Flory refused

[4] Flory controlled entities and the RSH Group owned individually and by virtue of their ownership interest in Texas Star 49% and 51 % of TSQF respectively.

to allow CBIF to do so, blaming Friday's for not fully vetting DPC/Jackmont's ability to participate in the venture. As a result, Friday's sold 10% of its interest in TGIFJV to Domain Enterprises, Inc. ("Domain"), a DBE, leaving Friday's with at 27.5% interest in TGIFJV. In the process of selling 10% of its interest in TGIFJV to Domain, Friday's had to first offer to sell the 10% interest to the remaining partners or get a waiver of rights of first refusal. Flory blocked TSQF from purchasing an additional interest in the joint venture and extracted a payment of $109,000 from Friday's to waive CBIF's right of first refusal. Thereafter, Friday's assigned its 27.5% interest in TGIFJV to LBD Corporation, a subsidiary of Friday's, to comply with liquor license requirements.

Below is a graph of the structure of TGIFJV after the transfers to Domain and LBD.



V. MASTER LEASE AGREEMENT WITH THE AIRPORT

In April 1996, TGIFJV entered into a single master lease agreement with the Airport for restaurant locations within the Airport terminals. The initial term of the lease was 10 years with

two 5-year renewal options. The lease allowed the Airport to relocate TGIFJV's café bars in Terminals B and C, in which case, the term of the lease for the affected locations would be extended by the number of months that had passed from the commencement of the term through the date that any of the café bars ceased business in the space from which the new location was relocated.

VI. AIRPORT TERMINAL D

In June 2004, the Airport opened up bidding for concession spaces in the newly built Terminal D. Bids were due by the end of August 2004 and bidders had to certify that they were or would be 35% owned by a DBE. On December 10, 2004, Columbia called a meeting of the partners of TSQF. At that meeting, the TSQF partners voted to move forward with the Terminal D project. Within the week, Flory communicated to Friday's, as manager of TGIFJV, that TSQF approved proceeding with the project. Friday's circulated a draft of the Terminal D lease agreement and set forth the deadlines for capital contributions. TGIFJV signed the lease for Terminal D on February 25, 2005 and Friday's set a deadline of April 8, 2005 to make initial capital contributions.

TSQF held another partnership meeting on April 12, 2005, four days after Friday's deadline to make the initial capital contributions, to discuss funding the Terminal D project. Concerned about meeting the April 8 payment deadline, the RSH Group paid their 51% share of the initial capital contribution directly to TGIFJV. At the partnership meeting, the partners voted to participate in the Terminal D project and the RSH Group told Flory that it had already sent its portion of the capital contribution to Friday's. Flory advised the RSH Group that he had been in contact with Friday's attorney, who indicated there was still time to make the capital contributions, and admonished the RSH Group that it should have made the payment to TSQF, not TGIFJV. Notwithstanding the partnership vote to participate in the Terminal D project,

CBIF failed to pay its portion of the capital contribution. The RSH Group attempted to remedy the partnership default on its payment obligation by paying the remaining portion of TSQF's capital contribution to TGIFJV.

CBIF admonished Friday's that the RSH Group was not authorized to make payments on behalf of TSQF. As a result, Friday's declared TSQF to be in default and LBD and Domain acquired TSQF's allocated 25% interest in the Terminal D project. Immediately thereafter, TSQF obtained its DBE certification. Flory then changed his mind about TSQF participating in the Terminal D project. He approached Friday's about TSQF participating in the project and Friday's told Flory it was too late. Flory then argued that the funds the RSH Group paid to TGIFJV on behalf of TSQF had been timely delivered and threatened a lawsuit if Friday's refused to allow TSQF to participate. To resolve the dispute, LBD and Domain agreed to give TSQF a 25% interest in the Terminal D restaurant.

CBIF, as a venture partner in TGIFJV, and separate and apart from its role as a limited partner of TSQF, decided it would not participate in the Terminal D project. Flory advised Friday's of CBIF's decision. Several days later, TSQF, LBD and Domain were given the option to purchase *pro rata* portions of CBIF's allocated 37.5% interest in Terminal D. As a result, TSQF had the opportunity to increase its ownership interest in Terminal D by another 15%. Because the RSH Group wanted to acquire the forfeited interest, it paid TSQF's portion of the initial capital call. Flory again took the position that the RSH Group had no authority to act for the partnership and asserted that TSQF had not authorized pursuit of the additional interest in Terminal D. As a result of Flory's actions, TSQF's interest in the Terminal D project was 25% rather than 40%.

VII. CONCERNS OVER FEDERAL POLICY DEVELOPMENTS

In 2005, the United States Department of Transportation ("USDOT") issued long-awaited revised Airport Concessions Disadvantage Business Entity ("ACDBE") regulations. USDOT noted its concern that some airport joint ventures had circumvented ACDBE requirements by having an ACDBE "silent partner" on payroll and, therefore, the Federal Aviation Authority (FAA) was drafting joint venture guidance on the subject.

VIII. DISPUTE OVER BANK CARD SIGNATURES

Prior to 2006, Flory and Canseco were the only individuals with signature authority over TSQF's bank account. On February 27, 2006, the RSH Group instructed the bank to include the group as signatories. Rather than simply add the RSH Group to the signature card, the bank removed Flory and Canseco as signatories on the account. The mix up on the signature card was discovered when Flory attempted to transfer funds from the account. Upon notification, Roby authorized the transfer and the signature cards were corrected to reflect that Flory, Canseco, and Roby were the only authorized signers on the account.

Columbia and CBIF sued the RSH Group over the bank signatory and transfer controversy to determine whether the RSH Group had made any misrepresentations to TSQF's bank or made changes to other bank documents (the "Tarrant County Lawsuit"). In connection with that lawsuit and the claims involved, Flory caused TSQF to pay the attorney's fees for services provided to Columbia and CBIF in the amount of $385,323.52. The RSH Group filed a counterclaim against Columbia and CBIF seeking damages for TSQF's lost profits in Terminal D and rescission/judicial termination of the TSQF MSA to address the persisting control problems in TSQF. That case was consolidated into this case.

VII. DISPUTE OVER DOMAIN OWNERS' PARTICIPATION IN PAPPAS' VENTURES

In late 2007, TGIFJV discovered the owners of Domain planned to participate in Pappadeaux and Pappasito's restaurants at the Airport. TGIFJV, CBIF, and the RSH Group sued

the owners of Domain seeking to enjoin them from participating in the Pappas' ventures claiming doing so violated a non-compete provision in the PMSA (the "Domain Lawsuit"). The Airport supported the owners of Domain's participation in multiple concessions because it disfavored exclusive agreements. TGIFJV and the RSH Group decided not to pursue the matter, but CBIF was intent upon pursuing a claim against Domain.[5] That case was likewise incorporated into this case.

VIII. FAA JOINT VENTURE GUIDANCE

In July 2008, the FAA issued its Joint Venture Guidance, in which the FAA restated existing law requiring that a DBE maintain a degree of control at both the DBE partner level and the joint venture level.

The Airport's Diversity Department required all Airport ACDBE concessionaires to meet the new federal guidelines. Although compliance with the FAA Joint Venture Guidance was voluntary for existing leases, the Airport required compliance for new leases.

On April 23, 2009, the Airport notified TGIFJV that it did not meet the requirements of the FAA Joint Venture Guidance because a DBE partner did not have the requisite level of control over TGIFJV decisions or operations. The Airport also reminded TGIFJV that TSQF must also comply with the joint venture guidelines and indicated that it looked forward to receiving revised TSQF joint venture agreements and amendments that complied with the new FAA mandate.

The participants in TGIFJV started drafting amendments to their agreements endeavoring to make them ACDBE compliant. The focus of the proposed amendments was to increase Domain and TSQF's participation and control of the restaurants while protecting Friday's

[5] Domain was willing to transfer its ownership interest in TGIFJV to another DBE in exchange for termination of the litigation. CBIF refused to settle the litigation.

intellectual property. Flory would not agree to the changes proposed by Friday's and refused to change the TSQF agreements. Flory submitted his own proposed changes to the joint venture's governing documents to the Airport. The Airport concluded Flory's proposed amendments did not comply with the regulations.

IX. DFW AIRPORT'S TERMINAL RENEWAL AND IMPROVEMENT PROGRAM (TRIP)

In September 2009, the Airport announced its intention to renovate and improve Terminals A, B, C, and E as part of an 8-year, 2 billion dollar construction project. The TRIP project called for a complete overhaul of ticketing, security, and concessions areas, beginning with Terminal A in 2011 and proceeding through completion of all four terminals in approximately 2017. As part of the TRIP project, the Airport began requiring joint venture ACDBE compliance because each location would require a new lease. The Airport directed relocation of TGIFJV restaurants and café bars in Terminals A, B, and C, and sought a remodel of the restaurant in Terminal E if TGIFJV became ACDBE compliant and executed new leases. If TGIFJV failed to become ACDBE compliant and execute new leases, the Airport would exercise its eminent domain power and condemn TGIFJV's leases and put the spaces out for bid.

X. TERMINAL A

The Airport offered TGIFJV space in renovated Terminal A. Shortly thereafter, the FAA completed an audit of four Airport concessionaire joint ventures, including TGIFJV, and issued its findings in a report it provided to the Airport. The report outlined several concerns regarding Friday's management of TGIFJV. In essence, the FAA concluded that Friday's had precluded the TGIFJV's minority-certified partners from participating in the management of TGIFJV in violation of FAA guidelines. The FAA, therefore, recommended that the partners revise TGIFJV's governing agreements to clarify the roles of TSQF and Domain and give them more control over TGIFJV's restaurant operations.

In October 2010, the Airport asked TGIFJV to submit revised governing agreements by November 22, 2010 addressing the issues raised in the FAA audit. As the November 22 deadline loomed, with no consensus of the partners of TGIFJV on modifications to TGIFJV's governing agreements, Friday's and the RSH Group, through TGIF/DFW Partner and RSH Concessions, LLC, created a new joint venture and secured a lease for a Friday's restaurant in Terminal A. They included a side agreement preserving interests for Domain and CBIF. As a result of this arrangement, TGIFJV no longer owns or operates a Friday's restaurant in Terminal A.[6]

XI. THE LAWSUIT

In April 2011, Friday's filed this lawsuit against the CBIF parties. CBIF and Columbia filed crossclaims against Friday's and third-party claims against TSQF, the RSH Group, and other related entities. In turn, TSQF and the RSH Group asserted claims against the CBIF parties.

By its suit, Friday's claimed CBIF breached its fiduciary duty by allegedly (1) unreasonably withholding consent to enter into a new lease with the Airport, (2) providing inaccurate information to the Airport, (3) acting out of its own self-interest, and (4) threatening TGIFJV and its constituents with the total loss of the venture's business existence by virtue of condemnation for lack of ACDBE compliance. Friday's sought to hold Columbia and Flory personally accountable for CBIF's breaches-of-fiduciary duty. In connection with its breach-of-fiduciary-duty and aiding-and-abetting claims against Columbia and Flory, Friday's claimed damages of $152,852.40 representing the attorney's fees it incurred because the CBIF parties complicated the Terminal A leasing process. In addition, Friday's sought a judicial dissolution of TGIFJV and a declaratory judgment as to certain restrictive covenants the CBIF parties

[6] The cities of Dallas and Fort Worth, on behalf of the Airport, through an eminent domain proceeding, condemned the leasehold interest in Terminal A.

claimed Friday's and others breached in connection with the venture Friday's and the RSH Group created to enter into the lease for the renovated space in Terminal A.

On behalf of TSQF, the RSH Group sued CBIF and Columbia for theft of TSQF funds used to pay attorney's fees in the Tarrant County Lawsuit. TSQF sought to hold Flory accountable for CBIF and Columbia's theft under a conspiracy theory. TSQF sought to recover the legal fees and expenses CBIF and Columbia caused TSQF to pay in the Tarrant County Lawsuit. TSQF also asserted breach-of-fiduciary-duty and breach-of-contract claims against CBIF and Columbia. It also sought to hold Flory personally accountable for CBIF's and Columbia's claimed breaches. In connection with TSQF's breach-of-fiduciary-duty and breach-of-contract claims, TSQF sought to recover as damages the legal fees and expenses paid in connection with the Tarrant County Lawsuit and lost profits on the defaulted interest in the Terminal D project.

The RSH Group sued CBIF and Columbia for breach-of-fiduciary duty and breach of contract. In its pleadings, the RSH Group sought to recover as damages the attorney's fees it incurred in creating a separate venture to enter into the Terminal A lease and attorney's fees pursuant to chapters 37, 38, and 134 of the civil practice and remedies code, and chapter 154 of the business organizations code.[7] At trial, the RSH Group submitted a claim for attorney's fees under chapter 38 only.

[7] Section 153.405 of the business organizations code does not provide an independent basis for an award of attorney's fees to the RSH Group as against CBIF and Columbia. TEX. BUS. ORGS. CODE ANN. § 153.405 (West 2012). Section 153.405 provides, "[i]f a derivative action is successful, wholly or partly, or if anything is received by the plaintiff because of a judgment, compromise, or settlement of the action or a claim constituting part of the action, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct the plaintiff to remit to a party identified by the court the remainder of the proceeds received by the plaintiff. *Id.* This statutory allocation of attorney's fees in derivative actions is analogous to the common-fund doctrine. *See, e.g., Dallas v. Arnett*, 762 S.W.2d 942, 954 (Tex. App.—Dallas 1988, writ denied) (the common fund doctrine is based on the principle that those receiving the benefits of the suit should bear their fair share of the expenses); *see also Bayoud v. Bayoud*, 797 S.W.2d 304, 315 (Tex. App.—Dallas 1990, writ denied) (attorney's fees are allowed in shareholder derivative suits where it is shown the suit has conferred substantial benefits on the corporation and its shareholders).

XII. THE VERDICT

After a lengthy trial, the jury made the following findings:

- The economic purpose of TGIFJV had been unreasonably frustrated and likely would be frustrated in the future; CBIF engaged in conduct that made it not reasonably practicable to carry on the business of TGIFJV in partnership with CBIF; and it was not reasonably practicable for the joint venture to carry on its business in conformity with its governing documents.

- Section 12.05 of the PMSA, providing the venture partners would not participate in other restaurant operations at the Airport, was unreasonable and Exhibit B, a restrictive covenant concerning the ownership or operations of restaurants in direct competition with TGI Friday's, was not unreasonable.

- CBIF breached its fiduciary duties to Friday's and Columbia and Flory knowingly participated in those breaches.

- TGIF suffered damages in the amount of $152,852.40 as a result of CBIF's breach of fiduciary duty.

- CBIF and Columbia breached their fiduciary duties to TSQF and the RSH Group and Flory knowingly participated in those breaches.

- TSQF suffered damages in the amount of $1,577,589.52 as a result of CBIF's and Columbia's breaches of fiduciary duties.

- The RSH Group suffered damages in the amount of $33,221.23 as a result of CBIF's and Columbia's breaches of fiduciary duties.

- CBIF and Columbia committed civil theft by using TSQF funds to pay for Columbia's or CBIF's legal fees in the Tarrant County lawsuit, and CBIF, Columbia, and Flory conspired to commit the alleged theft.

- TSQF suffered damages in the amount of $385,323.52 as a result of CBIF's and Columbia's theft.

- CBIF breached sections 13.1 and 14.2 of the TSQF LP Agreement and Columbia breached sections 1.02 and 1.03 of the TSQF MSA and sections 3.10, 5.02(a), 6.01(a), and 6.02(a) of the Texas Star Regulations.[8]

[8] Section 13.1 of the TSQF LP Agreement provides, "The Partnership shall be managed by the General Partner [Texas Star] and the conduct of the Partnership's business shall be controlled and conducted solely by the General Partner in accordance with this Agreement."

Section 14.2 of the TSQF LP Agreement provides, "No Limited Partner shall take part in the management of the business of or transact any business for the Partnership or be paid any salary or have a drawing account unless under a separate agreement with the General Partner. All management responsibility is vested in the General Partner.

- TSQF suffered damages in the amount of $1,577,589.52 as a result of CBIF's and Columbia's breaches of contract.

- The RSH Group suffered damages in the amount of $33,221.23 as a result of CBIF's and Columbia's breaches of contract.

- The RSH Group incurred reasonable fees of $1,363,072.67 for prosecuting its breach-of-contact claims and claims on behalf of TSQF.

In addition, the jury found against the CBIF parties on their affirmative claims for relief.

XIII. THE JUDGMENT

Based on the jury's verdict and the evidence concerning attorney's fees Friday's submitted to the trial court post-trial, the trial court rendered Final Judgment on November 7, 2014:

1. Dissolving TGIFJV under section 11.314 of the Texas Business Organizations Code and appointing a wind-up representative to carry out the dissolution.

2. Declaring section 12.05 of the PMSA unenforceable and reforming it to provide that the partners could not participate in other restaurant operations at DFW unless the other operation was a Friday's. The court also deleted the Exclusive-License Provision and

---

Section 1.02 of the TSQF MSA provides, in part, "Should any Question regarding the interpretation or requirements of the TSQF Limited Partnership Agreement *or* this Agreement arise, COLUMBIA is authorized at the expense of STAR to seek such reasonable legal or accounting advice as *it* determines is reasonably necessary."

Section 1.03 of the TSQF MSA provides, "Anything herein to the contrary notwithstanding, COLUMBIA shall have no authority hereunder to bind STAR in any contractual or other obligation, other than would normally accrue from endorsing checks, filing tax returns, and the like; further COLUMBIA shall under no circumstances be required to make any loan to STAR. COLUMBIA is not nor shall any action taken hereunder by it cause it to be a limited or general partner of STAR nor cause the relationship between it and STAR to be a partnership."

Section 3.10 of the Texas Star Regulations provides, "No Member (other than a Manager or an Officer) has the authority or power to act for or on behalf of the Company, to do any act that would be binding on the Company, or to incur any expenditure on behalf of the Company."

Section 5.02 of the Texas Star Regulations provides, in part, "From time to time the Managers also may cause property of the Company other than cash to be distributed to the Members, which distribution must be made in accordance with their Sharing Ratios and may be made subject to existing liabilities and obligations. Immediately prior to such a distribution, the capital accounts of the Members shall be adjusted as provided in Treas. Reg. 11. 704-1 (b) (2) (iv) (f)."

Section 6.01(a) of the Texas Star Regulations provides, in part, "Except for situations in which the approval of the Members is required by these Regulations or by non-waivable provisions of applicable law, and subject to the provisions of Section 6.02, (i) the powers of the Company shall be exercised by or under the authority of, and the business and affairs of the Company shall be managed under the direction of, the Managers, (ii) the Managers may make all decisions and take all actions for the Company not otherwise provided for in the Regulations . . . ."

Section 6.02(a) of the Texas Star Regulations provides,

> "In managing the business and affairs of the Company and exercising its powers, a majority of the Managers shall act (i) collectively through meetings and written consents pursuant to Sections 6.05 and 6.071 (ii) through committees pursuant to section 6.02(b); and (iii) through Managers to whom authority and duties have been delegated pursuant to Section 6 .0l(c)."

declared that Exhibit B to the PMSA was inapplicable to the partners' attempts to own or operate competing restaurants at the Airport.

3. Ordering:

(a) CBIF, Columbia, and Flory, jointly and severally, to pay Friday's $152,852.40 in actual damages plus interest on Friday's breach-of-fiduciary-duty claim;

(b) CBIF and Columbia, jointly and severally, pay Friday's $2.8 million in attorney's fees based on its DJA claim;

(c) CBIF, Columbia, and Flory, jointly and severally, pay TSQF $1,577,589.52 in actual damages plus interest on TSQF's breach-of-fiduciary-duty and breach-of-contract claims, comprised of the attorney's fees TSQF paid in connection with the Tarrant County lawsuit in the amount of $385,323.52 (which was also awarded by the jury on TSQF's theft claim), past lost profits in the amount of $1,022,180, and future lost profits in the amount of $170,986; and

(d) CBIF, Columbia, and Flory, jointly and severally, pay the RSH Group $33,221.23 in actual damages plus interest on RSH Group's breach-of-fiduciary-duty and breach-of-contract claims, as well as $1,363,072.67 in attorney's fees for representation in the Tarrant County lawsuit and this case.

ISSUES AND ARGUMENTS PRESENTED

On appeal, CBIF raises the following issues. First, CBIF challenges whether the evidence was legally sufficient to support a dissolution of TGIFJV. Second, CBIF contends that the damages awarded to Friday's are unsupportable. Third, CBIF argues the trial court erred by awarding Friday's relief pursuant to the DJA. Fourth, CBIF argues the trial court erred by awarding Friday's attorney's fees on its DJA claim. Fifth, CBIF challenges the legal and factual sufficiency of the evidence to support the finding that CBIF committed theft or conspired to commit theft. Finally, CBIF challenges the legal and factual sufficiency of the evidence to support the damages and attorney's fees awarded to TSQF and the RSH Group.

In addition to adopting CBIF's brief in its entirety, Columbia and Flory raise twenty-two issues complaining about the Court's Charge, the jury findings, and the trial court's judgment. In issues one and two, Columbia and Flory challenge the legal and factual sufficiency of the evidence to support the findings CBIF breached its fiduciary duty to Friday's, Flory participated

in the breach, and the damages awarded on Friday's breach-of-fiduciary-duty claim. In their third, ninth, twelfth, and twentieth issues, Columbia and Flory argue the trial court erred in refusing to submit their requested jury questions and instructions on legal justification, fiduciary duty, and good-faith belief. In their fourth issue, Columbia and Flory challenge the attorney's fees awarded to Friday's on its DJA claim. In issues five through eight and issues ten and eleven, Columbia and Flory challenge the legal and factual sufficiency of the evidence to support the jury's findings on TSQF's breach-of-contract, breach-of-fiduciary-duty, and theft claims, and findings Flory knowingly participated in CBIF's and Columbia's breaches of their fiduciary duties and the CBIF parties conspired to breach a fiduciary duty and to commit theft. In issues thirteen through fifteen, Columbia and Flory challenge the legal and factual sufficiency of the evidence to support the damages awarded to TSQF and argue TSQF's claims for lost profits are barred by limitations. In issues sixteen through nineteen, and issues twenty-one and twenty-two, Columbia and Flory challenge the legal and factual sufficiency of the evidence to support the jury's finding on the RSH Group's breach-of-fiduciary-duty claim and findings Flory knowing participated in the breach and the CBIF parties conspired to breach a fiduciary duty, and the damages and attorney's fees awarded to the RSH Group.

DISCUSSION

I. DISSOLUTION

In the first three sub-parts to its first issue, CBIF argues the trial court erred in ordering the dissolution of TGIFJV because:

> (a) there is no evidence that the economic purpose of the Joint Venture—making profits from the sale of food and beverages at Friday's branded restaurants at DFW—has been and is likely to be "unreasonably frustrated";
>
> (b) there is no evidence that CBIF has engaged in the type of conduct relating to the Joint Venture's business that makes it "not reasonably practicable" to carry on its business in partnership with CBIF; and

(c) there is no evidence that carrying on the Joint Venture's business in conformity with its governing documents "is not reasonably practicable."

A. *Standard of Review*

In its brief, CBIF asserts the trial court erred in allowing the jury to determine whether any of the bases for dissolution existed and in accepting the jury's findings without any meaningful analysis. In other words, CBIF claims the issue of whether a ground for dissolution exists was for the court to decide, not the jury.

When contested fact issues must be resolved before a court can determine the expediency, necessity, or propriety of equitable relief, a party is entitled to have a jury resolve the disputed fact issues. *See State v. Tex. Pet Foods, Inc.*, 591 S.W.2d 800, 803 (Tex. 1979). Dissolution proceedings are equitable in nature and contested facts concerning a basis for dissolution are for the jury. *See, e.g.*, *M.R. Champion, Inc. v. Mizell*, 904 S.W.2d 617, 618 (Tex. 1995) (jury finding "not reasonably practicable to carry on the partnership business"). This case presented contested fact issues that had to be resolved by the jury before the court could determine whether dissolution was warranted.

Next, CBIF argues the evidence is legally insufficient to support the jury's findings on the statutory bases for dissolution. The test for legal sufficiency is whether the evidence at trial would enable reasonable and fair-minded people to reach the decision under review. *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005). In our review of the evidence, we credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not. *Id.* We will uphold the jury's finding if more than a scintilla of competent evidence supports it. *Tanner v. Nationwide Mut. Fire Ins. Co.*, 289 S.W.3d 828, 830 (Tex. 2009).

B. *Applicable Law*

Section 11.314 of the Texas Business Organizations Code authorizes a district court to order the winding up and termination of a partnership "if the court determines" that at least one-of-three exigent circumstances listed in the statute exists.[9] TEX. BUS. ORGS. CODE ANN. § 11.314 (West 2012).

C. *Application of the Law to the Facts*

In response to Questions 1, 2, and 3 in the Court's Charge, the jury found each statutory basis for dissolution existed and the trial court decreed, pursuant to sections 11.314 and 11.051 of the Texas Business Organizations Code, that TGIFJV is dissolved. The dissolution was effective as of the date of the Final Judgment. Evidence supporting a finding that any one of the three bases for dissolution exists is sufficient to uphold the trial court's decree of dissolution. *See id.*

As to the economic purpose basis for dissolution, CBIF argues the economic purpose of TGIFJV has never been unreasonably frustrated and is not likely to be frustrated in the future because the venture has made profits of over $70 million from 1995 through 2013.[10]

We begin our review of this issue by noting the TGIFJV Agreement provides that the purpose of TGIFJV is "to construct, outfit and operate for profit" Friday's restaurants and café bars at the Airport. In connection with this purpose, TGIFJV entered into a lease agreement with the Airport. The lease covered TGI Friday's restaurants and café bars in Terminals A, B, C, and

[9] The statute allows dissolution if the court determines (1) the economic purpose of the partnership is likely to be unreasonably frustrated (the economic purpose basis); (2) another partner has engaged in conduct relating to the partnership's business that makes it not reasonably practicable to carry on the business in partnership with that partner (the partner-conduct basis); or (3) it is not reasonably practicable to carry on the entity's business in conformity with its governing documents (governing-documents basis). TEX. BUS. ORGS. CODE ANN. § 11.314.

[10] CBIF cites three cases in support of its position. None is applicable here. *Abuzaid v. Abuzaid*, No. 05-08-00876-CV, 2009 WL 2217737, at *3 (Tex. App.—Dallas July 24, 2009, no pet.) (the trial court's order dissolving the partnership did not state a ground for dissolution and the plaintiff did not submit any evidence of an event that would allow a court to issue a decree that would trigger a winding up of the partnership business under the Texas Revised Partnership Act); *Logan v. Logan*, 675 P.2d 1242, 1244, 1246 (Wash. 1984) (upholding denial of request for dissolution on finding the burden to establish a ground for dissolution had not been met); *Goldstein v. Pikus*, No. 653201-2014 and 651209-2014, 2015 WL 4627747, at *17 (N.Y. Sup. Ct. July 20, 2015) (addressing carrying on business in conformity with governing documents, not the economic purpose basis).

E. TGIFJV agreed to consent to amendments and modifications of the lease agreement if required by the FAA and to comply with all present and further governmental laws, ordinances, rules, regulations, requirements, orders and directions. If TGIFJV fails to comply with the aforementioned laws, the Airport may terminate the lease agreement, effectively shutting down the restaurants and café bars, which would clearly frustrate the economic purpose of the venture.

In addition, the evidence presented at trial established the following. The Airport is required to have and enforce ACDBE and DBE programs in order to receive federal grants and is required to follow FAA and USDOT guidelines for administering the programs. In 2008, the FAA issued a mandate that the Airport review existing joint ventures and bring them into compliance with the joint venture guidelines. The TRIP project provided the Airport with an avenue to enforce compliance because the Airport and concessionaires had to execute new leases for space in the renovated terminals. The Airport would not enter into a new lease with a joint venture that was not ACDBE compliant by the completion of the renovations and non-compliant leaseholds would be lost upon expiration of the lease term or condemnation.[11] Neither TGIFJV nor TSQF were compliant when the Airport leased concession space in the newly renovated Terminal A. Flory did not trust the RSH Group and refused to enter into agreements that would allow the group to exercise the level of control required to meet the FAA guidelines. As a result, the Airport condemned TGIFJV's restaurant space in Terminal A. The evidence further established that Flory had no intention of changing his position concerning control of the partnership and joint venture, making condemnation of the other restaurant and bar spaces inevitable.

[11] The evidence included a letter from the Vice President of concessions for the Airport to Friday's stating "[a] critical component of these future leases is the incorporation of a new, fully consummated lease and Joint Venture Agreement that meets all the requirements as set forth by the FAA and our Business Diversity and Development Department. . . . To ensure these locations are not part of the upcoming Request for Proposal, it will be important for us to receive a fully executed lease for the Terminals A and E locations, in particular, along with the associated JV Agreement, 30 days from Board approval."

CBIF argues the Airport's extension of the lease as to some of the restaurant and café bar locations without ACDBE compliance negates a finding that the economic purpose of the venture is likely to be frustrated. But the jury could have readily found that the Airport extended the lease to accommodate the renovation progress only. The evidence clearly established that for future leases the Airport will require new, fully consummated lease and joint venture agreements that meet all of the requirements as set forth by the FAA and the Airport's Business Diversity and Development Department. The Airport intends to exercise its eminent-domain authority to terminate the lease as to specific restaurants and café bars in terminals coming under construction if TGIFJV, at both the joint venture and partner level, does not comply with the Airport's ACDBE program and gain approval of the FAA.

The evidence established TGIFJV lost the Terminal A space and that TGIFJV would inevitably lose the remaining spaces.[12] With the loss of the lease spaces, TGIFJV will not be able to construct, outfit and operate for profit Friday's restaurants and café bars at the Airport. Thus, there is more than a scintilla of evidence to support the jury's finding in Question 1 that the economic purpose of TGIFJV has been unreasonably frustrated and will likely be unreasonably frustrated in the future. Accordingly, we overrule the first sub-part to CBIF's first issue. Our disposition makes it unnecessary to address the second and third sub-parts. TEX. R. APP. P. 47.1.

[12] CBIF relies on a letter dated May 2, 2011 from the Airport to the FAA to argue that TGIFJV was in compliance. But a review of that letter and attachments established TGIFJV was not in compliance and would require continued monitoring. In that letter, the Airport represented to the FAA that it would continue to reach out to TGIFJV to try and bring resolution to their FAA recommended actions, including (1) rewriting the duties of the joint venture partners to capture actual duties of the partners, which the Airport would then review to determine the value to be counted towards ACDBE participation, (2) revising the management agreement which was not in compliance with the Joint Venture Guidance, and (3) re-evaluating control of ACDBE following a rewrite of duties and evaluation of the management agreement. These recommended actions remained pending because the parties to the joint venture were engaged in a contract dispute that prevented the re-assignment of roles between the parties, and were unable or unwilling to revise the agreement until their contract dispute was settled. In closing out its DBE Compliance Review, the FAA advised the Airport that it should continue to provide the FAA with updates on the status of TGIFJV.

II. THE WINDING-UP PROCESS

In the fourth sub-part to CBIF's first issue, CBIF argues the trial court's order authorizing the wind-up representative to systematically liquidate all the assets of TGIFJV, including the master lease with the Airport, violates section 157.701 of the Texas Business Organizations Code and the common law as specified in *Bader v. Cox*, 701 S.W.2d 677 (Tex. App.—Dallas 1985, writ ref'd n.r.e.). For the reasons set forth in this opinion, we disagree.

CBIF argues section 152.701(1) of the business organizations code and *Bader* prohibit the winding up of TGIFJV until the leases with the Airport expire. Section 152.701(1) provides that on the occurrence of an event requiring winding up of a partnership business under Section 11.051 or 11.057, the partnership continues until the winding up of its business is completed, at which time the partnership is terminated. TEX. BUS. ORGS. CODE ANN. § 152.701. Nothing in section 152.701(1) requires continuation of a partnership until all executory contracts are fulfilled and CBIF cites no authority to support such a conclusion.

Instead, CBIF relies upon this Court's decision in *Bader* to argue the duty to wind up generally includes the duty to complete all executory contracts. While this Court recognized this general rule, it also noted that in some cases executory contracts need not be concluded as part of the winding-up process, but rather may be given a present value. *Bader*, 701 S.W.2d at 682. That is what the trial court intended in this case by ordering that the wind-up representative commission an appraisal of the fair-market-value of the leasehold interest taking into account (1) the remaining term of the leases and the likelihood of any renewals of the leases, (2) the potential for the Airport to exercise its eminent-domain power as to any lease, (3) the condemnation value of the leases, (4) the constraints on assignability of the leases and any necessary consent from the Airport, and (5) any other factors or assumptions necessary to appraise the market value of the leases under the appropriate standards for commercial real estate appraisal.

CBIF also argues that allowing the wind-up representative to terminate the lease before the end of its term has exposed CBIF to potential liability to the Airport. The trial court addressed this concern in its wind-up order by providing that, subject to court approval, the wind-up representative is authorized to terminate existing contracts or leases between TGIFJV and any third party during the wind-up period in a manner calculated to minimize the risk of liability of TGIFJV and/or maximize the value of TGIFJV property.

Next, CBIF claims the trial court's order runs afoul of *Bader's* admonition that partners owe a fiduciary duty to wind up and cannot take actions for purely personal gain because the order allows the wind-up representative to sell or assign the leasehold interest applicable to each restaurant to a new entity owned or controlled by Friday's. But unlike *Bader*, where the remaining partners were winding up the partnership business and clearly owed fiduciary duties and refused to give credit to the deceased partner's estate for the value of the contingent files, here the partners are not winding up the venture's business. Rather, the trial court appointed Kevin Buchanan ("Buchanan") as the wind-up representative. There is no evidence to suggest that Buchanan has any connection to or interest in Friday's or is likely to personally gain from the wind-up process. Consequently, the situation and concern presented in *Bader* does not exist here.

Finally, CBIF asserts that the wind-up representative order is a liquidating-receiver order requiring a judicial determination under section 11.401 of the business organizations code that all other available legal and equitable remedies are inadequate. TEX. BUS. ORGS. CODE ANN. § 11.405(b)(3). The liquidating receiver provision in section 11.405 applies in circumstances not applicable here—receivership or on application by the attorney general, the entity, a creditor, or member or director of a nonprofit corporation or cooperative association. *Id.* §11.405.

We overrule the fourth sub-part to CBIF's first issue.

III. DECLARATORY JUDGMENT

In the third sub-part to CBIF's fourth issue, in which Columbia and Flory join by their fourth issue, CBIF argues Friday's is barred from recovering attorney's fees under the DJA because it impermissibly used the DJA as a vehicle to recover otherwise unavailable attorney's fees.

A. *Standard of Review*

We review a trial court's award of fees for an abuse of discretion. *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). It is an abuse of discretion to award attorney's fees under the DJA when the statute is relied upon solely as a vehicle to recover such fees. *City of Carrollton v RIHR Inc.*, 308 S.W.3d 444, 454 (Tex. App.—Dallas 2010, pet. denied).

B. *Applicable Law*

The DJA cannot be used to "obtain otherwise impermissible and unavailable attorney's fees." *MBM Fin. Corp. v. Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 669 (Tex. 2009); *City of Carrollton*, 308 S.W.3d at 454. This rule bars the recovery of attorney's fees for DJA claims that merely duplicate other affirmative claims for which fees are unrecoverable. *MBM*, 292 S.W.3d at 671. It also bars the recovery of DJA fees for merely "resisting" or defending against an opposing party's DJA claim. *Cellular Sales of Knoxville, Inc. v. McGonagle*, No. 05-13-00246-CV, 2014 WL 3513254, at *8 (Tex. App.—Dallas July 15, 2014, no pet.) (mem. op.).

C. *Application of the Law to the Facts*

CBIF argues declaratory judgment was not available to Friday's because the dispute concerning the restrictive covenants already existed. CBIF asserted breach-of-contract claims against Friday's and the RSH Group for participating in the Terminal A joint venture in violation of a non-compete agreement. To sustain a claim under Texas law for breach of a covenant not to compete, the claimant must show: (1) the non-compete agreement is enforceable; (2) the

defendant violated the non-compete; and (3) the defendant does not have an affirmative defense. *In re Gomez*, 520 B.R. 233, 237 (Bankr. S.D. Tex. 2014) (applying Texas law). Section 15.50 of the Texas Business and Commerce Code provides:

> A covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promise.

TEX. BUS. & COM. CODE ANN. § 15.50 (West 2011).

Friday's requested a declaration that section 12.05 of the PMSA contains limitations as to time, geographical area, or scope of activity to be restrained that are not reasonable and impose a greater restraint than is necessary to protect a legitimate business interest of TGIFJV and that the restrictive covenant in Exhibit B to the PMSA does not apply to the ownership or operation of a Friday's restaurant at the Airport.[13] Friday's request for a declaration that section 12.05 is not enforceable and Exhibit B does not apply in this case was simply a restatement of its denial of CBIF's breach-of-contract claim. Thus, the main thrust of Friday's declaratory-judgment action encompassed an issue that could be resolved within the context of CBIF's breach-of-contract claim. *See, e.g., Crews v. Dkasi Corp.*, 469 S.W.3d 194, 204 (Tex. App.—Dallas 2015, pet. denied) (party seeking declaration that a partnership agreement terminated on a certain date was no more than a restatement of defense that no agreement existed or that the agreement terminated

[13] Section 12.05 provides, "During the Term of this Agreement Owner, any *of* the joint venture partners in Owner of Friday's shall not own, manage, operate or otherwise participate in any other restaurant operation at the DFW Airport. and during the Term of *this* Agreement Friday's shall not permit any party other than Owner to use the "TGI Friday's brand (including but not limited to operating systems, recipes, menus, training materials and procedures that are exclusive to the TGI Friday's system) while operating at the DFW Airport."

Exhibit B provides, in relevant part, "Owner (Including the venture partners in Owner), or persons controlling, controlled by or under common control with Owner (a "Restricted Party"), shall not have *anv* interest in the ownership or operation of any restaurant that serves any alcoholic beverages and is part of any multi-unit restaurant and/or bar operation that is a direct competitor of Friday's (save and except any restaurant operated on the Premises or any substitute premises as may from time to time occur under the Lease), and Friday's may terminate this Management Agreement if such Restricted Party shall fail *or* refuse to divest itself of such interest (a "Restricted lnterest") within thirty (30) days after demand by Friday's. . . ."

on a certain date and the trial court could resolve the issue through defenses raised rather than through declaration).

Under these facts, Friday's used the DJA as a vehicle to obtain an otherwise impermissible attorney's fee award. In addition, the proper remedy for overbreadth of a non-compete provision is reformation, not a declaration that it is unenforceable, *see* section 15.51 of the Texas Business & Commerce Code, a remedy the trial court included in its judgment. Accordingly, the trial court abused its discretion by entering a declaration concerning the non-compete agreement and Exhibit B and by awarding Friday's attorney's fees. Consequently, we sustain the third sub-part to CBIF's fourth issue and Columbia's and Flory's fourth issue. Our disposition makes it unnecessary to address CBIF's third issue and the first and second sub-parts to its fourth issue addressing the validity of the non-compete covenant and application of the restrictive covenant set forth in Exhibit B, and waiver of attorney's fees.[14] TEX. R. APP. P. 47.1.

IV. BREACH OF FIDUCIARY DUTY AND KNOWING PARTICIPATION FINDINGS AND DAMAGES AWARD TO FRIDAY'S

In CBIF's second issue and Columbia's and Flory's first and second issues, the CBIF parties challenge the legal and factual sufficiency of the evidence to support the jury's findings CBIF breached a fiduciary duty to Friday's, Columbia and Flory knowingly participated in the

[14] **CBIF Issue 3:** Did the trial court err in granting Friday's request for declaratory relief under the TDJA to invalidate, reform, and interpret the Joint Venture Management Agreement, when:

(a) the Competing-Restaurant Covenant in section 12.05 of the JVMA is a valid covenant not to compete under Texas law and should not have been rewritten in the manner the trial court ordered.

(b) the Exclusive-License Provision in section 12.05 of the JVMA is not a covenant not to compete and is valid as a matter of law.

(c) the plain and unambiguous language of Exhibit B, which prohibits Joint Venture partners from owning or operating a Friday's restaurant at DFW, is inconsistent with the trial court's declaration that Exhibit B "do[es] not apply to the ownership or operation of a Friday's restaurant at the DFW Airport"?

CBIF Issue 4: Did the trial court abuse its discretion in awarding $2.8 million in attorney's fees to Friday's under the TDJA, when:

(a) Friday's waived recovery of such fees by failing to request a jury question on reasonableness and necessity;

(b) there was no Rule 11 agreement allowing Friday's to submit the issue of reasonableness and necessity to the trial court.

breach, and the award of $152,852 in damages to Friday's for its transactional attorney's fees. In Columbia's and Flory's third issue, they argue the trial court erred in refusing to submit their requested jury question on justification as a defense to knowing participation in CBIF's breach-of-fiduciary duty.

A. *Sufficiency of the Evidence*

1. Standard of Review

The test for legal sufficiency is "whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *Wilson*, 168 S.W.3d at 823. In our review of the evidence, we "credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not." *Id.* We will uphold the jury's finding if more than a scintilla of competent evidence supports it. *Tanner*, 289 S.W.3d at 830.

When reviewing a jury verdict to determine the factual sufficiency of the evidence, we must consider and weigh all the evidence, and should set aside the verdict only if it is contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam).

2. Allegations and Evidence of Breach of Fiduciary Duty

Friday's alleged CBIF breached its fiduciary duty by unreasonably withholding consent to enter into a new lease with the Airport, by providing inaccurate information to the Airport, by acting out of its own self-interest, and by threatening TGIFJV and its constituents with the total loss of the venture's business existence through condemnation proceedings if CBIF was not paid millions of dollars in order to buy out its interest in the venture. CBIF argues it cannot be held liable for breach of fiduciary duty because it was merely exercising its contractual right to vote against proposed changes to the venture's governing documents and that its refusal to agree to

Friday's proposed modifications does not constitute a breach of fiduciary duty that caused damage to Friday's.

Be that as it may, contracts do not exist in a vacuum. Rather, contractual rights, such as those claimed by CBIF, do not "operate to the exclusion of fiduciary duties." *Fleming v. Kinney*, 395 S.W.3d 917, 925 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). Instead, where the two overlap, contractual rights must be exercised in a manner consistent with fiduciary duties. *Ritchie v. Rupe*, 443 S.W.3d 856, 883–84 (Tex. 2014); *Anderton v. Cawley*, 378 S.W.3d 38, 53–54 (Tex. App.—Dallas 2012, no pet.).

Here the evidence established that while the TGIFJV Agreement required unanimous consent of the venture partners to modify or amend the agreement, TGIFJV had to comply with governmental laws and regulations—including ACDBE requirements—or risk having its lease, which is essential to the operation of TGI Friday's restaurants and café bars at the Airport, terminated. CBIF knew the Airport and the FAA had concluded TGIFJV's and TSQF's ownership structures did not meet the ACDBE requirements and the Airport threatened condemnation of the lease if the entities failed to become compliant. CBIF refused to amend the venture's governing documents to give the disadvantaged business entities the requisite level of control, placing TGIFJV in default of the lease's compliance requirement, which jeopardized the entire venture. The evidence also established that CBIF pursued its own self-interest at the expense of the joint venture by conditioning its waiver of its right of first refusal to purchase the 10% interest Friday's sold to Domain, to maintain a 35% DBE ownership interest in the joint venture, upon payment of $109,000.

Considering and weighing all of the evidence in the record pertinent to the finding CBIF breached its fiduciary duty to Friday's, we conclude there is more than a scintilla of competent evidence to support the finding and the finding is not contrary to the overwhelming weight of all

the evidence as to be clearly wrong and unjust. Accordingly, we overrule the second sub-part to CBIF's second issue and Columbia's and Flory's first issue.

3. Attorney's Fees as Damages

Citing *RAS Group, Inc. v. Rent-A-Center East. Inc.*, 335 S.W.3d 630, 641 (Tex. App.—Dallas 2010, no pet.), CBIF claims this Court has made it clear that attorney's fees are recoverable as actual damages in only two situations, that being in a legal malpractice case and when the defendant's tort requires a party to protect its own interests by bringing or defending an action against a third party. *RAS* is not so limiting. In that case, this Court simply discussed two situations in which attorney's fees may properly be recovered. Although attorney's fees are not ordinarily considered as an element of damages, *Phillips v. Wertz*, 579 S.W.2d 279, 280 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.), this Court has recognized that a plaintiff may recover in tort those damages that proximately resulted from the alleged wrongful act, including expenses incurred in hiring an attorney to investigate the injury, as distinguished from the cost of prosecuting claims against the defendant. *See Jackson v. Julian*, 694 S.W.2d 434, 437 (Tex. App.—Dallas 1985, no writ). In addition, the damage award to Friday's is entirely consistent with the supreme court's recognition that attorney's fees unrelated to the ongoing litigation can be recovered as compensatory damages. *In re Nalle Plastics Family Ltd.*, 406 S.W.3d 168, 174–75 (Tex. 2013) (where "the underlying suit concerns a claim for attorney's fees as an element of damages[,] . . . those fees may properly be included . . . .").

In this case, the jury was asked to find the amount of reasonable and necessary attorney's fees, expenses, and costs incurred by Friday's as a result of CBIF's failure to comply with its fiduciary duties, excluding any fees, expenses, and costs incurred by Friday's to prosecute or defend claims in this case. This instruction is consistent with our holding in *Julian*. The jury responded to this question by awarding Friday's the transactional attorney's fees it incurred in

connection with the Terminal A renovation and relocation. Friday's presented evidence that these fees were incurred as a result of CBIF's Terminal A misconduct and to save the Terminal A lease for the operation of a Friday's restaurant and that Friday's paid the fees.

Considering and weighing all of the evidence in the record pertinent to the finding Friday's incurred damages of $152,852.40 as a result of CBIF's breach of its fiduciary duty, we determine that there is more than a scintilla of competent evidence to support the finding and the finding is not contrary to the overwhelming weight of all the evidence as to be clearly wrong and unjust. Accordingly, we overrule the first sub-part to CBIF's second issue and Columbia's and Flory's first issue.

4. Knowing Participation in CBIF's Breach of Fiduciary Duty

a. Agent Status

Citing *Holloway v. Skinner*, 898 S.W.2d 793, 795 (Tex. 1995), Flory argues that he cannot be held individually liable for CBIF's breach of fiduciary duty because he acted only in his capacity as manager of Columbia, the general partner of CBIF, and acted in good faith, believing that what he did was for the best interest of CBIF and Columbia. But *Holloway* was a breach-of-contract and tortious-interference case, not a breach-of-fiduciary-duty case. Thus, Flory's reliance on it is misplaced.

Next, citing *Span Enterprises v. Wood*, 274 S.W.3d 854, 859 (Tex. App.—Houston [1st Dist.] 2008, no pet.), Columbia and Flory argue agents cannot be held liable for aiding and abetting a violation of a fiduciary duty by their principal. Columbia and Flory's reliance on *Wood* is likewise misplaced. In that case, the court of appeals upheld the trial court's summary judgment for attorneys on the ground that there was no cause of action for aiding and abetting a breach of fiduciary duty because no attorney–client relationship existed in the first instance. *Id.*

Wood does not reach the question of whether an agent might be held liable for aiding and abetting a principal's breach of fiduciary duty.

When a defendant knowingly participates in the breach of a fiduciary duty, he becomes a joint tortfeasor and is liable as such. *Kastner v. Jenkens & Gilchrist, P.C.*, 231 S.W.3d 571, 580 (Tex. App.—Dallas 2007, no pet.). A claim that a defendant knowingly participated in a breach-of-fiduciary duty by a third party necessarily hinges on the existence of a fiduciary duty owed by the third party to the plaintiff. *Cox Tex. Newspapers, L.P. v. Wooten*, 59 S.W.3d 717, 722 (Tex. App.—Austin 2001, pet. denied). In addition to the existence of a fiduciary duty, the plaintiff must show the defendant knew of the fiduciary relationship and was aware of his participation in the third party's breach of its duty. *Id.* In this case, the jury was asked whether Columbia or Flory knowingly participate in CBIF's failure to comply with its fiduciary duty to Friday's and instructed that "[k]nowingly means actual awareness, at the time of the conduct, that a fiduciary duty was owed and that the fiduciary was breaching that fiduciary duty. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness." The jury answered "yes" as to both of them.

b. Evidence of Knowing Participation

CBIF was a partner in TGIFJV. The relationship between partners is fiduciary in character, and imposes on all the participants the obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise. *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 264 (Tex. 1951). Thus, CBIF owed its partners in the joint venture, including Friday's, a fiduciary duty. As stated *supra*, the evidence supports the jury's finding CBIF breached its fiduciary duty to Friday's. Flory acknowledged that CBIF owed a fiduciary duty to its partners, including a duty to act in the best interest of TGIFJV and its partners and to avoid self-dealing. Thus, the evidence

established Flory, and thus Columbia, knew of the fiduciary relationship between CBIF and the joint venture, and its partners.

Flory argues Friday's did not present any evidence that he actually knew the actions of CBIF constituted breaches of fiduciary duty owed to Friday's and urges his testimony that he believed that CBIF was acting within its rights to oppose formation of a new joint venture (and to oppose fundamental changes to the structure of the existing joint venture) established he did not know CBIF was acting in breach of a fiduciary duty. In doing so, Flory focuses on the first basis upon which the jury could find Flory acted "knowingly" and ignores the second which allowed the jury to find knowing participation by inference where objective manifestations indicate that a person acted, for example, with actual awareness. The jury was free to weigh the credibility of all of the live testimony and other evidence before them and to reject Flory's explanation for his conduct, which it evidently did. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003).

Evidence of Columbia's and Flory's roles and involvement in CBIF's actions relative to Terminal A—including their oversight and management of CBIF, their knowledge of the Airport's concern over DBE compliance, their thwarting Friday's efforts to preserve TGIFJV's space in Terminal A, their actions precluding TGIFJV from complying with Airport requirements, and Flory's attempt to extract $4,287,500 and 25% of Domain's Terminal D interest before he would resolve any of the issues that prevented the joint venture from moving forward—all support the jury's findings Columbia and Flory knowingly participated in CBIF's failure to comply with its fiduciary duty to Friday's. *See Darocy v. Abildtrup*, 345 S.W.3d 129, 138 (Tex. App.—Dallas 2011, no pet.) (evidence of the agent's central "role and involvement in" the principal's operations constituted "legally and factually sufficient evidence to support" knowing participation finding).

We will uphold the jury's finding if more than a scintilla of competent evidence supports it and if the finding is not contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. When viewed under the appropriate standards, there is legally and factually sufficient evidence to support the jury's finding of knowing participation. Accordingly, we overrule Columbia's and Flory's second issue.

B. *Requested Jury Question on Legal Justification*

1. Standard of Review

A trial court's failure to submit a requested question warrants reversal "only when the trial judge denies a proper submission of a valid theory of recovery" and "the error probably caused the rendition of an improper judgment." *Barnett v. Coppell N. Tex. Court, Ltd.*, 123 S.W.3d 804, 825 (Tex. App.—Dallas 2003, pet. denied). A tendered question not in substantially correct form is properly rejected. TEX. R. CIV. P. 278; *Placencio v. Allied Indus. Int'l, Inc.*, 724 S.W.2d 20, 21 (Tex. 1987).

2. Question Requested

Columbia and Flory requested inclusion of the following question in the charge:

> Did Columbia or Flory have a good-faith belief that they were entitled to take their actions based upon the Joint Venture Agreement, the Management Agreement, or the [PMSA]?
>
> Answer "Yes" or "No" for each of the following:
>
> a. Columbia
>
> b. Flory

To be sure, good-faith belief is a recognized justification defense to tortious-interference claims. *Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc.*, 29 S.W.3d 74, 80 (Tex. 2000) (citing *Tex. Beef Cattle Co. v. Green*, 921 S.W.2d 203, 211 (Tex. 1996)). Columbia and Flory, however, cite no authority extending this good-faith defense to a claim of knowing

participation—which would seem logically antithetical to good faith—and we find none.[15] Accordingly, Columbia and Flory did not tender a proper question and the trial court properly rejected the requested question. We overrule Columbia's and Flory's third issue.

V. BREACH OF FIDUCIARY DUTY, KNOWING PARTICIPATION, AND CONSPIRACY FINDINGS AS TO TSQF

In Columbia's and Flory's sixth through eighth issues, Columbia and Flory challenge the legal and factual sufficiency of the evidence to support the jury's findings CBIF or Columbia breached a fiduciary duty to TSQF, Flory knowingly participated in the breaches, and the CBIF parties conspired to breach fiduciary duties. In their thirteenth issue, Columbia and Flory argue TSQF's breach-of-fiduciary-duty claim is barred by limitations. In Columbia's and Flory's ninth issue, they argue the trial court erred in refusing to submit their requested jury question and instructions on fiduciary duty. In the first and second sub-parts to CBIF's sixth issue and Columbia's and Flory's fourteenth and fifteenth issues, the CBIF parties challenge the legal and factual sufficiency of the evidence to support the jury's findings on damages.

A. *Allegations and Evidence of Breach of Fiduciary Duty*

TSQF alleged CBIF and Columbia breached their fiduciary duties by using TSQF's money to fund the Tarrant County Lawsuit against the RSH Group, by preventing TSQF from participating in a portion of CBIF's defaulted interest in the Terminal D restaurant, by complicating the ACDBE compliance of TSQF, and by refusing to cooperate in adjusting the joint venture to allow it to proceed at the Airport for the purpose for which it was created—to operate Friday's restaurants.

Columbia argues it cannot be held liable for using TSQF funds to pay legal fees because the TSQF MSA authorized it to obtain the legal services at issue and to pay for them with TSQF

[15] We discuss the sufficiency of the evidence in this regard *infra* at Section IV.A.4.c.

funds. But Columbia ignores the fact that TSQF's general partner, Texas Star, is to manage the partnership and that Columbia's role in its management is very limited and administrative in nature. More particularly, Columbia was charged with: (1) receiving, endorsing, collecting, and depositing in TSQF's account, whether one or more, any and all cash, checks, drafts and other sums that is the property of or made payable to TSQF; (2) paying from the bank accounts of TSQF routine bills, invoices, charges, taxes, fees, costs and expenses incurred by or due from TSQF; and (3) paying distributions according to the terms and provisions of the TSQF LP Agreement. In connection with its limited accounting and bookkeeping role, Columbia was authorized to seek reasonable legal or accounting advice should a question regarding the interpretation or requirements of the TSQF LP Agreement or the TSQF MSA arise. Columbia had no authority to bind TSQF for any contractual or other obligation, other than would normally accrue from endorsing checks, filing tax returns, and the like.

CBIF and Columbia, not TSQF or its general partner Texas Star, sued the RSH Group and incurred legal fees in the process for which they caused TSQF to pay. The stated nature of the action was ". . . to require compliance by [the RSH Group] of a Limited Partnership Agreement and to protect the business relationships of the TSQF Limited Partnership in which all of the Parties have an interest . . . [and] to recover damages previously caused by the Defendants by certain breaches of the Limited Partnership Agreement." Columbia's action of filing and maintaining a protracted lawsuit against the limited partners of TSQF went well beyond its authority to seek legal advice on a question regarding the interpretation or requirements of a governing document, and usurped Texas Star's general management role, in which Roby would have had a voice as one of the managers. Thus, Columbia's suit against the RSH Group was not authorized by the TSQF MSA. Because CBIF was a party to the Tarrant County Lawsuit and acted through its general partner Columbia, it responsible for Columbia's

actions. *Kao Holdings, L.P. v. Young*, 261 S.W.3d 60, 63 (Tex. 2008) (partnership is liable for the acts of a partner done with authority or in the ordinary course of business).

CBIF and Columbia further argue they are not liable for breach of a fiduciary duty to TSQF because TSQF could not have participated in Terminal D without a super-majority vote of its partners, which was never requested and would never have occurred because Columbia would not have voted in favor of the participation. This position amounts to a restatement of Columbia's argument that it cannot breach a fiduciary duty by exercising its contractual right not to vote in favor of participation in the defaulted interest of CBIF in the Terminal D restaurant—an argument we have rejected. *See supra* at section IV. A. 2.

The evidence established that once Flory learned the RSH Group paid their portion of the capital call to participate in the Terminal D project directly to Friday's, as manager of TGIFJV, he: (1) refused to meet with the RSH Group again until they obtained an accounting or tax opinion concerning whether they could fund the capital call by remitting the funds directly to TGIFJV, (2) notified Friday's that CBIF would not fund its forty-nine percent pro rate share of TSQF's initial deposit despite its earlier approval of the investment, (3) was critical of the RSH Group, and (4) notified Friday's on May 9, 2005, that the RSH Group had no authority to act on behalf of TSQF. The evidence also established: (1) Flory notified TGIFJV on April 27, 2005, that CBIF would not be participating in the Terminal D project, (2) TGIFJV offered CBIF's defaulted interest in the Terminal D project to the remaining partners on May 3, 2005, and (3) on May 11, 2005, Friday's notified Roby that because of the internal dispute of the partners of TSQF, Friday's would not accept the RSH Group's payments, including its payment of CBIF's portion, and its pro rata interest would be offered to the other partners. The evidence further established: (1) Flory changed his mind about TSQF participating in the Terminal D project after LBD and Domain acquired TSQF's share and threatened to sue if Friday's did not allocate 25%

to TSQF,[16] (2) the RSH Group paid the capital call for TSQF's portion of CBIF's defaulted interest in the Terminal D project, and (3) upon discovering the RSH Group had made the payment and had attempted to exercise the option to purchase an additional fifteen percent interest in the Terminal D project, Flory reverted to his earlier position insisting the RSH Group had no authority to act for TSQF. As a result, Friday's returned the payment the RSH Group made to exercise the option to purchase TSQF's pro rata share of CBIF's defaulted interest and TSQF lost out on the opportunity to secure the additional interest in the Terminal D project.

Considering and weighing all of the evidence in the record pertinent to the findings CBIF and Columbia breached their fiduciary duties to TSQF, we determine that there is more than a scintilla of competent evidence to support the findings and the jury's findings are not contrary to the overwhelming weight of all the evidence as to be clearly wrong and unjust. Accordingly, we overrule Columbia's and Flory's sixth issue.

B. *Statute of Limitations*

We now address Columbia's and Flory's argument TSQF's claim for lost profits relating to Terminal D is barred by limitations. The limitations period for a breach of fiduciary duty claim is four years. TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(5) (West 2002). Columbia and Flory contend the statute of limitations on TSQF's breach of fiduciary duty claim accrued in May 2005—when TSQF lost the opportunity to acquire a proportionate share of CBIF's interest in the Terminal D restaurant—and that TSQF did not assert its claim until 2012.

1. Applicable Law

If a counterclaim arises out of the same transaction or occurrence that is the basis of an action, a party may file the counterclaim even though as a separate action it would be barred by

[16] In order to obtain the 25% interest in Terminal D, after Flory interfered with the exercise of the option to participate, Roby had to withdraw her letter to Friday's insisting on a share of CBIF's defaulted interest. Otherwise, TSQF would have received no interest in the Terminal D project.

limitations on the date the party's answer is filed. TEX. CIV. PRAC. & REM. CODE ANN. § 16.069(a) (West 2015). The counterclaim must be filed not later than the 30th day after the date on which the party's answer is required. *Id.* § 16.069(b). If a filed pleading relates to a cause of action that is not subject to a plea of limitation when the pleading is filed, a subsequent amendment or supplement to the pleading that changes the facts or grounds of liability or defense is not subject to a plea of limitation unless the amendment or supplement is wholly based on a new, distinct, or different transaction or occurrence. *Id.* § 16.068.

2. Application of the Law to the Facts

The record shows CBIF and Columbia sued TSQF on February 10, 2012 in connection with TSQF's participation in TGIFJV. Among their complaints was an allegation that the lack of ACDBE certification caused CBIF to lose the opportunity to participate in the Terminal D restaurant. That allegation was incorporated into CBIF's breach-of-contract and breach-of-fiduciary-duty claims. On March 12, 2012, within 30 days of its answer date, TSQF filed its original counterclaim against CBIF and Columbia. On April 5, 2013, TSQF filed an amended counterclaim that included allegations about the lost opportunity to acquire a proportionate share of CBIF's interest in the Terminal D restaurant. The amended counterclaim concerns the same transaction that is the basis of CBIF's and Columbia's action. Thus, it is not subject to a plea of limitations. We overrule Columbia's and Flory's thirteenth issue.

C. *Knowing Participation in CBIF's and Columbia's Breach of Fiduciary Duty to TSQF*

In this case, the jury was asked whether Flory knowingly participate in CBIF's and Columbia's failures to comply with a fiduciary duty to TSQF and instructed that "[k]nowingly means actual awareness, at the time of the conduct, that a fiduciary duty was owed and that the fiduciary was breaching that fiduciary duty. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness." The jury found he did.

We previously set forth the applicable law concerning knowing participation under our discussion of knowing participation in CBIF's breach of its fiduciary duty to Friday's. Therefore, we proceed to our analysis of Flory's participation in CBIF's and Columbia's breaches of their fiduciary duties to TSQF.

CBIF was a limited partner of TSQF. A limited partner owes a fiduciary duty to the partners and partnership if it actively engages in control over the operation of the business. *Strebel v. Wimberly*, 371 S.W.3d 267, 279 (Tex. App.—Houston [1st Dist.] 2012, pet. denied); *AON Props., Inc. v. Riveraine Corp.*, No. 14-96-00229-CV, 1999 WL 12739, at *23 (Tex. App.—Houston [14th Dist.] Jan. 14, 1999, no pet.) (not designated for publication). The jury found, and appellants do not challenge on appeal, that CBIF exerted dominant operating control over the affairs of TSQF. Thus, CBIF owed TSQF a fiduciary duty. Columbia, managed by Flory and Canseco, was the general partner of CBIF and a manager of TSQF. Thus, Columbia owed TSQF a fiduciary duty. *Darocy*, 345 S.W.3d at 138. Flory does not contest knowledge of the fiduciary relationships.

Flory again argues there is no evidence he actually knew the actions of CBIF or Columbia constituted breaches of fiduciary duty. In so doing, Flory ignores much of the evidence before the jury and that it could reject his stated explanation for his motivation and reasonably infer knowing participation where objective manifestations indicate actual awareness. As stated *supra*, the evidence viewed in the light most favorable to the verdict, supports the jury's findings CBIF and Columbia breached their fiduciary duties to TSQF. Evidence of Flory's role and involvement in CBIF's and Columbia's actions relative to (i) using TSQF's money to fund the Tarrant County Lawsuit against the RSH Group, (ii) preventing TSQF from participating in a portion of CBIF's defaulted interest in the Terminal D restaurant, (iii) complicating the ACDBE compliance of TSQF, and (iv) refusing to cooperate in adjusting the

joint venture to allow it to proceed at the Airport for the purpose for which it was created—to operate Friday's restaurants—support the jury's finding that Flory knowingly participated in CBIF's and Columbia's failures to comply with their fiduciary duties to TSQF. *See id.*

When viewed under the appropriate standards, there is legally and factually sufficient evidence to support the jury's finding Flory knowing participated in CBIF's and Columbia's breaches of their fiduciary duties to TSQF. Accordingly, we overrule Columbia's and Flory's seventh issue. Because we have concluded the evidence is legally and factually sufficient to support the breaches of fiduciary duty and knowing participation findings, we need not address Columbia's and Flory's eighth issue on conspiracy to breach a fiduciary duty. TEX. R. APP. P. 47.1.

D. *Jury Instructions and Question on Fiduciary Duty*

Columbia and Flory argue the trial court erred in not submitting instructions that contractual rights supplant fiduciary duties.[17] Rule 277 of the Texas Rules of Civil Procedure requires a court to "submit such instructions and definitions as shall be proper to enable the jury to render a verdict." TEX. R. CIV. P. 277. We do not disturb the trial court's decision on which instructions to submit to the jury absent an abuse of discretion. *Shupe v. Lingafelter*, 192 S.W.3d 577, 579 (Tex. 2006); *Latham v. Burgher*, 320 S.W.3d 602, 607 (Tex. App.—Dallas 2010, no pet.). A trial court has more discretion when submitting instructions than when submitting questions. *Wal-Mart Stores, Inc. v. Middleton*, 982 S.W.2d 468, 470 (Tex. App.—San Antonio 1998, pet. denied). The trial court's refusal to submit a requested definition or instruction is not reversible error unless a substantially correct definition or instruction has been requested in

[17] More particularly, Columbia and Flory requested the following instructions:

> You are instructed that a fiduciary duty does not extend so far as to create duties in derogation of the express terms of the written agreement between the parties.
>
> You are instructed that a lawful exercise of a contractual right is not a breach of fiduciary duty.

writing by the party complaining of the judgment. TEX. R. CIV. P. 278. When a trial court refuses to submit a properly requested instruction, the question on appeal is whether the request was reasonably necessary to enable the jury to render a proper verdict. *Shupe*, 192 S.W.3d at 579. The omission of an instruction is reversible error only if the omission probably caused the rendition of an improper judgment. *Id.*

Under Texas law, contractual rights do not "operate to the exclusion of fiduciary duties," as noted previously. *Fleming*, 395 S.W.3d at 924. Consequently, Columbia's and Flory's requested instructions directing jurors to the contrary were not substantially correct and the trial court's refusal to submit the instructions is not reversible error.

Columbia and Flory again argue the trial court erred by not submitting their question on good-faith belief, the justification defense.[18] As we previously observed, justification is not a defense to knowing participation. Consequently, the trial court did not err in refusing to submit the requested question. We overrule Columbia's and Flory's ninth issue.

E. *Damages Awarded to TSQF*

1. Award of $385,323 to TSQF for funds used to pay CBIF and Columbia Legal Fees on TSQF's breach of fiduciary duty claim

In their fourteenth issue, Columbia and Flory challenge the legal and factual sufficiency of the evidence to support the award of attorney's fees to TSQF as damages. More particularly, Columbia argues it was expressly authorized under section 1.02(c) of the TSQF MSA to obtain legal services and pay for them with TSQF's funds.

For the reasons stated *supra* at section V. A., we overrule Columbia's and Flory's fourteenth issue.

[18] More particularly, Columbia and Flory requested the following question:

Did Flory have a good-faith belief that he was entitled to take his actions based upon the TSQF Limited Partnership Agreement, the [PMSA], or the Texas Star Regulations?

2. Award of Lost Profits to TSQF

In the second sub-part to CBIF's sixth issue and in Columbia's and Flory's fifteenth issue, the CBIF parties challenge the sufficiency of the evidence to support the award of $1,193,166 in lost profits to TSQF.

In support of its claim for lost profits, TSQF offered the testimony of Roby and a chart showing distributions from the Terminal D restaurant from 2005 through August 2012**.** The CBIF parties claim her testimony is insufficient to prove lost profits inferring lost profits must be supported by expert testimony. Under the circumstances presented in this case, expert testimony is not necessary to establish lost profits as lost profits may be proved by the testimony of the owner or property. *See ERI Consulting Eng'r, Inc. v. Swinnea*, 318 S.W.3d 867 (Tex. 2010); *Sharifi v. Steen Auto., LLC*, 370 S.W.3d 126, 150 (Tex. App.—Dallas 2012, no pet.).

While proof of lost profits need not be exact, it cannot be speculative. *Phillips v. Carlton Energy Grp., LLC*, 475 S.W.3d 265, 278 (Tex. 2015). This is not a case in which lost profits are speculative because the business TSQF claims it should have had an additional ownership interest in existed and operated.

TSQF presented evidence at trial of the profits it made on its 25% ownership interest in the Terminal D restaurant, from which the lost profits on an additional 15% ownership interest can be calculated. TSQF's actual net profit on its 25% interest from 2005 through August 2012 was $1,349,448.63. Absent the CBIF parties' unwillingness to allow TSQF to obtain an additional 15% interest, TSQF would have received an additional $809,669.17 in profits through August 2012 and an additional $212,520.96 in profits from September 2012 through the close of

trial in May 2014.[19] Thus, the evidence supports lost past profits of $1,022,190.13, slightly more than the $1,022,180 awarded by the jury.

As to lost future profits, the Terminal D lease ended on October 28, 2015. Therefore, lost profits based upon an annual profit loss of $121,440.55 for the period of June 2014 through October 2015 is $172,040.78, slightly more than the jury's award of $170,986.13.

In both lost profit awards, the evidence need not reflect the precise amount awarded by the jury. *Hani v. Jimenez*, 264 S.W.3d 881, 888 (Tex. App.—Dallas 2008, pet. denied) ("[w]hen the evidence supports a range of awards, an award of damages within that range may be an appropriate exercise of the jury's discretion").

Next, CBIF argues the lost profit calculations are flawed in failing to reduce lost profits by capital contributions TSQF would have made for the extra 15% interest. However, TSQF did not seek damages for its lost equity interest or lost business value in Terminal D. It sought to recover its lost profits, which are reduced by the operating expenses required to produce revenue. *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 921 n.7 (Tex. 2013). The evidence established that TSQF's calculation for lost profit damages took into consideration the operating expenses and related costs.

We overrule the second sub-part to CBIF's sixth issue and Columbia's and Flory's fifteenth issue.

VI. BREACH OF FIDUCIARY DUTY, KNOWING PARTICIPATION, AND CONSPIRACY FINDINGS AS TO THE RSH GROUP

In their seventeenth through nineteen issues, Columbia and Flory challenge the legal and factual sufficiency of the evidence to support the jury's findings CBIF and Columbia breached fiduciary duties to the RSH Group, Flory knowingly participated in the breaches, and the CBIF

[19] TSQF received an annual average distribution of $202,400.93 from 2006 through 2011. If TSQF received an additional 60% (additional 15% interest divided by existing 25% interest) of that amount, it would provide $121,440.55 per year.

parties conspired to breach fiduciary duties. In Columbia's and Flory's twentieth issue, they argue the trial court erred in refusing to submit their requested jury question and instructions on fiduciary duty.

A. *Allegations and Evidence of Breach of Fiduciary Duty*

The RSH Group alleged CBIF and Columbia breached their fiduciary duties by refusing to agree to changes to the governing documents required to bring TSQF and TGIFJV into ACDBE compliance so that TSQF and TGIFJV could participate in the Terminal A location.

Columbia argues because the governing documents require unanimous consent to amend or modify the agreements, it had no duty to agree to the proposed changes in the governing documents. As we previously stated, contractual rights do not operate to the exclusion of fiduciary duties. *Fleming*, 395 S.W.3d at 925. Instead, where the two overlap, contractual rights must be exercised in a manner consistent with fiduciary duties. *Ritchie*, 443 S.W.3d at 883–84; *Anderton*, 378 S.W.3d at 53–54.

Here the evidence established the Airport required TGIFJV and TSQF to meet the FAA guidelines for ACDBE compliance or risk losing TGIFJV's right to operate restaurants and café bars at the Airport. The evidence further established CBIF and Columbia refused to amend the governing documents to give the disadvantaged business entities the requisite levels of control over the venture and the partnership, which resulted in the Airport condemning the lease as to Terminal A.

Considering and weighing all of the evidence in the record pertinent to the findings CBIF and Columbia breached their fiduciary duties to the RSH Group, we determine that there is more than a scintilla of competent evidence to support the findings and the jury's findings are not contrary to the overwhelming weight of all the evidence as to be clearly wrong and unjust. Accordingly, we overrule Columbia's and Flory's seventeenth issue.

B. *Knowing Participation in CBIF's and Columbia's Breach of Fiduciary Duty to the RSH Group*

In this case, the jury was asked whether Flory knowingly participate in CBIF's and Columbia's failures to comply with a fiduciary duty to the RSH Group and instructed that "[k]nowingly means actual awareness, at the time of the conduct, that a fiduciary duty was owed and that the fiduciary was breaching that fiduciary duty. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness." The jury found he did.

As we have previously set forth the applicable law concerning knowing participation, we proceed to our analysis of Flory's participation in CBIF's and Columbia's breaches of their fiduciary duties to the RSH Group.

CBIF was a limited partner in TSQF. A limited partner owes a fiduciary duty to the partners and partnership if it exercises control over the operation of the business. *Strebel*, 371 S.W.3d at 279; *AON Props.*, 1999 WL 12739, at *23. The jury found, and appellants do not challenge on appeal, that CBIF exerted dominant operating control over the affairs of TSQF. Thus, CBIF owed TSQF and its partners, including the RSH Group, a fiduciary duty. Columbia, managed by Flory and Canseco, was the general partner of CBIF and a manager of TSQF. Thus, Columbia owed TSQF's partners a fiduciary duty. *Darocy*, 345 S.W.3d at 138. Flory does not contest knowledge of the fiduciary relationship.

Flory again argues there is no evidence he actually knew the actions of CBIF or Columbia constituted breaches of fiduciary duty. In doing so, Flory ignores the fact that the jury could find knowing participation by inference where objective manifestations indicate that a person acted with actual awareness. As stated *supra*, the evidence supports the jury's findings CBIF and Columbia breached their fiduciary duties to the RSH Group. Evidence of Flory's role and involvement in CBIF's and Columbia's actions relative to the Terminal A project,

complicating the ACDBE compliance of TSQF, and refusal to cooperate in adjusting the joint venture to allow it to proceed at the Airport for the purpose for which it was created, to operate Friday's restaurants, support the jury's finding that Flory knew of the fiduciary relationship and knowingly participated in CBIF's and Columbia's failures to comply with their fiduciary duties to the RSH Group. *See id.*

When viewed under the appropriate standards, there is legally and factually sufficient evidence to support the jury's finding Flory knowing participated in CBIF's and Columbia's breaches of their fiduciary duties to the RSH Group. Accordingly, we overrule Columbia and Flory's eighteenth issue. Because we have concluded the evidence is legally and factually sufficient to support the breach-of-fiduciary duty and knowing-participation findings, we need not address Columbia's and Flory's nineteenth issue on conspiracy to breach a fiduciary duty. TEX. R. APP. P. 47.1.

C. *Jury Instructions and Question on Fiduciary Duty*

For the reasons set forth in this opinion addressing Columbia's and Flory's arguments that the trial court erred in not submitting instructions and a question on fiduciary duty in the breach-of-fiduciary duty to TSQF question, we overrule Columbia's and Flory's twentieth issue.

D. *DAMAGES AND ATTORNEY'S FEES AWARDED TO THE RSH GROUP*

1. Damages Awarded to the RSH Group

In the third sub-part to CBIF's sixth issue and in Columbia's and Flory's twenty-first issue, the CBIF parties challenge the legal and factual sufficiency of the evidence to support the award of $33,221 in attorney's fees as damages.

As we stated previously in connection with CBIF's challenge of the award of attorney's fees to Friday's as damages, the supreme court recognizes that attorney's fees unrelated to the

ongoing litigation can be recovered as compensatory damages. *In re Nalle*, 406 S.W.3d at 174–75.

In this case, the jury was asked to find the amount of reasonable and necessary attorney's fees, expenses and costs incurred by the RSH Group to participate in the Terminal A joint venture. The jury responded to this question by awarding the RSH Group the transactional attorney's fees it incurred in connection with the Terminal A renovation and relocation. The RSH Group presented evidence it paid these fees because of CBIF's and Columbia's Terminal A misconduct and to obtain a lease in Terminal A for the operation of a Friday's restaurant.

Considering and weighing all of the evidence in the record pertinent to the finding the RSH Group incurred damages of $33,221.23 as a result of CBIF's and Columbia's breaches of their fiduciary duties, we conclude there is more than a scintilla of competent evidence to support the finding and the finding is not contrary to the overwhelming weight of all the evidence as to be clearly wrong and unjust. We overrule the third sub-part to CBIF's sixth issue and Columbia's and Flory's twenty-first issue.

2. Attorney's Fees Award to the RSH Group

In the fourth sub-part to CBIF's sixth issue and the first sub-part to Columbia's and Flory's twenty-second issue, the CBIF parties challenge the award of attorney's fees to the RSH Group based on findings CBIF and Columbia breached their agreements with TSQF and the RSH Group. The RSH Group's request for attorney's fees was predicated upon affirmative breach of contract findings against CBIF or Columbia. The basis for the award of attorney's fees was thus limited to the breach of contract claims. *See Telecheck Serv., Inc. v. Elkins*, 226 S.W.3d 731 (Tex. App.—Dallas 2007, no pet.). Consequently, the jury awarded attorney's fees pursuant to chapter 38 of the Texas Civil Practice and Remedies Code.

a. Applicable Law

Texas follows the American Rule, which provides that litigants may recover attorney's fees only if specifically provided for by statute or contract. *Varel Int'l Indus., L.P. v. PetroDrillbits Int'l, Inc.*, No. 05-14-01556-CV, 2016 WL 4535779, at *7 (Tex. App.—Dallas Aug. 30, 2016, pet. denied) (mem. op.) (citing *Epps v. Fowler*, 351 S.W.3d 862, 865 (Tex. 2011)). Section 38.001 of the Texas Civil Practice and Remedies Code authorizes an award of attorney's fees for certain enumerated classes of claims brought by a "person" against "an individual or corporation." TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (West 2015). Under the plain language of section 38.001, a trial court cannot order limited liability partnerships, limited liability companies, or limited partnerships to pay attorney's fees. *Varel*, 2016 WL 4535779, at * 7 (citing *Choice! Power, L.P. v. Feeley*, No. 01-15-00821-CV, 2016 WL 4151041, at *8 (Tex. App.—Houston [1st Dist.] Aug. 4, 2016, no pet.) (section 38.001 does not permit recovery against an L.P.); and *Alta Mesa Holdings, L.P. v. Ives*, 488 S.W.3d 438, 452–53 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (section 38.001 does not permit recovery against an L.L.C.); and *Fleming & Assocs., L.L.P. v. Barton*, 425 S.W.3d 560, 574 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (section 38.001 does not permit recovery against an L.L.P.)). The availability of attorney's fees under a particular statute is a question of law for the court. *See Fleming*, 425 S.W.3d at 574. Consequently, the jury's finding about the amount of reasonable attorney's fees is immaterial to the ultimate issue of whether such fees are recoverable under chapter 38 of the civil practice and remedies code.

b. Application of the Law to the Facts

The CBIF parties challenged the legal sufficiency of the evidence to support the award of attorney's fees during the charge conference. By doing so they gave the trial court ample

opportunity to rule on the availability of attorney's fees before an erroneous judgment was rendered. *See Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94 (Tex. 1999) (per curiam).

The record shows CBIF is a limited partnership and Columbia is a limited liability company. Because attorney's fees are not recoverable from limited partnerships or limited liability companies under chapter 38 of the civil practice and remedies code, we sustain the fourth sub-part to CBIF's sixth issue and the first sub-part to Columbia's and Flory's twenty-second issue.

VII. BREACH OF CONTRACT AND THEFT CLAIMS

Because the damages awarded to TSQF and the RSH Group on their breach-of-contract claims are the same as the damages awarded to TSQF and the RSH Group on their breach-of-fiduciary-duty claims, which we have concluded are supported by the evidence, we need not address Columbia's and Flory's fifth and sixteenth issues challenging the legal and factual sufficiency of the evidence to support the jury's findings on TSQF's and the RSH Group's breach-of-contract claims. TEX. R. APP. P. 47.1.

Because the damages awarded to TSQF on its theft claim are included in the damages awarded to TSQF on its breach-of-fiduciary-duty claims, which we have concluded are supported by the evidence, we need not address CBIF's fifth issue and the first sub-part to CBIF's sixth issue and Columbia's and Flory's tenth through twelfth issues challenging the legal and factual sufficiency of the evidence to support the jury's findings on TSQF's theft claim. TEX. R. APP. P. 47.1.

CONCLUSION

We reverse, in part, that portion of the trial court's judgment awarding Friday's relief pursuant to the DJA, and render judgment, in part, that Friday's take nothing on its attendant attorney's fee claim. We further reverse, in part, that portion of the trial court's judgment

awarding the RSH Group attorney's fees in the amount of $1,363,072.67, and render judgment, in part, that the RSH Group take nothing on its claim for attorney's fees. We otherwise affirm the trial court's judgment.

/DAVID J. SCHENCK/
DAVID J. SCHENCK
JUSTICE

150157F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CBIF LIMITED PARTNERSHIP, COLUMBIA AIRPORT, LLC, AND STEVE FLORY, Appellants

No. 05-15-00157-CV V.

TGI FRIDAY'S INC., LBD CORPORATION, TGIF/DFW PARTNER, LLC, TGIF/DFW MANAGER, LLC, TGIF/DFW TERMINAL A RESTAURANT, DOMAIN ENTERPRISES, INC., TGIF/DFW RESTAURANT JOINT VENTURE, LOUIS STURNS, NORMA ROBY, ERMA JOHNSON HADLEY, RSH CONCESSIONS, LLC, TSQF LIMITED PARTNERSHIP, AND TEXAS STAR QUALITY FOODS, LLC, Appellees

On Appeal from the 68th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-11-04730.
Opinion delivered by Justice Schenck.
Justices Francis and Stoddart participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part. We **REVERSE** that portion of the trial court's judgment awarding TGI Friday's, Inc. relief pursuant to the Uniform Declaratory Judgments Act, and that portion of the trial court's judgment awarding Louis Sturns, Norma Roby, and Erma Johnson Hadley attorney's fees. We **RENDER** judgment that TGI Friday's, Inc., Louis Sturns, Norma Roby, and Erma Johnson Hadley take nothing on their attorney's fees claims. In all other respects, the trial court's judgment is **AFFIRMED**.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 21st day of April, 2017.