Affirmed in Part and Reversed and Rendered in Part and Majority and Concurring Opinions filed June 28, 2022.

In The

Fourteenth Court of Appeals

NO. 14-20-00214-CV

GHP NAIL SYSTEMS, LLC D/B/A HAUTE POLISH AND JE MATADI, INC., Appellants

V.

BENELUX COSMETICS B.V. AND ANVIRI COSMETICS B.V., Appellees

On Appeal from the 234th District Court
Harris County, Texas
Trial Court Cause No. 2016-19641

M A J O R I T Y O P I N I O N

A licensor under an exclusive distribution agreement appeals a final judgment in which the trial court ordered that the licensor take nothing on its claims against the distributor for breach of the agreement and rendered judgment in favor of the distributor on its Deceptive Trade Practices Act ("DTPA") claims against the licensor and its parent company. On appeal, the licensor's parent

corporation argues that the evidence is legally insufficient to support the jury's finding that the parent corporation is responsible for the licensor's conduct. We conclude that the evidence is legally insufficient to support this finding and legally insufficient to support either of the two damage findings that the jury made as to the DTPA claims. We also conclude that the trial evidence is legally and factually sufficient to support the jury's failure to find that the distributor breached section 6.2 or section 6.4 of the agreement. We affirm the part of the trial court's judgment in which the court orders that the licensor take nothing on its claims, reverse the trial court's judgment in favor of the distributor, and render judgment that the distributor take nothing.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant/plaintiff/counter-defendant GHP Nail Systems, LLC d/b/a Haute Polish ("GHP"), a Texas limited liability company, developed, marketed, and sold a gel nail polish product called "Haute Polish." Appellant/third-party defendant Je Matadi, Inc. is a Texas corporation that is the sole member, manager, and owner of GHP. Appellee/defendant/counter-plaintiff/third-party plaintiff Impulss Cosmetics B.V. d/b/a Benelux Cosmetics ("Benelux") is a Netherlands company that distributes consumer products in Europe. Appellee/defendant Anviri Cosmetics B.V. ("Anviri") is a Netherlands company that is an affiliate of Benelux.

Effective as of September 1, 2013 Benelux and GHP entered into an Exclusive Distribution Agreement ("Agreement") under which GHP granted Benelux a revocable exclusive license to distribute, market, sell, and advertise Haute Polish products throughout the Belgium-Netherlands-Luxembourg region of Europe (the "Benelux Region"). In April 2014, Benelux placed its first order with GHP for Haute Polish products. Benelux received the products and began distributing them. Benelux received complaints from customers about the products,

including complaints indicating that some of the products might be defective. Benelux investigated the complaints, relayed the complaints to GHP, and tried to find a solution to the issues with the products. GHP stood by the quality of its products and did not resolve the problems to Benelux's satisfaction. On July 31, 2015, Benelux gave written notice to GHP that Benelux was terminating the Agreement effective August 31, 2015 and that Benelux was invoking its right under section 5.3 of the Agreement to continue marketing the products during a "Sell-off Term" after termination of the Agreement.

GHP filed this lawsuit against Benelux and Anviri asserting a breach-of-contract claim against Benelux for allegedly breaching various sections of the Agreement, as well as various tort claims against Benelux and Anviri. Benelux filed counterclaims against GHP alleging claims for breach of the Agreement, breach of express and implied warranties, DTPA violations (including breach of express and implied warranties actionable under the DTPA), and common-law fraud. Benelux also asserted third-party claims against Je Matadi, Luminess Direct, LLC ("Luminess Direct"), and Luminess Cosmetics, LLC d/b/a Luminess Air ("Luminess Cosmetics"). Benelux sought a declaratory judgment that each of the third-party defendants is an alter ego of GHP and thus is liable for all damages, attorney's fees, and costs that GHP must pay Benelux based on Benelux's claims against GHP. Benelux alleged that each of the third-party defendants had disregarded the corporate fiction in the conduct of its own affairs and had used GHP as a mere conduit for the purpose of committing a fraud and injustice on Benelux, which Benelux claimed directly benefitted each of the third-party defendants.

The case proceeded to a jury trial. In response to Question 7, the jury answered "no" as to whether Benelux failed to comply with section 6.2 or section

6.4 of the Agreement. The jury found that Benelux failed to comply with section 5.3 of the Agreement but that this failure to comply was excused by GHP's previous failure to comply with a material obligation of the Agreement. The jury answered "no" to questions relating to Benelux's liability on various tort claims by GHP. The jury answered liability and damages questions in Benelux's favor on Benelux's claims against GHP for breach of the Agreement, breach of the implied warranty of merchantability, common-law fraud, and DTPA violations based on two of the laundry list items in Business and Commerce Code section 17.46(b). In response to each of the four substantially similar damage questions, the jury found the same amount of actual damages—$619,610. The jury made findings as to Benelux's reasonable and necessary attorney's fees. After finding that GHP acted knowingly in engaging in the conduct that violated the DTPA, the jury assessed additional damages. In response to questions asking if Luminess Cosmetics or Luminess Direct is responsible for the conduct of GHP, the jury answered "no" to each question. In response to Question 41, the jury found that Je Matadi is responsible for the conduct of GHP.

Benelux elected to recover under its DTPA claims,[1] and the trial court rendered an amended final judgment in which the trial court: (1) rendered judgment that GHP take nothing on its claims; (2) rendered judgment in favor of Benelux and against GHP and Je Matadi, jointly and severally, based on the DTPA claims; and (3) denied all relief not expressly granted in the trial court's judgment. The trial court denied timely filed motions for judgment notwithstanding the verdict and for a new trial filed by GHP and Je Matadi, each of whom has timely appealed.

[1] These DTPA claims were based on GHP's breach of the implied warranty of merchantability and on GHP's violation of two laundry list items in Business and Commerce Code section 17.46(b).

II. ISSUES AND ANALYSIS

A. Is the evidence legally sufficient to support the jury's finding in response to Question 41 that Je Matadi is responsible for GHP's conduct?

The only basis for Je Matadi's liability to Benelux in the trial court's final judgment is the jury's finding in response to Question 41. In part of its second issue, Je Matadi argues that the trial evidence is legally insufficient to support the jury's affirmative answer to Question 41. Je Matadi preserved error in the trial court on this complaint by raising it during the charge conference and in its motion for judgment notwithstanding the verdict and obtaining adverse rulings from the trial court. In Question 41 the trial court asked "Is Je Matadi, Inc. responsible for the conduct of GHP?" The trial court gave the jury the following instructions regarding Question 41:

> Je Matadi, Inc. is "responsible" for the conduct of GHP if GHP was organized and operated as a mere tool or business conduit of Je Matadi, Inc.; there was such unity between GHP and Je Matadi, Inc. that the separateness of GHP had ceased and holding only GHP responsible would result in injustice; and Je Matadi, Inc. caused GHP to be used for the purpose of perpetrating and did perpetrate an actual fraud on Benelux primarily for the direct personal benefit of Je Matadi, Inc.
>
> In deciding whether there was such unity between GHP and Je Matadi, Inc. that the separateness of GHP had ceased, you are to consider the total dealings of GHP and Je Matadi, Inc., including—
>
> 1. the degree to which GHP's property had been kept separate from that of Je Matadi, Inc.;
> 2. the amount of financial interest, ownership, and control Je Matadi, Inc. maintained over GHP; and
> 3. whether GHP had been used for personal purposes of Je Matadi, Inc.
>
> "Injustice" does not refer a subjective perception of unfairness, but means the kinds of abuse that the corporate structure should not shield, such as fraud, evasion of existing obligations, circumvention of

statutes, monopolization, criminal conduct, and the like.

"Actual fraud" means dishonesty of purpose or intent to deceive, which must relate to the transaction at issue.

Question 41 tracks Pattern Jury Charges 108.1 and 108.2 addressing standards for piercing the corporate veil based on an alter ego theory. *See* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Business* PJC 108.1, 108.2 & cmt. (2018); *Hong v. Harvey*, 551 S.W.3d 875, 881 (Tex. App.—Houston [14th Dist.] 2018, no pet.). When reviewing the legal sufficiency of the evidence, we consider the evidence in the light most favorable to the challenged finding and indulge every reasonable inference that would support it. *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005). We must credit favorable evidence if a reasonable factfinder could and disregard contrary evidence unless a reasonable factfinder could not. *See id.* at 827. We must determine whether the evidence at trial would enable reasonable and fair-minded people to find the facts at issue. *See id*. The jury is the only judge of witness credibility and the weight to give to testimony. *See id.* at 819.

At the charge conference, no party objected to the form of Question 41. We measure the sufficiency of the evidence to support the jury's finding in response to Question 41 using the charge submitted to the jury. *See Mungas v. Odyssey Space Research, LLC*, No. 14-19-00378-CV, 2021 WL 3416500, at *4 (Tex. App.—Houston [14th Dist.] Aug. 5, 2021, no pet.) (mem. op.). Under the charge submitted to the jury, for Je Matadi to be responsible for the conduct of GHP, the trial evidence must prove each of the following propositions by a preponderance of evidence: (1) GHP was organized and operated as a mere tool or business conduit of Je Matadi; (2) there was such unity between GHP and Je Matadi that the separateness of GHP had ceased and holding only GHP responsible would result in injustice; and (3) Je Matadi caused GHP to be used for the purpose of perpetrating

and did perpetrate an actual fraud on Benelux primarily for the direct personal benefit of Je Matadi. *See id.* We presume, without deciding, that the trial evidence is legally sufficient to support the first two propositions, and we focus on the third proposition.

Benelux retained Alexander Walther as an expert to testify regarding the Benelux's alleged damages as well as to analyze corporate records and testimony to provide observations on how Je Matadi, GHP, Luminess Direct, and Luminess Cosmetics operated. As Benelux's only expert regarding alter ego, Walther testified as follows:

- Walther concluded that Je Matadi, GHP, Luminess Direct, and Luminess Cosmetics "did not observe corporate separateness."
- Walther thinks that this failure to observe corporate separateness is a problem because (1) one cannot tell where one entity begins and the other ends; (2) GHP currently has no assets or operations; (3) if there is a judgment against GHP, GHP has no funds; and (4) these entities operate together in such a way that a lot of the operations are at the Je Matadi level.
- Companies that are corporately separate each have their own set of operations completely independent from one another.
- When related entities are involved there is the potential that they may not operate as separate entities, in which case there is "a blur" among the entities. There might be "overlap, shared bank accounts or shared addresses or shared business operations."
- The issue of corporate separateness addresses whether companies are operating distinctly as independent companies, or whether there is a blur among the companies and it is hard to tell where one company ends and another one begins.
- Walther reviewed deposition testimony showing that employees of Je Matadi provided services to GHP and that GHP did not pay the salaries of any of the Je Matadi employees working on behalf of GHP.
- Documents Walther reviewed showed that Je Matadi paid some vendors that provided items related to GHP's Haute Polish product.

- Documents Walther reviewed show that Je Matadi was funding GHP's operations and providing the working capital for GHP to operate.
- The balance sheets for 2013 through 2016 each show a payable owed by GHP to Je Matadi and that GHP's assets in each year were less than the amount of the payable to Je Matadi.

Walther did not state whether Je Matadi caused GHP to be used for Je Matadi's direct personal benefit. Walther did not address whether any alleged fraud committed by GHP against Benelux was primarily for Je Matadi's direct personal benefit. Nor did Walther testify as to whether Je Matadi caused GHP to be used for the purpose of perpetrating and did perpetrate an actual fraud on Benelux primarily for the direct personal benefit of Je Matadi.

In response to Je Matadi's motion for directed verdict and motion for judgment notwithstanding the verdict, Benelux did not assert that Je Matadi caused GHP to be used for the purpose of perpetrating and did perpetrate an actual fraud on Benelux primarily for the direct personal benefit of Je Matadi or that the trial evidence is legally sufficient to support this proposition. On appeal, Benelux still does not assert this proposition or argue that the evidence is legally sufficient to support it. Instead, Benelux asserts that the evidence need not have established each of the three propositions stated in Question 41. Benelux argues that for this court to affirm the trial court's judgment against Je Matadi, there need only be legally sufficient evidence that (1) the total dealings between GHP and Je Matadi indicated corporate unity and (2) Je Matadi used GHP's corporate structure illegitimately. The trial court did not submit this legal standard to the jury in Question 41, and no party objected to the failure of the trial court to do so. In this context, we measure the sufficiency of the evidence based on the legal standard submitted in Question 41, and we may not use the legal standard for which Benelux advocates on appeal. *See Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex.

2000) (holding that appellate court could not review the sufficiency of the evidence based on a particular legal standard because that standard was not submitted to the jury and no party objected to the charge on this ground or requested that the jury be charged using this standard); *Mungas*, 2021 WL 3416500, at *4. Under the unambiguous language of Question 41 and under this court's binding precedent, the evidence must establish each of the three propositions stated in Question 41, including the third. *See id.* Under the applicable standard of review, we conclude that the trial evidence is legally insufficient to support the jury's finding in response to Question 41 that Je Matadi caused GHP to be used for the purpose of perpetrating and did perpetrate an actual fraud on Benelux primarily for the direct personal benefit of Je Matadi, and thus the evidence is legally insufficient to support the jury's answer to Question 41. *See Mungas*, 2021 WL 3416500, at *4; *Hong*, 551 S.W.3d at 885–86; *Metroplex Mailing Servs., LLC v. RR Donnelley & Sons Co.*, 410 S.W.3d 889, 898 (Tex. App.—Dallas 2013, no pet.), *abrogated on other grounds by Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 496 (Tex. 2019). We sustain Je Matadi's second issue to the extent Je Matadi asserts that the evidence is legally insufficient to support the jury's finding in response to Question 41.[2] We reverse the trial court's money judgment against Je Matadi and in favor of Benelux, and we render judgment that Benelux take nothing against Je Matadi.

B. Is the evidence legally sufficient to support the jury's findings in response to Questions 28 and 30 as to Benelux's actual damages under its DTPA claims?

The trial court's money judgment in favor of Benelux was based on Benelux's DTPA claims. The damage questions for Benelux's DTPA claims were Questions 28 and 30. Though each question was predicated on an affirmative

[2] We need not and do not address the remainder of Je Matadi's second issue or its first issue.

answer to a different liability question, the text of these two questions was the same:

> What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Benelux for its damages, if any, that resulted from such conduct?
>
> Consider the following element of damage, if any, and none other: Out of pocket expenses, which is defined as expenses that Benelux reasonably incurred in performing under the Exclusive Distribution Agreement and in responding to failures in Haute Polish, less any costs saved or benefits received by Benelux as a result
>
> Do not add any amount for interest on damages, if any.
>
> Answer separately in dollars and cents for damages, if any.

The jury answered each question with the same amount of damages—$619,610.[3] Under its first issue, GHP argues that though these questions required that Benelux's damages be based on its reasonable expenses, the trial evidence is legally insufficient to support a finding that Benelux's expenses were reasonable, and therefore, the evidence is legally insufficient to support the jury's answers to Questions 28 and 30. In this argument GHP relies on *McGinty v. Hennen*, 372 S.W.3d 625 (Tex. 2012) and related cases.

Under its plain text, each damage question requires that the jury apply a measure of damages based on Benelux's reasonable expenses in performing under the Agreement and in responding to failures in Haute Polish. Under the DTPA a consumer may recover as damages its reasonable and necessary expenses. *See Building Concepts, Inc. v. Duncan*, 667 S.W.2d 897, 901 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). The damage questions submitted to the jury required that Benelux's expenses be reasonable. Benelux submitted a proposed

[3] The damage questions for Benelux's breach-of-contract and common-law-fraud claims were substantially similar, and the jury answered these questions with the same amount of damages.

jury charge to the trial court that included a proposed damage question similar to Questions 28 and 30. Benelux's proposed question required that the jury apply a measure of damages based on Benelux's reasonable expenses in performing under the Agreement and in responding to failures in Haute Polish. No party objected at the charge conference that Question 28 or Question 30 should not require that the jury apply a measure of damages based on Benelux's reasonable expenses in performing under the Agreement and in responding to failures in Haute Polish. Therefore, we measure the sufficiency of the evidence to support the jury's findings in response to the Questions 28 and 30 using the charge submitted to the jury.[4] *See Osterberg*, 12 S.W.3d at 55; *Kormanik v. Seghers*, 362 S.W.3d 679, 688 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

When reviewing the legal sufficiency of the evidence, we consider the evidence in the light most favorable to the challenged finding and indulge every reasonable inference that would support it. *City of Keller*, 168 S.W.3d at 823. We must credit favorable evidence if a reasonable factfinder could and disregard contrary evidence unless a reasonable factfinder could not. *See id.* at 827. We must determine whether the evidence at trial would enable reasonable and fair-minded people to find the facts at issue. *See id.* The jury is the only judge of witness credibility and the weight to give to testimony. *See id.* at 819.

Parties generally have the freedom to choose to pay unreasonably high prices for goods and services. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 129 (Tex. 2004). In light of this freedom, evidence merely of the amounts charged or paid, the amount of the expense incurred, the nature of the expense, the character of and need for the expense is not legally sufficient evidence that an

[4] We need not and do not address the correctness of any part of Question 28 or Question 30. Thus, we do not address whether either question includes a proper measure of damages or whether applicable law requires proof that Benelux's expenses are reasonable.

expense is reasonable; instead, separate evidence must be offered that raises a fact issue regarding the reasonableness of the expense in question. *See McGinty v. Hennen*, 372 S.W.3d 625 (Tex. 2012); *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 200–01 (Tex. 2004); *Allright, Inc. v. Lowe*, 500 S.W.2d 190, 191–92 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ).

Mustang Pipeline illustrates this principle. *See McGinty*, 372 S.W.3d 627; *Mustang Pipeline Co.*, 134 S.W.3d at 200–01. In that case, Driver agreed to build a pipeline for Mustang. *Mustang Pipeline Co.*, 134 S.W.3d at 196. Unexpected weather prevented Driver from completing the task on time, and Driver sought an extension. *Id.* Mustang then contracted with another company to finish Driver's portion of the pipeline and sued Driver for breach of contract. *Id.* at 197. The jury found that Driver had breached the agreement and awarded Mustang $2 million. *Id.* The trial court and court of appeals, however, set that award aside because Mustang did not establish that the $2 million it paid the new company was a reasonable cost for the completion of the pipeline. *Id.* at 198. The Supreme Court of Texas agreed. *Id.* at 201. Mustang's expert estimated the cost for the new company to complete the contract but did not opine about "whether that contracted amount was a reasonable cost to build a pipeline." *Id.* The high court noted that evidence of out-of-pocket costs alone "did not establish that the damages were reasonable and necessary." *Id.* Instead, the high court found it "well settled that proof of the amounts charged or paid does not raise an issue of reasonableness, and recovery of such expenses will be denied in the absence of evidence showing that the charges are reasonable." *Id.* (quoting *Dall. Ry. & Terminal Co. v. Gossett*, 294 S.W.2d 377, 383 (Tex. 1956)). Because Mustang failed to produce evidence on the reasonableness of its damages, the Supreme Court of Texas held that the trial court correctly set aside the damage award. *Id.*

In *McGinty*, the Supreme Court of Texas reversed a court of appeals's

judgment affirming a trial court judgment based on a jury finding that $651,230.72 was the reasonable and necessary cost to repair the plaintiff's house, and the high court rendered judgment that the plaintiff take nothing. *See McGinty*, 372 S.W.3d at 626–29. Though the plaintiff offered an expert to testify as to reasonable remedial damages, the expert did not opine as to the reasonable cost of the necessary repairs to Hennen's house. *See id*. at 627–28. The plaintiff's expert testified that he derived his estimated costs of repair from an "Exactimate" program "that's used widely in the insurance industry." *Id*. at 627 (internal quotations omitted). The program had a Houston price guide, which the expert compared with Corpus Christi and found to be "within a percent or two difference." *Id*. (internal quotations omitted). The expert further testified that because not every price issued by the program is right, "we have to cross-reference and double check all our pricing." *Id*. (internal quotations omitted). And finally, he testified that "some of the other costs came from subcontractors or historical data or jobs." *Id*. (internal quotations omitted).

The *McGinty* court concluded that the plaintiff's evidence on reasonableness was quite similar to what the high court concluded was insufficient in *Mustang Pipeline*. *See id*. at 627; *Mustang Pipeline Co.*, 134 S.W.3d at 200–01. The *McGinty* court stated that estimated out-of-pocket expenses, like paid out-of-pocket expenses, do not establish that the cost is reasonable. *See McGinty*, 372 S.W.3d at 627–28. Instead, the high court held that some other evidence of reasonableness was necessary. *See id*. at 628. The *McGinty* court noted that neither the plaintiff's damage expert nor any other witness testified to the reasonableness of the estimated cost of repair. *See id*. In *McGinty*, the plaintiff argued that his expert testified extensively about how the expert derived his pricing estimate, and the plaintiff claimed that this extensive testimony was the same as reasonableness. *See id*. The high court concluded that although the expert's extensive testimony

might have explained how the expert calculated the cost to repair the plaintiff's house, the testimony was not legally sufficient to show that the cost calculated by the expert was reasonable. *See id*. The *McGinty* court noted that in some cases, the process will reveal factors that were considered to ensure the reasonableness of the ultimate amount, but the court concluded that that had not happened in *McGinty*. *See id*. The high court stated that the plaintiff's expert established only that some of the pricing came from a widely used software program and some from "subcontractors or historical data or jobs." *Id*. (internal quotations omitted). Nonetheless, the *McGinty* court concluded that the trial evidence was legally insufficient to support the jury's finding that $651,230.72 represented the reasonable cost for the repairs to plaintiff's house. *See id*.

Benelux's damage expert, Alexander Walther, testified at trial regarding his opinion that the $649,610 is the "net loss that Benelux sustained as a result of relying on the [Agreement]." Walther testified at length at trial regarding his review of documents and his calculation of the benefits Benelux received as a result of the Agreement and the expenses that Benelux incurred as a result of the Agreement. Walther concluded that "by relying on the contract" Benelux incurred expenses that exceeded the amount of revenue Benelux received by $649,610. Walther testified that the total amount of Benelux's expenses related to Haute Polish was $1,713,577 and that the total revenue that Benelux received was $1,063,967. Walther explained in detail his tabulation of the amount of revenue Benelux received as a result of the Agreement and the amount of expenses Benelux incurred. Many of the expenses were incurred by Benelux in the Benelux Region in Europe. Many of the documents relied on by Walther were in the Dutch language, and many of the amounts were denominated in euros, requiring Walther to convert these amounts to dollars.

Walther based his calculation on the amount of Benelux's actual expenses.

However, at no point in his testimony did Walther state that any expense was reasonable or offer any opinion as to the reasonableness of any expense. On cross-examination, Walther testified that certain advertising expenses that Benelux had incurred were $342,000. Walther agreed that this amount was about twenty-five percent of the relevant sales of Benelux during the period of time corresponding to the advertising expenses. When asked if he had compared these advertising expenses to similar expenses incurred by similar companies in the Netherlands or elsewhere, Walther answered that he had not done so. It is clear from Walther's testimony that he made no determination as to whether any of the expenses were reasonable.

We conclude that Benelux's evidence on reasonableness was similar to what the high court concluded was insufficient in *Mustang Pipeline. See id*. at 627; *Mustang Pipeline Co.*, 134 S.W.3d at 200–01. No witness testified at trial that any of Benelux's expenses was reasonable. There was no direct evidence at trial that any of Benelux's expenses was reasonable. Paid out-of-pocket expenses do not establish that the cost is reasonable. *See McGinty*, 372 S.W.3d at 627–28. Walther's testimony as to the various expenses that Benelux incurred is legally insufficient to support a finding that any of these expenses is reasonable. *See McGinty*, 372 S.W.3d at 627–28; *Mustang Pipeline Co.*, 134 S.W.3d at 200–01; *Allright, Inc.*, 500 S.W.2d at 191–92. Walther's opinion that the total amount of expenses that Benelux incurred related to Haute Polish was $1,713,577 is legally insufficient to support a finding that this amount is the total of the reasonable expenses incurred by Benelux in performing under the Exclusive Distribution Agreement and in responding to failures in Haute Polish. *See McGinty*, 372 S.W.3d at 627–28; *Mustang Pipeline Co.*, 134 S.W.3d at 200–01; *Allright, Inc.*, 500 S.W.2d at 191–92. Some other evidence that the expenses in question were reasonable was required. *See McGinty*, 372 S.W.3d at 628. Though a fact issue can

be raised even if no witness uses the word "reasonable," in the case under review, this can only occur if, considering the evidence in the light most favorable to the jury's finding and indulging every reasonable inference that would support it, the record contains evidence that would enable reasonable and fair-minded people to find that Benelux incurred reasonable expenses in performing under the Exclusive Distribution Agreement and in responding to failures in Haute Polish. *See City of Keller,* 168 S.W.3d at 827. In some cases, the process will reveal factors that were considered to ensure the reasonableness of the ultimate amount of expenses, but we conclude that has not happened in today's case. *See McGinty,* 372 S.W.3d at 628. Under the applicable standard of review, we conclude that the trial evidence was legally insufficient to prove that (1) any of the expenses incurred by Benelux in performing under the Agreement or in responding to failures in Haute Polish was reasonable, or (2) the amount of reasonable expenses incurred by Benelux in performing under the Agreement and in responding to failures in Haute Polish exceeded the "costs saved or benefits received by Benelux as a result." *See id*. at 627–28; *Mustang Pipeline Co.,* 134 S.W.3d at 200–01.

Benelux relies on the Second Court of Appeals's opinion in *Hernandez v. Lautensack*. *See* 201 S.W.3d 771, 777 (Tex. App.—Fort Worth 2006, pet. denied). Presuming for the sake of argument that this court should follow the *Hernandez* opinion and that this opinion does not conflict with the legal standard in *McGinty*, the *Hernandez* case is not on point. In *Hernandez,* an expert witness testified as to how much he would charge to replace the plaintiff's roof, but no witness opined that this amount was reasonable. *See id*. Nonetheless, the *Hernandez* court found legally sufficient evidence that this amount was reasonable based on evidence that this amount was less than what the defendant himself would charge to replace the roof and proportionately less than what a third-party contractor would charge to

replace part of the roof. *See id*. In the case under review, there was no similar evidence; therefore, the *Hernandez* case is not on point. *See id*.

Benelux also relies upon the First Court of Appeals's opinion in *Great American Homebuilders, Inc. v. Gerhart*. *See* 708 S.W.2d 8, 12 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.). In that case the plaintiff testified that the amount she sought for the repair work was reasonable. *See id*. The plaintiff in that case also testified that (1) she had been a retail major in college; (2) she had worked as a salesperson in oil field valve sales and two retail stores; (3) she had been a buying and selling assistant at one of the stores; (4) she obtained three estimates on one repair job, four estimates on another repair job, and as many as six estimates on other work; and (5) on the work which had been completed she had accepted the low estimates. *See id*. The *Gerhart* case is not on point.

For the reasons stated above, we conclude that the trial evidence is legally insufficient to support the jury's answers to Question 28 and to Question 30 and legally insufficient to support a finding that Benelux suffered any damages under the measure of damages submitted in these questions. *See McGinty*, 372 S.W.3d at 627–28; *Mustang Pipeline Co.*, 134 S.W.3d at 200–01; *Allright, Inc.*, 500 S.W.2d at 191–92. Thus, we sustain the part of the first issue in which GHP argues that the trial evidence is legally insufficient to support the jury's answers to Questions 28 and 30.[5] Under its first issue, GHP also argues that without any legally sufficient evidence of damages under Benelux's DTPA claims, Benelux cannot recover additional damages or attorney's fees under the DTPA.[6] We agree. *See* Tex. Bus.

[5] We need not and do not address whether these two questions require proof that the expenses are necessary or whether the evidence is legally sufficient to support a finding that the expenses are necessary.

[6] GHP preserved error on these points in its First Amended Motion for Judgment Notwithstanding the Verdict, which the trial court denied.

& Com. Code §17.50(b)(1) (West, Westlaw through 2021 C.S.); *Gulf States Utilities Co. v Low*, 79 S.W.3d 561, 567 (Tex. 2002); *Schlein v. Griffin*, No. 01-14-00799-CV, 2016 WL 1456193, at *23 (Tex. App.—Houston [1st Dist.] Apr. 12, 2016, pet. denied) (mem. op.). We reverse the trial court's money judgment in favor of Benelux and against GHP and render judgment that Benelux take nothing against GHP.[7]

C. Is the trial evidence legally and factually sufficient to support the jury's failure to find that Benelux breached section 6.2 of the Agreement and its failure to find that Benelux breached section 6.4 of the Agreement?

In Question 7, the trial court asked the jury whether Benelux failed to comply with section 6.2, section 6.4, or section 5.3 of the Agreement. In response, the jury answered "no" as to sections 6.2 and 6.4 and "yes" as to section 5.3. In response to Question 8, the jury found that Benelux's failure to comply with section 5.3 of the Agreement was excused by GHP's previous failure to comply with a material obligation of the Agreement. Liberally construing GHP's brief, GHP argues under its eighth issue, that the trial evidence is legally and factually insufficient to support the jury's failure to find that Benelux breached section 6.2 or section 6.4 of the Agreement.

When reviewing the legal sufficiency of the evidence, we consider the evidence in the light most favorable to the challenged finding and indulge every reasonable inference that would support it. *City of Keller*, 168 S.W.3d at 823. We must credit favorable evidence if a reasonable factfinder could and disregard contrary evidence unless a reasonable factfinder could not. *See id.* at 827. We must determine whether the evidence at trial would enable reasonable and fair-minded

[7] We need not and do not address any other appellate issue or argument by GHP challenging Benelux's money judgment against GHP.

people to find the facts at issue. *See id.* The jury is the only judge of witness credibility and the weight to give to testimony. *See id.* at 819.

When reviewing a challenge to the factual sufficiency of the evidence, we examine the entire record, considering both the evidence in favor of, and contrary to, the challenged finding. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *Teel v. Shifflet*, 309 S.W.3d 597, 603 (Tex. App.—Houston [14th Dist.] 2010, pet. denied). After considering and weighing all the evidence, we set aside the fact finding only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986); *Teel*, 309 S.W.3d at 603. The jury is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *Teel*, 309 S.W.3d at 603. We may not substitute our own judgment for that of the jury, even if we would reach a different answer on the evidence. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 407 (Tex. 1998). The amount of evidence necessary to affirm a judgment is far less than that necessary to reverse a judgment. *Teel*, 309 S.W.3d at 603.

In these two sections of the Agreement, the parties agreed as follows:

> 6.2 Intellectual Property Rights. Distributor hereby acknowledges that Haute Polish and/or its affiliates owns or otherwise has rights to the Property Rights associated with the Product and the Marketing Materials, including, but not limited to copyrights in the Product and Product packaging. Distributor hereby agrees that it will not duplicate, copy, alter, edit, translate, or modify the Product packaging or otherwise infringe on Haute Polish[’s] and/or its affiliates[’] Property Rights without first obtaining Haute Polish’s written approval.
>
> . . .
>
> 6.4 Knockoff or Imitation Products. Distributor hereby agrees that it will not purchase, market, distribute, sell, or otherwise exploit any similar product (“Knockoff Product(s)”) which in Haute Polish’s sole opinion violates or infringes any of the intellectual property rights that Haute Polish, its subsidiaries, affiliates, licensors and the like have in the Product. If for

> some reason during the term of this Agreement and for a period of twenty-four (24) months thereafter, Distributor violates these limitations on Knockoff Product(s) and in Haute Polish's sole opinion violates or infringes any of the Intellectual property rights that Haute Polish its subsidiaries, affiliates, licensors and the like have in the Product, then Distributor hereby agrees to pay Haute Polish (2X) two times the distributor price listed in Exhibit A for each Knockoff Product(s) sold. If Distributor is or becomes aware of any Knockoff Products, Distributor shall immediately notify Haute Polish of such and provide Haute Polish with all details and information it has on the Knockoff Product. Distributor shall also comply with any reasonable request by Haute Polish to obtain additional details or information on the Knockoff Product.

In its argument under the eighth issue, GHP does not cite a single legal authority. GHP does not recite the standards of review for legal or factual sufficiency or apply them to the record in this case. Thus, GHP has provided no case in which a court held that the trial evidence was legally or factually insufficient to support a jury's failure to find that a party had breached a contract. Though GHP provides citations to testimony by various witnesses at trial, the jury could have discredited the parts of this testimony that indicated that Benelux breached section 6.2 or 6.4. *See Caballero v. Caballero*, No. 14-16-00513-CV, 2017 WL 6374724, at *5 (Tex. App.—Houston [14th Dist.] Dec. 14, 2017, no pet.) (mem. op.). We conclude that GHP has not shown that the trial evidence conclusively proves that Benelux failed to comply with either section 6.2 or section 6.4 of the Agreement. *See Nowlin v. Keaton*, No. 01-17-00523-CV, 2019 WL 1996483, at *16 (Tex. App.—Houston [1st Dist.] May 7, 2019, no pet.) (mem. op.). We conclude that GHP has not shown that the trial evidence is factually insufficient to support the jury's failure to find that Benelux failed to comply with either section 6.2 or section 6.4 of the Agreement. *See Yeh v. David J. MacDougall, D.O., P.A.*, No. 01–06–00509–CV, 2008 WL 183712, at *4–5 (Tex. App.—Houston [1st Dist.] Jan. 17, 2008, no pet.) (mem. op.). Therefore, we

overrule the eighth issue. Because this issue is GHP's only challenge to the part of the trial court judgment in which the court orders that GHP take nothing on its claims, we affirm this part of the judgment.

III. CONCLUSION

We conclude that the trial evidence is legally insufficient to support the jury's finding in response to Question 41 that Je Matadi caused GHP to be used for the purpose of perpetrating and did perpetrate an actual fraud on Benelux primarily for the direct personal benefit of Je Matadi, and thus the evidence is legally insufficient to support the jury's answer to Question 41. We conclude that the trial evidence was legally insufficient to prove that (1) any of the expenses incurred by Benelux in performing under the Agreement or in responding to failures in Haute Polish was reasonable, or (2) the amount of reasonable expenses incurred by Benelux in performing under the Agreement and in responding to failures in Haute Polish exceeded the "costs saved or benefits received by Benelux as a result." Therefore, the trial evidence is (1) legally insufficient to support the jury's answers to Question 28 and to Question 30 and (2) legally insufficient to support a finding that Benelux suffered any damages under the measure of damages submitted in these questions. Without any legally sufficient evidence of damages under Benelux's DTPA claims, Benelux cannot recover additional damages or attorney's fees under the DTPA.

GHP has not shown that the trial evidence is legally or factually insufficient to support the jury's failure to find that Benelux breached section 6.2 of the Agreement or to support the jury's failure to find that Benelux breached section 6.4 of the Agreement.

We affirm the part of the trial court's judgment in which the court orders that GHP take nothing on its claims. We reverse the trial court's money judgment

in favor of Benelux and against GHP and Je Matadi, and we render judgment that Benelux take nothing against GHP or Je Matadi.

/s/ Randy Wilson
Justice

Panel consists of Justices Jewell, Spain, and Wilson (Spain, J., concurring).