Franchising (& Distribution) Currents

Heather Perkins, Jan Gilbert, and Maral Kilejian

Ms. Perkins

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ACCOUNTING

***AKB Wireless, Inc. v. Wireless Toyz Franchise, LLC*, Bus. Franchise Guide (CCH) ¶ 15,677, No. 14-13424, 2015 WL 8769964 (E.D. Mich. Dec. 15, 2015)**

Alan Bahnam entered into a franchise agreement with Wireless Toyz Franchise, LLC to operate an electronic device franchise in Florida retail stores. Bahnam later formed AKB Wireless, Inc. to which he assigned all of his rights and obligations under the franchise agreement.

AKB filed suit against Wireless Toyz in the U.S. District Court for the Middle District of Florida. The parties agreed to transfer the case to the Eastern District of Michigan pursuant to 28 U.S.C. § 1404(a) and the venue provision in the franchise agreement. AKB's first amended complaint asserted claims against Wireless Toyz for breach of contract, violations of the Michigan Franchise Investment Law, and breach of the covenant of good faith and fair dealing. Wireless Toyz filed a counter-complaint against AKB and a third-party complaint against Bahnam, both of which asserted a declaratory judgment claim and breach of contract claim. AKB and Bahnam filed a motion to dismiss those claims under Federal Rule of Civil Procedure 12(b)(6), but the court denied that motion.

AKB filed a second amended complaint and asserted claims against Wireless Toyz for (1) breach of contract, (2) statutory and/or common law conversion, (3) breach of fiduciary duties, and (4) an action for accounting. Wireless Toyz filed a motion to dismiss the complaint for failure to state a claim. The district court granted Wireless Toyz's motion in part and dismissed AKB's claims for conversion and accounting.

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In support of its claim for conversion, AKB alleged that it earned commissions from wireless carriers for selling cellular service and the commissions were provided to Wireless Toyz for deposit into a commission trust account (CTA). AKB claimed it was entitled to those funds and provided Wireless Toyz written notice to informing Wireless Toyz that it was wrongfully retaining those funds and demanding distribution. AKB alleged Wireless Toyz never provided the funds, which AKB claimed was a violation of Michigan's statute governing conversion, entitling AKB to treble damages. Further, to ascertain what amounts were due and owing and whether those amounts had been wrongfully misappropriated by Wireless Toyz, AKB sought a complete reconciliation and accounting of Wireless Toyz's CTA.

Wireless Toyz argued AKB's conversion claim failed as a matter of law because it had lawfully exercised dominion and control over the commission payments it received from wireless carriers under the terms of the parties' franchise agreement. The court recognized that it had previously ruled that a party failed to plead a statutory conversion claim where the claim was based upon funds held pursuant to a contract as opposed to a claim based on some duty independent of a contract.

In its complaint, AKB did not allege that Wireless Toyz was holding the commissions pursuant to some duty independent of the alleged contractual relationship, but rather alleged that Wireless Toyz had failed to perform contractual duties required by the franchise agreement. Accordingly, the court dismissed the conversion claim. To the extent any commissions were owed under the contract, the court noted that any such claim sounded in contract and not tort.

As for AKB's claim for an accounting, the court explained that Michigan law required AKB to show mutual demands, a series of transactions on one side, and payments on the other. AKB made no allegations of a series of mutual demands, however. The court noted a claim for accounting could still be proper in the absence of any of the three elements under Michigan law if the party could prove an accounting was necessary to interpret complicated or difficult transactions or bookkeeping for determining adequate relief at law. Yet AKB made no allegations that would support an inference that the transactions concerning the commissions were so complex that ordinary discovery procedures would be inadequate for AKB to determine the amounts it claimed it was owed. Consequently, the court also dismissed AKB's claim for an accounting under Michigan law.

ADVERTISING AND MARKETING

***Retail Digital Network, LLC v. Appelsmith*, Bus. Franchise Guide (CCH) ¶ 15,674, No. 13-56069, 810 F.3d 638 (9th Cir. Jan. 7, 2016)**

This case is discussed under the topic heading "Statutory Claims."

ANTITRUST

Glynn-Brunswick Hosp. Auth. v. Becton, Dickinson & Co., Bus. Franchise Guide (CCH) ¶ 15,688, No. CV 2115-091, 2016 WL 397646 (S.D. Ga. Jan. 29, 2016)

The U.S. District Court for the Southern District of Georgia granted the motion to dismiss by a New Jersey manufacturer of hypodermic syringes and other medical supplies (Becton) against two Georgia hospitals that provide inpatient acute care (together, the hospitals) where the hospitals failed to state a claim that Becton monopolized a cost-plus contracts system that required its distributors to pass on its pricing to the hospitals.

In 2015, the hospitals sued Becton as part of a class action suit brought by acute care providers that purchased Becton's hypodermic syringes and IV catheters under several cost-plus contracts that required the distributor to pass on Becton's pricing to the providers. The hospitals alleged two claims under Section 2 of the Sherman Act—one for the sale of hypodermic syringes and the other for the sale of the IV catheters. The hospitals claimed that (1) Becton had market power in both the hypodermic syringe and catheter markets, (2) it engaged in various exclusionary schemes to maintain its market power, and (3) it used its power to charge the hospitals and other providers above-competitive pricing through their cost-plus contracts with distributors. Becton moved to dismiss the claims on the basis that the hospitals lacked standing to bring damages claims because they were not direct purchasers of its medical products and they failed to adequately plead their claims under Section 2 of the Sherman Act.

The court held that the hospitals could not seek damages as direct purchasers under the Sherman Act since they purchased the hypodermic syringes and IV catheters from distributors. It also held that they failed to demonstrate that they satisfied any of the permitted exceptions to the direct purchaser rule. Moreover, the court found no evidence that Becton unlawfully worked with the distributors to fix the resale prices on the syringes and catheters or that it otherwise organized any exclusionary scheme with the distributors.

Manitou N. Am., Inc. v. McCormick Int'l, LLC, Bus. Franchise Guide (CCH) ¶ 15,686, No. 324063, 2016 WL 439354 (Mich. Ct. App. Feb. 2, 2016)

In a dispute between manufacturer Manitou North America, Inc. and distributor McCormick International, LLC, the Michigan Court of Appeals affirmed jury verdicts awarded to McCormick under the Michigan Farm and Utility Act (MFUEA), the Michigan Antitrust Reform Act (MARA), and the jury's damage award under the MARA. The court vacated and remanded the jury's MFUEA damage award for McCormick.

In 2000, Manitou, the manufacturer of telescopic handlers (known as telehandlers) that are used in agriculture and industry, entered into a dealer marketing agreement (DMA) with McCormick wherein McCormick became an exclusive dealer of Manitou's telehandlers in Michigan and parts of Indiana and Ohio. Under the DMA, McCormick was required to achieve a certain market share and increase sales each year. In 2001, McCormick achieved the requisite market share but by the end of 2002 and each year thereafter, it failed to increase sales to the level required by the DMA. McCormick terminated the DMA in early 2007, citing the negative impact of Manitou deals with competitors as the basis for the termination. In July 2007, Manitou sued McCormick for breach of contract and McCormick counterclaimed. McCormick alleged that Manitou violated the MARA when it entered into a 2004 supply agreement with Gehl, a competing manufacturer, which resulted in the sale of Manitou and Gehl telehandlers in McCormick's territory. Under Manitou's agreement with Gehl, the two manufacturers' dealers could not distribute competing telehandlers.

The court affirmed the jury's verdict and award to McCormick of $3.85 million dollars on the MARA violation. It found that not only was the relationship between Manitou and Gehl a horizontal restraint on trade, which is a per se violation of the MARA, but also that the 2004 supply agreement caused McCormick to suffer an antitrust injury. It reversed the jury's award of $1.3 million dollars to McCormick on the MFUEA violation because McCormick failed to establish proof of lost profits to a reasonable degree of certainty.

***S. Gas, Inc. v. Exxonmobil Oil Corp.*, Bus. Franchise Guide (CCH) ¶ 15,712, No. 09-CV-6236, 2016 WL 816748 (D.N.J. Feb. 29, 2016)**

Approximately ninety-six Exxon branded retail gas stations, all franchisees, filed suit against their franchisor, ExxonMobil Oil Corp., in the U.S. District Court for the District of New Jersey. The franchisees asserted ten claims for relief: (1) violation of the Robinson-Patman Act for allegedly manipulating the wholesale gas market by charging disparate prices to competing wholesale customers; (2) violation of the New Jersey Franchise Practices Act (NJFPA) for allegedly imposing unreasonable standards of performance; (3) breaches of clauses in their franchise agreements stating that the dealers were in control of their day-to-day operations and could set their own retail prices, the rent guidelines under the lease, and Exxon's obligation to pay technology fees; (4) violation of the Uniform Commercial Code, which requires good faith in setting prices; (5) breach of the duties of good faith and fair dealing; (6) fraudulent inducement; (7) negligent misrepresentation based on Exxon's alleged representations regarding its future in New Jersey and offsetting the rents; (8) breach of the New Jersey Unfair Motor Fuels Practices Act (UMFPA) for allegedly manipulating the wholesale motor fuel market by charging different prices to competing wholesale customers; (9) reformation or declaratory judgment to resolve alleged inconsistencies in the agreements; and (10) tortious interference with prospective economic advantage based on Exxon's alleged retaliation and intent to cause harm to the business of one specific franchisee.

Exxon filed a motion to dismiss eight of the ten claims under Federal Rule of Civil Procedure 12(b)(6), which the court denied. In reviewing the price discrimination claims, the court found that when viewed together, the franchisee's allegations regarding Exxon's level of control over the franchisees were sufficient to raise a plausible inference of Exxon's price discrimination. The court also noted that Exxon provided no unique argument and cited no case law to support dismissing the UMFPA claim.

Next, the court said the NJFPA does not define "unreasonable standards of performance" and that New Jersey courts had given little guidance, but that a factual context is required. The court found the franchisees had alleged at least two facts sufficient for a claim to go forward as to whether Exxon was imposing unreasonable standards of performance: (1) inventory standards, detailing examples specific to particular franchisees; and (2) volume requirements, detailing examples specific to particular franchisees. Exxon attacked the franchisees' breach of contract claims by arguing that they had failed to establish that Exxon did not perform its contractual obligations under the agreements. The court disagreed and noted that franchisees specifically alleged that Exxon had breached five clauses of the agreements.

In regard to the state law claims for common law fraud and negligent misrepresentation, the franchisees alleged two misrepresentations: (1) Exxon repeatedly stated that it would not leave New Jersey; and (2) Exxon, when it decided to charge the plaintiffs for real estate taxes, stated that it would offset rent so that the plaintiffs' total payments would not increase. The franchisees alleged Exxon knew these representations were false and intended for the plaintiffs to rely on them. The franchisees further alleged that they reasonably relied on those statements and suffered damages, in that they were lulled into continuing to invest in promoting Exxon's goodwill and trademark, the value of which was diminished. The court determined that these tort claims were "adequately alleged" and that Exxon's denials were matters of fact to be addressed in connection with summary judgment.

The franchisees requested reformation because their contract was unconscionable. The court held that whether parties are mistaken or a party's conduct is unconscionable are fact questions that would emerge in discovery and denied Exxon's motion to dismiss the reformation claim. As for tortious interference with prospective economic advantage, the court said the franchisees' complaint had specific allegations on behalf of the one franchisee that Exxon harmed after Exxon organized the dealers.

ARBITRATION

Trouard v. Dickey's Barbecue Rest., Inc., Bus. Franchise Guide (CCH) ¶ 15,717, Nos. PWG-14-1703, GLR-14-1650, 2016 WL 687487 (D. Md. Feb. 19, 2016)

The plaintiffs sought to resolve their disputes under similar franchise agreements entered into with Dickey's Barbecue Restaurants, Inc. through mediation. The defendants responded by pursuing breach of contract and fraud claims via arbitration. The plaintiffs then filed suit in the U.S. District Court for the District of Maryland alleging fraud and violations of the Maryland Franchise Law (MFL). Before the date of this opinion, the court had instructed the parties to proceed to arbitration of the common law claims and to brief whether the MFL claims should be stayed pending resolution of the arbitration proceeding. The plaintiffs opposed a stay while the defendants favored one.

The decision of whether to stay a case is in the court's discretion after considering the interests of judicial economy, hardship, and equity to the moving party if the action is not stayed, and potential prejudice to the non-moving party. Both parties agreed that the non-nonarbitrable claims and those submitted to arbitration were intertwined. In the plaintiffs' view, the MFL claims, once decided, could result in a finding that the franchise agreements are invalid and unenforceable, for which reason they believed the court should not stay the suit. The defendants cited cases in support of their argument that the arbitrator's decision on the validity of the franchise agreements may have a preclusive effect, but that this cannot be determined until after the arbitration is completed. In agreement with the defendants' argument, and also determining that staying the suit would streamline the resolution of some or all of the issues in front of the court, the court ordered the stay of the MFL claims pending resolution of the arbitration.

Jewelry Repair Enter., Inc. v. Son Le Enter., Inc., Bus. Franchise Guide (CCH) ¶ 15,720, No. 9:15-cv-81622, 2016 WL 660904 (S.D. Fla. Feb. 18, 2016)

The U.S. District Court for the Southern District of Florida denied a motion to compel arbitration made by the franchisee/defendants.

The plaintiff franchisor filed suit against the defendants for trademark infringement, trademark dilution, unfair competition, and affiliated state law claims, all related to the defendants' alleged misappropriation of the plaintiff's trademarks and trade secrets. In pertinent part, the franchise agreement between the parties provided for binding arbitration in instances where the franchise agreement was terminated by the franchisor and the franchisee disputes franchisor's right to termination. The franchise agreement, with limited exceptions, further provided for arbitration of any controversy or claim arising out of or relating to the franchise agreement. However, the franchise agreement exempted certain issues from the scope of the arbitration provision, including, in relevant part, claims relating to confidential information or the trademarks; the obligations of the franchisee upon termination or expiration of the franchise agreement; matters relating to the goodwill associated with the marks; or all requests for restraining orders, injunctions, or other procedures. The defendants sought to compel arbitration pursuant to the aforementioned terms in the franchise agreement.

Citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 630–31 (1985), the court began by noting that the presence of a valid arbitration provision raises a strong presumption of enforcement. Indeed, the court noted, the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16, embodies a liberal federal policy favoring arbitration agreements. Despite the court's proclivity for enforcement of an arbitration provision, a party will not be required to arbitrate in the absence of an agreement to do so. Thus, when presented with a motion to compel arbitration, a district court will consider three factors: (1) whether a valid agreement to arbitrate exists, (2) whether an arbitrable issue exists, and (3) whether the right to arbitrate was waived. Citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 213 (1985), the court further noted that, by its terms, the FAA leaves no room for a court to exercise discretion. Thus, if the three criteria are met, the court is required to issue an order compelling arbitration.

The defendants acknowledged that the franchise agreement excluded claims relating to confidential information, trademarks, and restrictive covenants—that is, the very claims set forth in the complaint. The defendants, nevertheless, argued that the claims somehow fell outside the scope of the arbitration provision, based on a strained interpretation of the arbitration provision that the court concluded would have rendered a significant portion of the arbitration superflous. The court rejected this argument and denied the motion to compel arbitration.

***Woodruff & Huey Inv., Inc. v. Sears Authorized Hometown Stores, LLC*, Bus. Franchise Guide (CCH) ¶ 15,707, No. 1:15-CV-00134-BRW (E.D. Ark. Feb. 11, 2016)**

The U.S. District Court for the Eastern District of Arkansas upheld a franchise agreement's arbitration provision, notwithstanding a typographical error that obscured which claims were excluded from arbitration and a franchisee's claim that the agreement lacked mutuality.

Woodruff and Huey Investments, Inc., a franchisee of Sears Authorized Hometown Stores, claimed that the arbitration clause in the parties' franchise agreement was not enforceable. The court disagreed, finding that a cross-reference to a provision titled "Appeal" was an apparent scrivener's error in a section pertaining to claims that would be excluded from arbitration. The court concluded that the parties clearly intended to reference the section entitled "Exceptions." Moreover, the court upheld the provision of the agreement that excluded from arbitration claims that would cause irreparable harm to the franchisor. The court was not persuaded that the agreement lacked mutuality merely because the agreement permitted only the franchisor to bring such claims in court. It noted that the parties' obligations need not be identical for an agreement to be upheld. Indeed, both parties had agreed to arbitrate some claims. The court dismissed the case so that the parties could proceed with arbitration.

ATTORNEY FEES

Arctic Circle Rest., Inc. v. Bell, Bus. Franchise Guide (CCH) ¶ 15,719, No. 4:14-CV-00337, 2016 WL 617414 (D. Idaho Feb. 15, 2016)

This case involves a somewhat unusual procedural posture for a motion for attorney fees. In November 2005, the plaintiff, Arctic Circle Restaurants, Inc., and the defendant, David Bell, entered into a franchise agreement for Bell to operate an Arctic Circle restaurant. When Arctic Circle terminated the franchise agreement in June 2014, Bell was instructed to discontinue the use of the Arctic Circle signage and promotional materials. After the termination, Arctic Circle claimed that he continued to operate a restaurant in the same location using the trade name, trademarks, and other materials closely related to Arctic Circle in violation of the franchise agreement.

As a result, Arctic Circle filed suit in August 2014 and a few days later filed a motion for preliminary injunction and temporary restraining order. Bell opposed the motion and filed a motion to dismiss the complaint, claiming that all of the claims alleged in the complaint were subject to arbitration. As events unfolded, the underlying basis for Arctic Circle's motion for injunctive relief no longer existed. Thus, the only issue before the court was whether the case should be handled in arbitration. Following a hearing, the court determined that each of the remaining claims of Arctic Circle were covered by the arbitration provision in the franchise agreement and dismissed the claims without prejudice.

Thereafter, Bell brought a motion for attorney fees. Bell asserted that he became the prevailing party within the meaning of the franchise agreement because the court had dismissed Arctic Circle's claims without prejudice once the claims for injunctive relief no longer existed. Arctic Circle disagreed, arguing in response that the franchise agreement actually required Bell to pay its fees given the need for it to hire counsel to address his violations of the franchise agreement. Arctic Circle further argued that Bell should not be considered the prevailing party because the only reason the motion for preliminary injunction was withdrawn was because he stopped his infringing conduct.

Under both Idaho and Utah law, if a contract contains an attorney fee provision, the terms of the provision establish the right to fees. Citing *Wandering Trails, LLC v. Big Bite Excavation, Inc.*, 329 P.3d 368, 380 (Idaho 2014) and *Olsen v. Lund*, 246 P.3d 521, 523 (Utah Ct. App. 2010), the court stated that determination of which party, if any, is the prevailing party and thus entitled to fees under a contract, takes on an overall comparative analysis left to the trial court's discretion. The court said the issue became only whether and to what extent the fee shifting provision of the franchise agreement applied, given the "rather unique nature" in which the action had developed.

After extensive discussion of the factors weighing in each parties' favor, the court concluded that, when viewing the action as a whole, neither party could lay claim to the status of prevailing party. The court determined that Bell prevailed upon a particular portion of a larger whole (specifically the motion to dismiss and litigate the dispute in arbitration once the request for injunctive relief was rendered moot), but he was not, in the view of the court, the prevailing party. Accordingly, the court concluded in the exercise of its discretion that Bell was not entitled to an award of fees or costs.

***Domino's Pizza Franchising, LLC v. VTM Pizza, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,680, No. 15-13312, 2015 WL 9500791 (E.D. Mich. Dec. 31, 2015)**

The plaintiff, Domino's Pizza Franchising, LLC, filed a complaint alleging breach of contract against defendants VTM Pizza, Inc. and Terrance Williams. The defendants failed to answer or respond, despite having received service of the summons of complaint, and the U.S. District Court for the Eastern District of Michigan entered default and took evidence on remedies. Domino's filed a motion for default judgment, seeking injunctive relief, damages, and attorney fees.

The court first took up the request for injunctive relief, holding that injunctive relief is available by way of default, particularly if the defendant has actual notice of the proceedings. The court concluded that Domino's had demonstrated that it would suffer irreparable harm and permanently enjoined the defendants from violating the terms of the covenant not to compete in the franchise agreement and also ordered the defendants to cease use of the telephone number previously used when the location operated as a franchised location.

The court next turned to damages. Domino's sought both past due and lost future royalties, as well as advertising fees that it contended it would have received over the remainder of the ten-year franchise agreement. Domino's offered the declaration of a corporate controller laying out a methodology for calculating lost future royalties. It was based on the former franchise location's sales in the twelve months leading up to the defendants' ceasing to operate the location as a Domino's franchise, projected over the remaining term of the agreement, then discounted back to net present value using Domino's cost of capital. The court accepted Domino's calculation and awarded damages of approximately $188,000.

Finally, the court awarded the attorney fees of both national and local counsel. The court concluded that approximately $32,000 of the roughly $39,000 in attorney fees were reasonable.

***Azinian v. Luby's Fuddruckers Rest. LLC*, Bus. Franchise Guide (CCH) ¶ 15,718, No. B256660, 2016 WL 690539 (Cal. Ct. App. Feb. 19, 2016)**
The California Court of Appeal affirmed an award of attorney fees by the trial court, finding that the appellant had failed to present an adequate record to demonstrate a clear abuse of discretion by the trial court.

The defendant/appellant, Luby's Fuddruckers Restaurants (LFR), is the franchisor entity for the Fuddruckers chain of hamburger restaurants. The plaintiffs and several individuals, who were not parties to the appeal, jointly owned corporate entities that had franchise agreements with LFR to operate several Fuddruckers restaurants. The plaintiffs sued several individual defendants and LFR, alleging that LFR had breached the franchise agreements by failing to enforce noncompete provisions and allowing the individual defendants to open competing hamburger restaurants near the plaintiffs' restaurants.

After successfully demurring to the third amended complaint and opposing the plaintiffs' motion for a new trial, LFR sought an award of attorney fees. There was a discrepancy between the amount sought in the motion and the supporting papers; apart from a declaration of counsel based on his review of the invoices issued by his firm and the redacted invoices themselves, LFR offered no evidence concerning the reasonableness of the requested fees. The plaintiffs, who noted the discrepancy, challenged the fee award as exorbitant given LFR's limited involvement in the case and challenged the amount of the fees. The trial court ultimately granted LFR's motion but awarded only $36,000 in fees, less than LFR sought.

LFR appealed. LFR complained that the trial court erred by refusing to award the full amount of attorney fees and costs requested and argued that nothing in the record justified an award of fees less than the amount of fees billed by the attorneys. The appellate court disagreed, finding that it was LFR's burden, as the party challenging the award, to present a sufficient record to demonstrate that the trial court had abused its discretion. The appellate court found that the trial court had plainly determined that only a portion of the fees billed were reasonably incurred to defend the contract-related claims against LFR. Insofar as LFR complained that the trial court did not specify reasons for denying fees with respect to the hours billed, it was incumbent on LFR to request a statement of decision with specific findings to support its appeal.

CHOICE OF FORUM

***Brava Salon Specialists, LLC v. Label.M USA, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,721, No. 15-cv-631-bbc, 2016 WL 632649 (W.D. Wis. Feb. 16, 2016)**
The U.S. District Court for the Western District of Wisconsin ordered the transfer of this case involving common law and statutory claims under the

Wisconsin Franchise Dealership Law (WFDL), based on a forum-selection provision in the parties' franchise agreement.

The plaintiff, Brava Salon Specialists, LLC, filed suit against the defendant, Label.M USA, Inc., for allegedly violating an exclusive distribution agreement. Brava also sued three other parties for interfering with Brava's contract with Label.M. Brava raised claims for breach of contract, tortious interference with contract, and violations of the WFDL. The plaintiff filed in state court, but Label.M removed the case to federal court, relying on diversity of citizenship as the basis for jurisdiction. Label.M then moved to transfer the case to the Southern District of Florida because the plaintiff's claims arose under an agreement that required the parties to litigate their disputes in Florida.

The court applied a two-step analysis to determine whether to transfer a case under 28 U.S.C. § 1404(a) in light of the forum selection clause. In the first step, the court determines whether the forum selection clause is "contractually valid." *Atl. Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Texas*, 134 S. Ct. 568, 580–81 n.5 (2013). If it is, the court then conducts an analysis under § 1404(a) to determine whether any other factors show it would be in the interests of justice to disregard the forum selection clause. Because Brava did not argue that the forum selection clause was invalid as a matter of contract law, the court proceeded directly to the second factor. Brava argued that the forum selection clause should not receive dispositive consideration under § 1404(a) because doing so would be contrary to the policy embodied in the Wisconsin Fair Dealership Law.

Section 1404 allows a court to transfer a case for the convenience of the parties and witnesses in the interest of justice. Citing *Research Automation, Inc. v. Schrader-Bridgeport International, Inc.*, 626 F.3d 973, 978 (7th Cir. 2010), the court noted that § 1404 generally permits a "flexible and individualized analysis" such that a district court has the opportunity to look beyond a narrow or rigid set of considerations. The analysis changes, the court explained, when the parties have a contract with a valid forum selection clause. For example, the court noted that the court is not permitted to give any weight to the plaintiff's choice of forum under the *Atlantic Marine* case. In addition, the court may not consider private interests such as convenience. More generally, "a valid forum selection clause should be given controlling weight in all but the most exceptional cases." *Atl. Marine*, 134 S. Ct. at 581.

Brava contended that enforcing the forum selection clause would conflict with the strong public policy behind the WFDL. The only potential conflict Brava identified was that it was unaware of any Florida law that would contain the same important public policy provisions as the Wisconsin statute. The court noted that, even if Brava's observation about Florida law was correct, it was an argument about choice of law, not choice of forum. The court rejected the argument, noting Brava did not identify any reason why the Florida court could not apply the WFDL if it governed the case in the way that Brava contended. The court acknowledged that, while a Wisconsin court would be more familiar with the statute than a Florida court, that alone was not a sufficient reason to enforce a forum selection clause.

Brava also cited a number of cases decided prior to *Atlantic Marine* in which courts in the Western District of Wisconsin had refused to enforce a forum selection clause when the plaintiff was raising a claim under the WFDL. The court held that, given the Supreme Court's ruling in *Atlantic Marine*, those older cases may no longer apply. In any event, the court noted that the cases relied upon by Brava did not hold that the WFDL invalidated every forum selection clause. Rather, each of the courts in the cases cited by the plaintiff stated that the WFDL was one factor to consider in deciding a motion. Accordingly, the court granted Label.M's motion to transfer venue to Florida.

***Midwest Mailing & Shipping Sys. Inc. v. Neopost USA Inc.*, Bus. Franchise Guide (CCH) ¶ 15,692, No. 15 C7752, 2016 WL 367952 (N.D. Ill. Jan. 28, 2016)**

The U.S. District Court for the Northern District of Illinois granted a motion by dealer Midwest Mailing & Shipping Systems, Inc. to remand a dispute with the defendant, Neopost USA, Inc., to state court where a settlement agreement between the parties expressly provided that any dispute between them would be brought in Illinois state court.

Neopost, a company engaged in the business of selling and servicing postage meters, entered into a dealership agreement with Midwest in 1996. Six years later, several dealers, including Midwest, sued Neopost in Cook County Circuit Court. Midwest and the other dealers subsequently entered into a settlement agreement with Neopost, which Neopost allegedly later breached. Midwest sued Neopost in Illinois state court pursuant to a forum selection clause in the settlement agreement.

After Neopost removed the action to federal court, Midwest moved to have it remanded. The district court agreed with the remand, noting that the parties had expressly agreed to litigate any issues regarding enforcement of the settlement agreement in Illinois state court. It rejected an argument by Neopost that the terms of the parties' dealership agreement controlled the dispute because, among other things, the settlement agreement provided that it superseded the dealership agreement in the event of a conflict. Moreover, a review of Midwest's complaint demonstrated that Midwest sought to enforce the terms of the settlement agreement with Neopost.

***Moxie Venture L.L.C. v. The UPS Store, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,685, Civ. No. 15-3704 (RHK/JJK), 2016 WL 128136 (D. Minn. Jan. 12, 2016)**

The U.S. District Court for the District of Minnesota granted a franchisor's motion to transfer a lawsuit in which common law and state law claims were asserted to California.

The plaintiff, Moxie Venture L.L.C., filed suit against the defendant, The UPS Store, Inc. (TUPSS), seeking rescission of the parties' franchise agreement and damages. The franchise agreement contained a provision in which Moxie acknowledged that neither TUPSS, nor its officers, agents, or employees, had made any representations on potential revenues, earnings, or profits and that Moxie had not made a decision to purchase a franchise based on any such representation. The agreement also contained a provision in which Moxie acknowledged that establishing the business involved a number of risks, including the risk that the franchise location would be unprofitable and that Moxie could lose all or part of its investment and any other additional funds contributed to the business. The agreement further provided that the ultimate decision on site selection for the business was Moxie's. Finally, the agreement provided that it constituted the entire agreement between the parties and that San Diego was the exclusive venue for disputes arising under the agreement.

Moxie's business was not profitable, and it filed suit alleging that TUPSS made numerous misrepresentations to induce Moxie to enter the franchise agreement. Moxie asserted claims under the Minnesota Franchise Act (MFA), as well as three common law claims, and sought damages and rescission of the agreement. Relying on another case decided by the same judge, *Ellering v. Sellstate Realty System Network, Inc.*, 801 F. Supp. 2d 834 (D. Minn. 2011), TUPSS moved to dismiss Moxie's MFA claim under Federal Rule of Civil Procedure 12(b)(6) and to transfer the remaining claims under the franchise agreement's forum selection clause.

As in this case, the plaintiffs in *Ellering* alleged that the defendant franchisor had made misrepresentations in violation of the MFA, but expressly disclaimed any reliance on defendant's representations in the franchise agreement. Also, as in *Ellering*, the court granted TUPPS's motion to dismiss the MFA claim, holding that the franchise agreement firmly established that "even if TUPSS made misrepresentations in connection with the sale of Moxie's franchise, Moxie did not rely upon any of them and, if it did (contrary to the express terms of the franchise agreement), such reliance was unreasonable as a matter of law." The court also declined Moxie's invitation to revisit the holding of *Ellering*, noting that the result in *Ellering* was consistent with the law in the district.

With the MFA claim dismissed, the court held that the remaining common law claims were subject to the franchise agreement's forum selection clause and, thus, must be transferred to a court in California.

***Sears Home Appliance Showrooms, LLC v. Appliance Alliance, LLC*, Bus. Franchise Guide (CCH) ¶ 15,667, No. 15 C 4414 (N.D. Ill. Dec. 8, 2015)**

The U.S. District Court for the Northern District of Illinois denied a motion to dismiss filed by a franchisee of Sears Authorized Hometown Stores, LLC and rejected the franchisee's claim that the forum selection clauses in the parties' franchise agreements should be ignored. Although the Northern District of Illinois was a proper forum according to the parties' agreements, the franchisee sought for the dispute to be resolved by the Northern District of Texas, where the franchisee had previously filed suit. The court enforced the forum selection clause in the parties' franchise agreements and allowed the case to proceed.

Appliance Alliance, LLC signed multiple franchise agreements, promissory notes, and other agreements with Sears wherein the parties agreed that all disputes would be resolved in a state or federal court in Chicago. However, Appliance Alliance filed a suit against Sears in a Texas state court for claims arising out of their agreements, which was subsequently removed to federal court. Eleven days later, Sears filed a lawsuit against Appliance Alliance in the Northern District of Illinois, in accordance with the parties' forum selection clause. Appliance Alliance claimed that Sears' action should be dismissed based on the first-to-file rule. The court acknowledged a rebuttable presumption that the first case to be filed should proceed, but held that a forum selection clause is sufficient to rebut that presumption. That the parties' agreements were form contracts and not subject to negotiation was irrelevant. The court also rejected Appliance Alliance's claim that the Colorado River doctrine required that the federal claim be dismissed in light of the concurrent state proceeding. The court held that Sears' lawsuit should proceed.

CHOICE OF LAW

***Black Hills Truck & Trailer, Inc. v. MAC Trailer Mfg., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,669, No. 4:13-CV-04113-KES, 2015 U.S. Dist. LEXIS 164709 (D.S.D. Dec. 9, 2015)**

The U.S. District Court for the District of South Dakota held that a choice of law clause in a distributorship agreement designating Ohio law should be set aside because South Dakota's state motor vehicle dealer law offered materially greater protections to distributors than Ohio's laws.

Black Hills Truck & Trailer, Inc. entered into a distributorship agreement with MAC Trailer Manufacturing, Inc., which provided that the agreement would be governed by the laws of the State of Ohio. The parties' relationship deteriorated and Black Hills filed an action against MAC for breach of contract and various violations of state and federal law, including restraint of trade, breach of good faith and fair dealing, and deceit. MAC moved for an order stating that Ohio law would govern the dispute. The court noted that parties to a contract may agree to be bound by the laws of a particular state, but such agreements may be invalidated due to another state's overriding public policy concerns. In South Dakota, this inquiry requires an analysis of whether the application of another state's law is contrary to the public policy of South Dakota, whether South Dakota has a materially greater interest in the litigation than the contractually designated state, and whether South Dakota law would govern absent the choice of law clause. The court found that such considerations militated in favor of finding that South Dakota's law should govern the claims surrounding violations of South Dakota's motor vehicle law because the state has an interest in enforcing its law and its law provided greater substantive protection for distributors. However, because the substantive law surrounding the other claims was essentially the same in both states, the court enforced the parties' clause for resolution of those disputes and applied Ohio law.

***Family Wireless #1, LLC v. Automotive Techs., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,706, No. 15-CV-1310 (JCH), 2016 WL 183475 (D. Conn. Jan. 12, 2016)**

This case is discussed under the topic heading "Fraud."

***Rienzi & Sons, Inc. v. Puglisi*, Bus. Franchise Guide (CCH) ¶ 15,689, No. 15-791-cv, 2016 WL 520107 (2d Cir. Feb. 10, 2016)**

The Second Circuit affirmed a district court's award of summary judgment against an importer and distributor of Italian foods (Rienzi) in favor of a pasta manufacturer and its president (together, Puglisi). In 2008, Rienzi sued Puglisi in New York state court for breach of contract and breach of fiduciary duties after Rienzi terminated the parties' relationship. On appeal, Rienzi argued that the district court had erred when it, among other things: (1) applied New York law instead of the Convention on the International Sale of Goods (CISG) to the parties' contract claims and (2) determined that Rienzi had failed to raise a triable issue of fact on its fiduciary relationship and joint venture claims.

On a de novo review, the Second Circuit disagreed with Rienzi's argument. It found that Rienzi failed to mention application of the CISG when it filed the complaint, in its answer to Puglisi's counterclaim, or in it its amended complaint. The court was further persuaded that Rienzi opted out of the CISG when it continued to make legal arguments under New York state law as opposed to the CISG. The court determined that Rienzi declined to mention the potential application of the CISG until it filed its opposition to Puglisi's motion for summary judgment. The court also found that Rienzi had failed to provide any evidence, essential for a successful fiduciary relationship claim under New York state law, of Puglisi's de facto control or dominance over Rienzi to support its claim that its purchase of pasta exclusively from Puglisi raised a material issue of fact regarding the parties' fiduciary relationship.

CLASS ACTIONS

***Brunner v. Jimmy John's, LLC*, Bus. Franchise Guide (CCH) ¶ 15,698, No. 14-C-5509, 2016 U.S. Dist. LEXIS 5725 (N.D. Ill. Jan. 14, 2016)**
In July 2014, plaintiffs Brunner and Turowski initiated this suit on behalf of themselves and similarly situated employees, alleging violations of the Fair Labor Standards Act (FLSA) and certain Illinois wage and hour laws by Jimmy John's Enterprises, Inc. and JS Fort Group, Inc. In March 2015, Scott Watson filed a similar lawsuit in the U.S. District Court for the Southern District of Ohio against Jimmy John's, LLC, Jimmy John's Enterprises, LLC, and Jimmy John's Franchise, LLC (together, Jimmy John's). The Ohio court transferred its case to the same district as this case; thereafter, Jimmy John's filed two requests asking the court to reassign and consolidate the Brunner and Watson cases. After Jimmy John's third request and a related motion, the court granted the motion, determining that the time was right for consolidation in order to facilitate and expedite the notice process.

Certain Jimmy John's franchisee entities, however, which were the defendants in the *Brunner* case, but not in *Watson v. Jimmy John's, LLC*, objected to the consolidation on the grounds that the claims in the two cases did not "neatly overlap" and because it would cause them prejudice and result in financial ruin due to the nationwide certification of the *Watson* class. As to the first objection, the court clarified that claims in separate cases need not "neatly overlap" but rather, pursuant to Federal Rule of Civil Procedure 42, need only "involve a common question of law or fact." The court further noted that, under Northern District of Illinois Local Rule 40.4, cases may be reassigned where

> one or more of the classes involved in the cases is or are the same, provided: (1) both cases are pending in the same court; (2) the handling of both cases by the same judge is likely to result in a substantial saving of judicial time and effort; (3) the earlier case has not progressed to the point where designating a later filed case as related would be likely to delay the proceedings in the earlier case substantially; and (4) the cases are susceptible of disposition in a single proceeding.

Since both cases involved FLSA claims on behalf of nationwide classes for unpaid overtime, the court found that the requirements of both rules were satisfied. With respect to the second objection, that the consolidation would prejudice the Jimmy John's franchisee defendants in the current *Brunner* case, the court pointed to the fact that the case already involved a nationwide FLSA collective where nationwide discovery would be sought.

The plaintiffs in the *Watson* case also objected to the reassignment and consolidation, claiming that granting the motion would delay the notice process because the form of notice had already been approved. The court contended, however, that the consolidation would, in fact, prevent delay and not cause it. Accordingly, the court granted Jimmy John's second renewed motion for reassignment and consolidation.

CONTRACT ISSUES

***Broderick Assocs., Inc. v. Fansteel, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,695, No. 1:14-cv-01133, 2016 WL 274874 (S.D. Ind. Jan. 22, 2016)**
On April 1, 2006, the plaintiff, Broderick Associates, Inc., entered into a manufacturer's sales representative agreement with the defendants, Fansteel, Inc. and American Sintered Technologies, under which Broderick provided consulting and sales support services for the defendants' metal manufacturing activities in exchange for certain commission payments. The agreement was set to expire on December 31, 2007, but was extended by the parties until December 31, 2013, at which time the parties did not renew the agreement and defendants had fallen behind in payment of commission amounts to Broderick.

Under the terms of the agreement, termination "without cause" entitled Broderick to receive commissions for 180 days starting from the termination date and for 540 days from the termination date for automotive accounts. Termination "with cause," however, resulted in the forfeiture of all commission amounts due. In early 2014, Broderick reminded the defendants of the commission payments due, however, such payments were never made and, on April 30, 2014, the defendants' new chief operating officer sent an email to Broderick asserting that the agreement had been terminated "with cause" due to multiple breaches of the agreement, although no specific instances of breach were provided. Broderick filed suit for breach of contract, breach of implied contract, unjust enrichment, violation of the Illinois Sales Representative Act (ISRA), and violation of the Indiana Wholesale Sales Representative Act for unpaid, due, and owing commission payments. After the defendants filed their answer, Broderick filed a motion for partial summary judgment on its breach of contract and ISRA claims.

With respect to Broderick's breach of contract claim, the court found no dispute as to the existence of the agreement. The defendants' response, however, claimed that at the time the agreement terminated, they were not required to make a designation of termination "for cause" or "without cause" and that they simply exercised their right to designate the type of termination several months later by clarifying that the termination was indeed "for cause." The court, however, did not agree and stated that if no "cause" is communicated at the time of termination, logically such termination is "without cause" and a termination "without cause" entitled Broderick to commissions due under the agreement. As a result, the court found no genuine issue of material fact and granted Broderick's motion for summary judgment on its breach of contract claim.

The court went on to examine the defendants' alleged violation of the ISRA, under which Broderick claimed a right to statutorily granted exemplary damages and attorney fees and costs. The ISRA requires that all commissions due at the time of termination of a sales representative agreement be paid within thirteen days of termination and that commissions that become due after the date of termination be paid within thirteen days of their respective due dates. Because the court found that the termination of the agreement had been "without cause" and commissions were due and owing to Broderick, it followed that the defendants were in violation of the ISRA. Although such violation did make the defendants liable for Broderick's attorney fees and costs, which the court awarded to Broderick, it did not automatically follow that the court would grant exemplary damages. Such damages are appropriate under Illinois law only if the failure to pay the commissions was "in bad faith or the moral equivalent of criminal conduct." Because there was no evidence supporting such conduct, the court did not award exemplary damages to Broderick.

***Connelly Co. v. Primo Water Corp.*, Bus. Franchise Guide (CCH) ¶ 15,700, No. 2:14-CV-00340-JLQ, 2016 WL 225663 (E.D. Wash. Jan. 19, 2016)**

The plaintiff, Connelly Company, doing business as Lodi, provided bottling and distribution services to the defendant, Primo Water Corporation, from October 2013 until January 2014, when Primo terminated the contractual relationship. Lodi filed suit asserting that Primo violated the Washington Consumer Protection Act (WCPA), breached a valid contract, and engaged in fraudulent inducement, and that Lodi was entitled to equitable relief under such doctrines as unjust enrichment and quantum meruit, among others. The U.S. District Court for the Eastern District of Washington granted Primo's motion for summary judgment as to Lodi's breach of contract claim and Lodi's fraudulent inducement claim.

Primo typically contracted with regional businesses to provide bottling and distribution. These regional businesses could enter into a contract with Primo as regional operators (RO). An RO was free to enter into agreements with other local businesses that would perform duties as "sub-distributors." The sub-distributor would contract with the RO, not directly with Primo.

In mid-2013, a former RO ended its relationship with Primo. As a result, Primo began negotiations with Lodi regarding a new distribution and bottling arrangement in August 2013. The parties gathered for a meeting and tour of Lodi's bottling facilities but later disputed the topic of discussion at the meeting. Lodi asserted that the goal of the meeting was to enter into an agreement with Primo directly as an RO. However, Primo argued that Lodi had agreed to work as a sub-distributor under the purview of another RO, H2Oregon. At the August 2013 meeting, James Connelly, on behalf of Lodi, signed a document entitled, "Primo Sub-Distributor Agreement." This document was also signed by Ross Rosette on behalf of "Primo RO–H2Oregon Water Company." Connelly argued that his understanding was that this document was temporary and that he was assured by Primo that a complete RO contract was forthcoming. In November 2013, Primo entered into an agreement with DS Services of America, under which DS Services of America would provide national bottling and distribution for Primo. Primo then terminated all RO contracts. Lodi was notified of the termination via a letter dated December 31, 2013.

In considering Lodi's claim under the WCPA, the court first noted that a claim under the WCPA is not predicated on a contractual relationship between the parties. However, Primo argued that Lodi was unable to establish two requirements of the WCPA: (1) the existence of an unfair or deceptive act, and (2) that the allegedly unfair or deceptive act had an impact on the public interest. The court disagreed, holding that evidence that Connelly was under the impression that Lodi would be engaged as an RO was sufficient to escape summary judgment. Connelly's impression was reinforced by the fact that, contrary to the original document he signed, which referenced Lodi as a "sub-distributor," Primo sent a letter to Lodi that referenced Lodi as an RO and explained incentives typically available only to an RO. The court further held that, although Lodi had not yet established that Primo's alleged behavior had an effect on the public interest, Primo had failed to establish its right to summary judgment on the WCPA claim. The court rejected Primo's argument that, relying on language from the Washington Supreme Court, any alleged breach was of a private, not public, nature. The court pointed out that the very case Primo relied on also stated that conduct under a private contract can affect the public interest when there is a threat of injury to other parties due to repetition of the alleged unfair or deceptive acts. Accordingly, the court denied Primo's motion for summary judgment with regard to the WCPA claim.

The court next granted summary judgment on Lodi's breach of contract claim and on Lodi's fraudulent inducement claim. Summary judgment was appropriate on the contract claim, according to the court, because the only signed agreement was between Lodi and "Primo Regional Operator H2Oregon Water Company," meaning that there was never actually any written contract between Primo and Lodi. The fraudulent inducement claim was subject to summary judgment because Lodi failed to plead the claim with sufficient particularity and failed to assert all of the nine elements of fraud. In particular, the court noted Lodi's failure to assert that the statement made to James Connelly by a Primo executive was false. Finally, the court denied Primo's motion for summary judgment with respect to the equitable theories of recovery asserted by Lodi.

***Mull v. Griswold Int'l, LLC*, Bus. Franchise Guide (CCH) ¶ 15,673, No. 15-cv-00737-WYD-KLM (D. Colo. Dec. 3, 2015)**

The U.S. District Court for the District of Colorado stayed claims of fraud and breach of contract brought by a home care franchisee in deference to the provision of the franchise agreement that required the parties to mediate disputes before initiating litigation. The plaintiff was a franchisee of Griswold

International, LLC (GHC), a company that provides in-home caregiving to senior citizens and disabled persons.

The franchisee alleged that GHC engaged in fraud by advising prospective franchisees that they could lawfully pay their employees as independent contractors, even though GHC knew that new Department of Labor regulations would mandate changes to the independent contractor model. Because the franchise agreement required that the parties first engage in mediation before litigation—and because the parties consented to a stay of the proceeding for that purpose—the court stayed the case pending mandatory pre-litigation mediation.

***S. Gas, Inc. v. Exxonmobil Oil Corp.*, Bus. Franchise Guide (CCH) ¶ 15,712, No. 09-CV-6236, 2016 WL 816748 (D.N.J. Feb. 29, 2016)**
This case is discussed under the topic heading "Antitrust."

CORPORATE VEIL PIERCING

***KBZ Commc'ns Inc. v. CBE Techs. LLC*, Bus. Franchise Guide (CCH) ¶ 15,671, No. 14-3526, 2015 U.S. App. LEXIS 21231 (3d Cir. Dec. 8, 2015)**
The Third Circuit declined to hold officers of a limited liability company liable for fraud and other misconduct they allegedly committed in the performance of a contract executed by the entity. KBZ Communications, Inc., a company that sells videoconference equipment and similar services, entered into a dealer agreement with CBE Technologies, LLC. Although CBE failed to pay for its purchases, KBZ continued to deliver goods based on CBE's assurances that it would pay. Once CBE's unpaid invoices totaled nearly $1 million, KBZ filed a breach of contract and unjust enrichment action against CBE as well as claims of fraud, negligent representation, and civil conspiracy against CBE and/or its individual officers, including CBE's CEO. The thrust of KBZ's claim was that CBE's CEO and other officers fraudulently induced KBZ to continue delivering goods by failing to disclose that CBE was not financially sound and was "winding down" certain operations.

The district court declined to "pierce the corporate veil" and impose personal liability upon CBE's leadership. The court applied the "gist of the action" doctrine and found that KBZ's claims, at their core, related to breach of contract and not tort. The parties reached a settlement, and the district court entered a judgment in favor of KBZ for the settlement amount. Subsequently, KBZ filed an appeal solely pertaining to its claims against CBE's officers. The appellate court affirmed the district court's finding and dismissed KBZ's claim. It reiterated that, under the gist of the action doctrine, any fraud that CBE's officers committed was in performance of CBE's contract with KBZ. Thus, CBE's officers could not be held liable as individuals.

DAMAGES

***Am. Dairy Queen Corp. v. Wardlow*, Bus. Franchise Guide (CCH) ¶15,711, No. 4:15-cv-04131, 2016 WL 880035 (D.S.D. Mar. 1, 2016)**
The U.S. District Court for the District of South Dakota held that a terminated franchisee should pay its franchisor, Dairy Queen, damages for breach of contract, violation of the Lanham Act, and attorney fees when the franchisee refused to cease operation of a franchised restaurant.

Dairy Queen sent its franchisee several default notices in response to its failure to submit sales reports and pay fees. After negotiation, the parties agreed to sign a mutual cancellation and release agreement that enabled the franchisee to avoid immediate termination if it sold its restaurant before a certain date. The franchisee again failed to submit the required sales reports and fees during the interim period while it sought a buyer, and Dairy Queen instructed the franchisee to immediately close the restaurant.

Dairy Queen obtained an injunction requiring the franchisee to close the unit and moved for default judgment. The court granted the default judgment in favor of Dairy Queen. To calculate damages, the court relied on Dairy Queen's evidence of the gross monthly sales reported by the franchisee during the corresponding months of the prior year, compared to the franchisee's orders for soft serve ice cream mix during the period of noncompliance. The court also awarded Dairy Queen an amount equal to the franchisee's unpaid royalties for violating the Lanham Act and treble damages for its apparent misconduct. Lastly, the court awarded Dairy Queen attorney fees.

***Domino's Pizza Franchising, LLC v. VTM Pizza, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,680, No. 15-13312, 2015 WL 9500791 (E.D. Mich. Dec. 31, 2015)**
This case is discussed under the topic heading "Attorney Fees."

***Lofgren v. AirTrona Canada*, Bus. Franchise Guide (CCH) ¶ 15,679, No. 2:13-cv-13622, 2016 WL 25977 (E.D. Mich. Jan. 4, 2016)**
This case is discussed under the topic heading "Definition of a Franchise."

***Ramada Worldwide Inc. v. ATN Inn & Suites, LLC*, Bus. Franchise Guide (CCH) ¶ 15,696, No. 15-3993, 2016 WL 270076 (D.N.J. Jan. 21, 2016)**
ATN Inn & Suites, LLC and Ramada Worldwide Inc. entered into a franchise agreement on March 4, 2011, under which ATN assumed the obligation to operate a Ramada brand hotel for fifteen years. Mahfuzur Raman personally guaranteed ATN's obligations under the franchise agreement. On June 29, 2011, ATN ceased operating the hotel, triggering a default and termination of the franchise agreement. On the promise of accomplishing certain obligations set forth in writing, Ramada entered into a second franchise agreement with ATN, which Raman once again personally guaranteed.

ATN failed to meet the obligations agreed to and Ramada terminated the second franchise agreement and filed suit for damages. ATN and Raman failed to appear in the suit and Ramada filed a motion for a default judgment.

Before a court can enter a default judgment, it must ensure that all prerequisites have been met, that is, the service of all defaulting parties was proper and that defaulting parties failed to answer within the allotted twenty-one day time period. The court found that, in this case, Ramada had met all prerequisites. The court next must determine: "(1) whether the party subject to the default has a meritorious defense, (2) the prejudice suffered by the party seeking default, and (3) the culpability of the party subject to default." Having clearly outlined six causes of action that resulted in a breach of contract claim against ATN, and without an answer in the case from the defendants, the court accepted the allegations in the complaint as true and found that Ramada successfully met the first factor. As the defendants were properly served but failed to appear, the court also weighed the second and third factors in Ramada's favor and granted the motion for default judgment.

With respect to damages, Ramada sought money damages for amounts past due, plus interest as stated in the franchise agreement, as well as liquidated damages for a period of two years, which was meant to replace the income Ramada would have received if not for ATN's premature termination of the franchise agreement. The court granted a total judgment of $405,095.

DEFINITION OF FRANCHISE

Lofgren v. AirTrona Canada, Bus. Franchise Guide (CCH) ¶ 15,679, No. 2:13-cv-13622, 2016 WL 25977 (E.D. Mich. Jan. 4, 2016)

Brian Lofgren purchased equipment in 2009 from non-party AirTrona Green Technologies (AGT) to operate a vehicle deodorizing business. Two years later, Lofgren purchased upgraded equipment from defendant AirTrona Canada (ATC) to expand his business by providing vehicle sanitation services. Both transactions were facilitated by defendant Sam Barberio, who was significantly involved in both AirTrona companies. Lofgren's business lost money every year and he unsuccessfully tried to sell his business and equipment back to ATC. Lofgren then filed suit against ATC and Barberio in the U.S. District Court for the Eastern District of Michigan alleging violations of the Michigan Franchise Investment Law (MFIL), common law fraud, and breach of contract. Lofgren asked the court for rescission, that is, to unwind his transactions and return him to his financial situation prior to 2009.

Under the MFIL, to qualify as a franchise, Lofgren had to prove that he had been (1) granted the right to engage in the business of offering goods and services substantially associated with the franchisor's trademark; (2) granted the right to offer goods or services under a marketing plan or system prescribed in substantial part by a franchisor; and (3) required to pay a franchise fee. As an initial matter, the district court concluded it would be unfair to hold either defendant liable for alleged violations of the MFIL based on the 2009 transaction. The court reasoned that ATC did not exist at this time and there was no evidence that ATC assumed AGT's liabilities or was its successor in interest. Turning to Lofgren's 2011 purchase of upgraded equipment, Barberio argued there was no "franchise" under the MFIL because Lofgren had not been granted the right to use the AirTrona trademark and marketing plan (since he had previously been granted that right) and because Lofgren was not required to pay ATC anything (including a franchise fee).

The court rejected Barberio's arguments. First, the court found the 2011 transaction to constitute a franchise under the MFIL because the statute was intended to cover situations where a new agreement substituted, modified, or amended a prior right to use a mark or operate under the franchisor's marketing plan. Specifically, ATC wrapped Lofgren's van in AirTrona's marks as part of the 2011 transaction, which the court characterized as ATC granting Lofgren the right to use those marks, and the 2011 transaction was memorialized by an invoice with a line-item for "1 Franchise Michigan Location." Second, the court held ATC granted Lofgren the right to offer goods or services under ATC's marketing plan or system. ATC provided Lofgren technical training necessary to run the upgraded sanitization business, asked Lofgren for his list of customers so it could send them promotional materials, and dictated and monitored Lofgren's business. Further, Barberio promised Lofgren three dealership customers and training and sales techniques to induce him to enter into the 2011 transaction. Third, the court held Lofgren paid a franchise fee "under the Michigan Administrative Code because Lofgren paid ATC more than the bona fide wholesale price for the 2011 upgraded equipment. Even if Lofgren was not required to purchase the upgraded equipment, as argued by Barberio, the court recognized Lofgren was required to pay ATC once he decided on the upgrade.

Having found Lofgren's 2011 purchase constituted a franchise under the MFIL, the court next examined ATC's failure to file an annual notice with the Michigan Department of Attorney General prior to offering for sale or selling a franchise. While the evidence indicated that no such notice was filed, neither defendant was liable for this violation because the MFIL limits liability for a Section 7(a) violation to damages caused by noncompliance and Lofgren had not been damaged by this failure. Similarly, the court declined to hold either defendant liable for making material false statements in a notice or report filed with the Michigan Department of Attorney General because there is no civil cause of action for every violation of the MFIL, including Section 23, which did not apply to the failure to provide notices or reports to the franchisee.

The court did find, however, that ATC did violate the MFIL by failing to provide a franchise disclosure document (FDD) at least ten business days before the execution of any binding franchise or other agreement. The parties did not dispute that Lofgren never received an FDD, but Barberio argued that the MFIL excused the failure because it provided an exception to the disclosure requirement for extensions, renewals, or substitutions of a franchise agreement where there is no material change in the franchise relationship. According to the court, the exception did not apply here because the 2011 agreement did result in a material change to the franchise relationship. In contrast to the 2009 transaction, the 2011 franchise agreement was with a different company, ATC as opposed to AGT, and Lofgren's business expanded into a new line of business, sanitization as opposed to just deodorizing.

The court then turned to whether Barberio should be held jointly and severally liable with ATC under the MFIL. Barberio argued that he was not a "responsible party" as defined by the MFIL and that he fell within the Section's safe harbor. The court rejected both assertions finding that he was a responsible party because he was an employee of ATC who materially aided in the act or transaction constituting the violation, citing Barberio's title of CEO/COO, his deeply rooted involvement with the business, and his role in acting on behalf of ATC in negotiations. Finally, the court held the safe harbor provision did not apply to Barberio because Barberio testified he knew that franchisees were entitled to disclosures and that he knew Lofgren had received none.

As to the remedy elected by Lofgren, Barberio tried to argue that rescission was inappropriate, but the court was not persuaded and concluded rescission was not only proper but statutorily permitted. As for the amount of the remedy, the court reduced Lofgren's calculation of damages by the amount benefited for retained equipment and awarded the remaining amount, granted 12 percent interest per year from the date of purchase for reasonable attorney fees and court costs, which amounted, in total, to nearly $83,000, for which Barberio and ATC were held jointly and severally liable.

EARNINGS CLAIMS

Moxie Venture L.L.C. v. The UPS Store, Inc., Bus. Franchise Guide (CCH) ¶ 15,685, No. 15-3704 (RHK/JJK), 2016 WL 128136 (D. Minn. Jan. 12, 2016)

This case is discussed under the topic heading "Choice of Forum."

ETHICS

Younes v. 7-Eleven, Inc., Bus. Franchise Guide (CCH) ¶ 15,678, No. 13-3500, 312 F.R.D. 692 (D.N.J. Dec. 11, 2015)

The U.S. District Court for the District of New Jersey found that sanctions were warranted against the franchisor, 7-Eleven, Inc., because of its flagrant discovery transgressions. The franchisees filed suit against 7-Eleven for breach of franchise agreements and alleged that they were targeted for franchise termination under a project called Project P or Project Philly, that 7-Eleven wanted to "churn" franchisees to collect more fees from new franchisees, and that 7-Eleven targeted franchisees that voiced criticism and because of their national origin. Due to repeated discovery transgressions, the franchisees filed a motion for sanctions and moved to strike 7-Eleven's answer.

The court determined that sanctions were appropriate under Federal Rules of Civil Procedure 26(g)(3) and 37(b) because 7-Eleven failed to perform an objectively reasonable investigation to answer certain interrogatories, which resulted in incomplete and incorrect answers. 7-Eleven's conduct was not substantially justified because: (1) it signed interrogatory answers containing meritless and frivolous objections; (2) it knew or should have known when it signed its answers that certain information was responsive and should have been identified; (3) it did not timely supplement its responses to the interrogatories; (4) the information at issue was always readily available; (5) the substantive information 7-Eleven disclosed was misleading; and (6) 7-Eleven took eight months to finally identify responsive information. Thus, the court found 7-Eleven's discovery responses were substantially deficient and warranted sanctions.

The court reasoned that, although substantially deficient, it was not equitable to strike 7-Eleven's answer because the court could impose less drastic sanctions. The court ordered 7-Eleven to reimburse the franchisees for the fees and costs they incurred to obtain the discovery to which they were entitled. The court found that 7-Eleven's conduct was not so flagrant as to warrant default because franchisees received most of discovery to which they were entitled.

FRAUD

Connelly Co. v. Primo Water Corp., Bus. Franchise Guide (CCH) ¶ 15,700, No. 2:14-CV-00340-JLQ, 2016 WL 225663 (E.D. Wash. Jan. 19, 2016)

This case is discussed under the topic heading "Contract Issues."

Family Wireless #1, LLC v. Auto. Techs., Inc., Bus. Franchise Guide (CCH) ¶ 15,706, No. 15-CV-1310, 2016 WL 183475 (D. Conn. Jan. 12, 2016)

The plaintiffs, Family Wireless #1 LLC and thirty-eight other franchisees, brought suit against Automotive Technologies, Inc. (ATI), their mutual franchisor, claiming breach of contract; breach of the implied covenant of good faith and fair dealing; fraudulent, negligent, and innocent misrepresentation; violations of the franchise and consumer protection laws of eight different states; and unjust enrichment. ATI was, in turn, a licensee of Verizon Wireless.

All claims against ATI grew out of a franchising arrangement in which the plaintiff franchisees operated a franchise of ATI called "Wireless Zone." Wireless Zone stores were permitted to offer and sell Verizon products. Under the franchise agreement between ATI and the plaintiff franchisees, the franchisees would forward customer payments received for the sale of Verizon products to Verizon. Verizon would, in turn, pay ATI "commissions," which ATI would pass on to the franchisee that made the sale, less the amount the franchisee owed to ATI. The amount owed to ATI was outlined in the franchise agreement and amounted to a percent of the commissions paid by Verizon as well as a percent of other sales not related to Verizon products.

Until April 2014, Verizon products were sold under a "Contract Model" in which the franchisee sellers incentivized the sale of a Verizon service plan by providing a discounted mobile device. The sale of the device typically came at a loss to the franchisee, but the franchisee received a larger commission from Verizon, over and above the commission provided to the seller for having sold the service plan to the customer. The program was designed to allow the franchisees to recoup some of their costs.

However, in April 2014, Verizon replaced the Contract Model with the Edge Program in its relationship with ATI. Under the Edge Program, a customer purchased a mobile device at full price and entered into a month-to-month service plan with Verizon. Because of the high cost of many devices, customers often entered into an installment plan to pay off the cost on a monthly basis after paying a down payment amount to the franchisee. The customer paid the monthly installment and the cost of the service plan on the same bill each month. When the customer engaged in an installment plan, the unpaid amount was immediately assigned to Verizon. Under this arrangement, Verizon paid the franchisee for the cost of the device, less the amount of any down payment initially paid by the customer to the franchisee. That payment, known as the "installment offset," made the franchisee whole for the sale of the device. The franchisee also still received a commission payment from Verizon for the sale of the service contract.

From April 2014 until January 2015, the Edge Program operated like the Contract Model with ATI collecting a 10 percent royalty on the commissions received under the Edge Program. ATI did not, however, withhold any royalty on the installment offset. However, on January 1, 2015, ATI began withholding 10 percent of the installment offset as a royalty. The plaintiff franchisees filed suit on March 30, 2015. The complaint included a claim that ATI was unjustly enriched because it was withholding "spiffs," which were payments from Verizon to the franchisee when the franchisee sold certain products or reached certain performance indicators. Prior to 2012, these spiffs were paid to the franchisees, less a 10 percent royalty, without incident. However, in December 2012, after ATI was sold to Glentel USA, Inc., the pass through of any spiffs to franchisees stopped.

In dealing with the many assignments of error, the court first granted ATI's motion to dismiss with respect to several counts that the plaintiff franchisees did not oppose. Next, the court noted that the plaintiff franchisees' remaining misrepresentation claims applied only to the eleven plaintiffs that actually executed franchise agreements in 2014 and granted ATI's motion to dismiss those misrepresentation claims carried by the other plaintiffs. The court further dismissed the plaintiffs' claims under the Maryland Franchise Investment Law because they failed to allege that any franchised business operated in Maryland; that any offer to sell was made in Maryland; or that any offer to buy was accepted in Maryland, one of which is required to state a claim under the MFIL.

Moving to the claims not dismissed out of hand, the court first focused on the pleading standards applicable to claims sounding in fraud, such as fraudulent misrepresentation and violation of the New York Franchise Act. In dismissing both of these counts without prejudice to replead, the court focused on the plaintiffs' failure to comply with the requirements of Federal Rule of Civil Procedure 9(b), which contains pleading requirements specific to claims sounding in fraud. The court found that the plaintiffs' pleading claiming fraudulent misrepresentation was inadequate because they failed to point to the specific Franchise Disclosure Document (FDD) that contained the misrepresentation or the omission of a material fact. The court noted that it was true that each plaintiff shared the same general grievance, but that each plaintiff signed individual contracts at different times and may have relied on different FDDs. Additionally, the court decided that a claim under Section 687 of the New York Franchise Act was also subject to requirements of Rule 9(b) because it prohibits fraudulent conduct. As a result, the plaintiffs' Section 687 claim was also dismissed without prejudice for a failure to identify the specific contract and the specific FDD relied upon by each individual plaintiff. However, the court denied ATI's motion to dismiss with regard to the plaintiffs' claim under the Connecticut Unfair Trade Practices Act because fraud is not a necessary element.

In assessing the remaining claims against ATI, the court first considered which substantive law to apply. The court held that, because the court was sitting in diversity jurisdiction in Connecticut, the laws of Connecticut as the forum state, including its choice of law rules, governed the case. In Connecticut, choice of law is governed by lex loci, which required the court to apply the law of the state in which the injury occurred. According to the court, the injury to each plaintiff took place in each of the plaintiffs' states and therefore the court would consider the remaining claims under the laws of each of the individual eleven plaintiffs. The court then proceeded to discuss the economic loss and related doctrines in each relevant state, granting ATI's motion to dismiss with regard to the claims of negligent or innocent misrepresentations alleged by the Pennsylvania and Michigan plaintiffs, but denying ATI's motion for those plaintiffs from New York, Ohio, and Virginia.

Finally, the court addressed the claim, levied by all forty-three plaintiffs, of unjust enrichment with regard to the payment, or nonpayment, of "spiffs." The court rejected ATI's contention that a claim of unjust enrichment can be alleged only in the alternative in cases in which the enforceability of the contract is in dispute. Instead, the court denied ATI's motion to dismiss the claims of unjust enrichment and followed at least fourteen other jurisdictions in allowing the plaintiffs to pursue an unjust enrichment claim and a contract claim when the parties dispute whether the contract covered the subject matter of the unjust enrichment claim.

***Fantastic Sams Salons Corp. v. PSTEVO, LLC,* Bus. Franchise Guide (CCH) ¶ 15,702, No. 15 C 3008, 2016 U.S. LEXIS 5590 (N.D. Ill. Jan. 15, 2016)**

Fantastic Sams Salons and the defendants, PSTEVO, LLC and Jeremy Baker (collectively, PSTEVO) entered into a franchise agreement granting PSTEVO a right to operate a Fantastic Sams salon. Fantastic Sams filed suit against PSTEVO, seeking declaratory relief with regard to various terms of the franchise agreement. PSTEVO answered Fantastic Sams' complaint and asserted several counterclaims, one of which was for fraudulent misrepresentation. Fantastic Sams moved to dismiss the fraudulent misrepresentation counterclaim under Federal Rule of Civil Procedure 12(b)(6).

The franchise agreement contained two relevant provisions that disclaimed that any representations regarding income or projected profitability, among other things, had been made in the sales process. Each disclaimer provided several lines for a written response by the franchisee. After each disclaimer, Baker wrote the word "none" and initialed his response. Fantastic Sams argued that PSTEVO was precluded from claiming it relied on Fantastic Sams or its agents' representations regarding projected profitability because reliance is a necessary element of such a claim and PSTEVO's writing of the word "none" barred the claim. With respect to the first disclaimer, PSTEVO contended that the disclaimers did not apply to bar misrepresentation claims because it did not allege that the misrepresentations contradicted the disclosure documents. Rather, PSTEVO asserted that the disclosure documents contained the same alleged misrepresentations as those made by Fantastic Sams' agents and on its websites. The court agreed with this contention.

With respect to the second disclaimer, however, the court rejected PSTEVO's argument that it did not preclude the claim because the claim was premised on alleged misrepresentations about minimum viability rather than guaranteed income. However, the court noted that this argument directly contradicted the allegations found in PSTEVO's counterclaim. PSTEVO's fraud counterclaim was premised on the assertion that Fantastic Sams misrepresented projected profit levels. The second disclaimer expressly disclaimed that any such representations regarding projected sales, income, or profit levels were made. Accordingly, the court dismissed the fraudulent misrepresentation counterclaim.

***KBZ Commc'ns Inc. v. CBE Techs. LLC*, Bus. Franchise Guide (CCH) ¶ 15,671, No. 14-3526, 2015 U.S. App. LEXIS 21231 (3d Cir. Dec. 8, 2015)**
This case is discussed under the topic heading "Corporate Veil Piercing."

***Mull v. Griswold Int'l, LLC*, Bus. Franchise Guide (CCH) ¶ 15,673, No. 15-cv-00737-WYD-KLM (D. Colo. Dec. 3, 2015)**
This case is discussed under the topic heading "Contract Issues."

***S. Gas, Inc. v. Exxonmobil Oil Corp.*, Bus. Franchise Guide (CCH) ¶ 15,712, No. 09-CV-6236, 2016 WL 816748 (D.N.J. Feb. 29, 2016)**
This case is discussed under the topic heading "Antitrust."

INJUNCTIVE RELIEF

7-*Eleven, Inc. v. Sodhi*, Bus. Franchise Guide (CCH) ¶ 15,697, No. 13-3715, 2016 WL 541135 (D.N.J. Feb. 9, 2016)
The U.S. District Court for the District of New Jersey denied a franchisor's motion for a preliminary injunction against a franchisee.

Defendant Karamjeet Sodhi was a franchisee of six 7-Eleven convenience stores. The franchisor and plaintiff, 7-Eleven, Inc., terminated the franchise agreements for five of Sodhi's stores for failure to maintain the minimum net worth required under the terms of the agreements. When Sodhi continued to operate the convenience stores under the 7-Eleven trademarks, 7-Eleven brought suit against Sodhi and his employees, Manjinder Singh and Karamjit Sing, requesting a preliminary injunction enjoining the defendants from occupying and operating the five terminated stores.

The court recited the factors a plaintiff seeking a preliminary injunction must establish, including: (1) is the plaintiff is likely to succeed on the merits?, (2) is the plaintiff is likely to suffer irreparable harm in the absence of relief being granted?, (3) does the balance of equities tip in plaintiff's favor?, and (4) is an injunction in the public interest? The court stated in particular, however, that an injunction cannot be issued absent a showing of both a likelihood of success on the merits and a likelihood of irreparable harm.

The court found that 7-Eleven sufficiently showed that it was likely to succeed on the merits of its claim that the defendant breached the franchise agreements because 7-Eleven had submitted detailed financial information in support of its allegations. Because 7-Eleven was also relying on its claim for trademark infringement in seeking the preliminary injunction, the court looked to whether 7-Eleven was likely to succeed on its trademark infringement claim. The court found that a likelihood to succeed on the merits was established because 7-Eleven claimed ownership in an incontestable mark, the license granted to the defendants was terminated with the termination of the franchise agreements, and the defendants' continued use of the mark would create confusion as to the source of products sold.

The court, however, did not find that 7-Eleven had satisfied its burden to show irreparable harm. The court looked to two types of harm: (1) harm to reputation and (2) harm from unauthorized use of real property. The only evidence as to harm to reputation before the court were customer complaints regarding the poor condition of one of the five convenience stores, which the court stated it could not use as a basis for granting an injunction for all of the stores. There was no evidence before the court, however, with respect to harm to personal property, and why any such harm could not be remedied by money damages. Because 7-Eleven had not met one of the two required elements for the granting of a preliminary injunction, the court denied 7-Eleven's motion.

***Bruster's L.P. v. Golden Deer Corp.*, Bus. Franchise Guide (CCH) ¶ 15,704, No. 1927 WDA 2014, 2016 WL 128599 (Pa. Super. Ct. Jan. 12, 2016)**

The Pennsylvania Superior Court reversed the entry of a preliminary injunction barring a former franchisee and its president from permitting the operation of an ice cream shop that competed with the franchisor's ice cream shop at the location of the former franchisee's shop.

Plaintiff Bruster's instituted a breach of contract action against the defendants Golden Deer and JCG Cherries LLC. In 2001, Golden Deer's president, Ashwin Manjee, individually became a Bruster's franchisee for a ten-year term. Pursuant to the franchise agreement, Manjee opened a Bruster's franchise in a building located at 2970 Stonecrest Pass in Lithonia, Georgia. After the franchise agreement expired, Golden Deer and Bruster's renewed the franchise agreement. The renewed franchise agreement contained a three-year post-term covenant not to compete.

Golden Deer later decided to stop operating the ice cream shop. In February 2013, Bruster's approached Cherries to operate the location previously operated by Golden Deer. Bruster's entered into a franchise agreement with Cherries. Golden Deer and Bruster's mutually terminated the franchise agreement and Golden Deer transferred operations of the ice cream store at the Lithonia location. Cherries operated the Bruster's franchise until July 2014 when it received a notice that the franchise agreement was terminated for default of financial obligations. Cherries closed its Bruster's store, but reopened another ice cream parlor called Cherries at the same location a few weeks later.

Bruster's filed suit, claiming that Golden Deer violated the terms of the covenant not to compete contained in its franchise agreement with Bruster's.

Bruster's made these representations even though Golden Deer did not own the location where Cherries was operating and despite the fact that it admitted in its complaint that Golden Deer transferred its operations at the ice cream shop at 2970 Stonecrest Pass to Cherries. Bruster's alleged that Golden Deer was in violation of the noncompete because it was leasing the property at 2970 Stonecrest Pass to Cherries. At a hearing, Golden Deer submitted evidence that the record owner of the property at 2970 Stonecrest Pass was Redwood Company LLC, which was never joined as a party in the lawsuit. Although the court noted that Manjee was the registered agent for Redwood in Georgia, Bruster's submitted no proof that either Golden Deer or Manjee actually owned 2970 Stonecrest Pass, where Cherries continued to operate. After the hearing, the trial court issued a preliminary injunction against both Cherries and Golden Deer. It enjoined Cherries from operating an ice cream shop at 2970 Stonecrest Pass. The court also enjoined Golden Deer from directly or indirectly renting, leasing, subletting, assigning or otherwise transferring possession of the building located at 2970 Stonecrest Pass to Cherries or any other entity for purposes of operating an ice cream or yogurt shop. The court further ordered Golden Deer to have Redwood terminate its lease with Cherries within one week from the entry of the order.

Golden Deer appealed, claiming, among other things, that the trial court erred in granting injunctive relief for Bruster's by seeking to compel Golden Deer to compel non-parties (i.e., Redwood) to take actions in furtherance of preventing harm to Bruster's. The Pennsylvania Superior Court reversed. The court held that Bruster's failed to establish its right to the relief granted against Golden Deer and that the trial court had no reasonable grounds for enjoining Golden Deer. The court found that Golden Deer was not operating a franchise in violation of the noncompetition clause in its agreement—only Cherries had done so. The court further noted that, as the trial court and Bruster's both acknowledged, Golden Deer did not own 2970 Stonecrest Pass. The court held that it could not "fathom how either the trial court or Bruster's can believe that a party that does not own or occupy a piece of real estate can be enjoined from conducting activities on it." Accordingly, the court reversed the entry of an injunction against Golden Deer.

***Daekyo Am., Inc. v. Gunsberger*, Bus. Franchise Guide (CCH) ¶ 15,676, No. 505946/15 (Cal. Super. Ct. Dec. 15, 2015)**

Daekyo America, Inc., a franchisor of children's learning centers under the name "Eye Learning Centers," entered into a franchise agreement with Joshua Gunsberger for the operation of a center in Greenpoint, Brooklyn. This franchise agreement was terminated on September 18, 2014. Daekyo also contended it had a franchise relationship with Gunsberger for a second location in Williamsburg, Brooklyn, and that this second location was closed in February 2015 and reopened as a competing brand, a JEI Learning Center.

Daekyo began a suit against Gunsberger for breach of contract and to enforce the post-termination covenants under the Greenpoint franchise agreement, including the post-term covenant not to compete, which included a two-year time limitation and a restrictive geographic area of twenty-five miles from the Greenpoint location. The Williamsburg location was less than five miles away. Daekyo's suit also asserted causes of action against JEI Self-Learning Systems, Inc. for tortious interference with its contractual relationship with Gunsberger and theft of trade secret and unfair competition claims against both defendants. Daekyo moved for a preliminary injunction.

To prevail, Daekyo had to show that: (1) there was a likelihood that it would succeed on the merits; (2) it would suffer irreparable injury if the injunction was not granted; and (3) that the balancing of equities was in its favor. The court, however, found significant contradictory information in the evidence shown by the parties. In particular, it appeared that an Eye Learning Center franchise had never been operated from the Williamsburg location; that the FasTracKids franchise, which had been operated at that location by Gunsberger, had been transferred to David Green in 2015; and that Green was the one who had the contractual relationship with JEI. In addition, although the post-term noncompete provision in the Greenpoint franchise agreement prohibited Gunsberger from directly or indirectly being involved in a competing business, Gunsberger's affidavit stated that he had not "operated nor had any involvement in the operation of a competing franchise, such as JEI Learning Center" since September 2014. Directly in contradiction to the affidavit, however, were affidavits submitted by Daekyo, one of which was offered by Jin Yang, who posed as a parent and met with Gunsberger at the JEI Learning Center in Williamsburg. Given the many facts in dispute, the court determined that Daekyo could not show a likelihood that it would succeed on the merits and the preliminary injunction was not granted as to the noncompete. However, the court did order that the other post-termination obligations be observed, including the removal of signage and return of manuals and confidential information.

Exec. Home Care Franchising LLC v. Marshall Health Corp., Bus. Franchise Guide (CCH) ¶ 15,715, No. 15-1887, 2016 WL 703801 (3d Cir. Feb. 23, 2016)

Executive Home Care Franchising LLC is a franchisor of a home health care franchise. When the defendants prematurely abandoned the operation of the franchise, Executive brought suit in the U.S. District Court for the District of New Jersey for declaratory judgment of the termination of the franchise agreement and injunctive relief, breach of contract, unfair competition, violation of the Lanham Act, and trade dress infringement. The defendants filed their own counterclaims. Executive's motion for preliminary injunction sought to enjoin the defendants from continuing to operate a competing business in breach of their post-term noncompetition obligations as set forth in the franchise agreement, from breaching their confidentiality and non-solicitation obligations, and from failing to return certain proprietary information. The trial court, however, found that Executive failed to show irreparable harm, the second of the four elements a movant seeking a preliminary injunction must show. Executive appealed.

In order to obtain a preliminary injunction, a party must establish: "(1) a likelihood of success on the merits; (2) that he or she will suffer irreparable harm if the injunction is denied; (3) that granting relief will not result in even greater harm to the nonmoving party; and (4) the public interest favors such relief." As to the second prong, the Third Circuit noted that the defendants had returned thirteen boxes of documents, manuals, marketing materials, and other items to Executive; that they were no longer operating under Executive's marks; that the franchise's telephone number had been transferred to Executive; that they had informed their clients that they were no longer affiliated with Executive although they continued to operate a similar business; and, finally, of particular note to the court, that they were not operating from the same premises the franchise had operated from. Accordingly, the Third Circuit found that there was no showing of irreparable injury and affirmed the trial court's decision to deny Executive's motion for preliminary injunction.

***Intelligent Office Sys., LLC v. Virtualink Canada, LTD.*, Bus. Franchise Guide (CCH) ¶ 15,716, No. 15-CV-02724, 2016 WL 687348 (D. Colo. Feb. 18, 2016)**

The U.S. District Court for the District of Colorado denied a motion for preliminary injunction sought by the franchisor, Intelligent Office System, LLC (IO), in a breach of contract and trademark infringement suit following termination of its franchisee, Virtualink Canada, LTD.

In 2006, IO and Virtualink entered into a twenty-year master license agreement (MLA) that granted Virtualink the exclusive right to use IO's trademarks and its licensed office sharing methods in connection with the licensing of subfranchisees throughout Canada. In 2013, IO sent Virtualink notices of default under the MLA, including failure to meet and maintain the sales and opening goals and to provide reports and tax returns. During the subsequent two years, Virtualink continued committing defaults under the MLA. This resulted in IO terminating Virtualink in October 2015. In December 2015, IO filed suit against Virtualink and sought a preliminary injunction.

Holding that IO failed to establish the elements required for a preliminary injunction, the court denied IO's request. As a preliminary matter, the court noted that the purpose of a preliminary injunction is to maintain status quo of the parties until a trial can be held. To the extent that a preliminary injunction would change the parties' positions, it would be disfavored and subjected to heightened scrutiny. The court found that forcing Virtualink to stop its business would alter the parties' status quo and thus IO was subject to a "heightened burden" and "closer scrutiny," including making a "strong showing" as to the balance of the harms. Further, the court found that IO failed to establish irreparable harm because it had knowingly allowed Virtualink's defaults to persist for almost three years. The court focused on this delay and found that it undercut any presumption that IO was facing an imminent threat of irreparable harm. Moreover, the court found that IO failed to make the heightened "strong showing" that the threatened injury that might ensue in the absence of an injunction outweighed the injury to Virtualink, particularly because, under the status quo, IO received royalty payments from Virtualink.

***Red Robin Int'l, Inc. v. Lehigh Valley Rest. Group, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,714, No. 15-cv-02602, 2016 WL 705988 (D. Colo. Feb. 23, 2016)**

Leigh Valley Restaurant Group, Inc. (LVRG) owned and operated, along with twenty other locations, a Red Robin restaurant in Easton, Pennsylvania. The twenty-year term of its franchise agreement with Red Robin International, Inc. for the Easton restaurant expired on November 26, 2015, and LVRG intended to renew its franchise rights. According to LVRG, it provided Red Robin with notice of its intent on March 4, 2015, and had met all of its renewal requirements. According to Red Robin, LVRG has not met its renewal requirements and was not entitled to a renewal term for the restaurant. Red Robin filed an action alleging trademark infringement, trade dress infringement, and unfair competition and seeking a preliminary injunction requiring that LVRG sell the restaurant to Red Robin.

As a threshold matter, the court concluded that the injunctive relief sought was mandatory rather than prohibitory in nature because the relief would require that LVRG take particular affirmative action that would alter its long-standing operation of the restaurant and would disrupt the status quo. Thus, the court held that Red Robin was required to meet a heightened burden in showing the four primary factors required to secure injunctive relief.

In considering Red Robin's motion, the court first determined that there were too many questions of law and fact to show that Red Robin had a substantial likelihood of success on the merits, given that LVRG claimed it had met the requirements for renewal and Red Robin claimed that it had not. Moving to the second factor, the court stated that Red Robin could be sufficiently compensated through monetary relief and that the continued operation of a restaurant that has been in business for twenty years was not likely to cause irreparable injury. The court next found that that the balance of harms favored LVRG and not Red Robin because forcing a sale of the restaurant at the preliminary injunction stage and depriving LVRG of its possible right to continue operations through a renewal term was damage to LVRG that outweighed the threatened injury to Red Robin. The final and fourth factor, that the injunction, if issued, would not be adverse to the public interest, was not addressed by the court because it determined that the analysis was not necessary considering Red Robin's failure on the first three factors.

JURISDICTION

***A Corp. v. All Am. Plumbing, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,693, No. 15-1509, 2016 WL 325102 (1st Cir. Jan. 27, 2016)**

On August 28, 2014, A Corp., a franchisor doing business as Rooter Man under associated trademarks, filed a trademark infringement action against the defendant All American Plumbing, an Arizona company, in the U.S. District Court for the District of Massachusetts, where A Corp. is located. A Corp. claimed that All American's use of trademarks confusingly similar to Rooter Man trademarks was causing consumer confusion in the Arizona market for A Corp.'s franchisees and, as a result, interfering in its franchise agreements with its Arizona franchisees. All American moved to dismiss the suit for lack of personal jurisdiction and the district court granted the motion. A Corp. filed an appeal, and the First Circuit reviewed the district court's decision de novo.

Because the Massachusetts long-arm statute is "coextensive with the outer limits of the Constitution," the court looked to the Due Process Clause of the Fourteenth Amendment to determine whether the court had personal jurisdiction in this case. For specific personal jurisdiction, "the constitutional analysis has three distinct prongs: relatedness, purposeful availment, and reasonableness." To satisfy the "relatedness" prong, A Corp. had to show a nexus between its claim and All American Plumbing's activities in Massachusetts; however, A Corp. was only able to show the use of a potentially confusing similar mark used on a website available in Massachusetts as well as throughout the world. The court found that the injury claimed occurred in Arizona, where All American's business activities and those of A Corp.'s own franchisees were located. The court decided "this type of indirect effect of out-of-state injury caused by out-of-state conduct is insufficient to fulfill the relatedness prong."

Next, the court turned to the purposeful availment prong and sought to determine if All American's conduct connected it to a Massachusetts forum in any meaningful way. Once again, the existence of a website was the only connection offered as evidence by A Corp. The existence of the website was insufficient "contact" to show purposeful availment because the website acted as a type of static billboard and was not interactive, was not directed to residents of Massachusetts, and did not solicit services in the State of Massachusetts. More clearly stated, the court held that "the mere availability of a passive website, even one containing an allegedly infringed trademark owned by a forum company, cannot, standing alone, subject a defendant to personal jurisdiction in the forum." Having found that the first two prongs in the due process analysis were not satisfied, the court did not address the third prong, instead affirming the district court's decision to dismiss the case for lack of personal jurisdiction.

***Appliance Alliance, LLC v. Sears Home Appliance Showrooms, LLC*, Bus. Franchise Guide (CCH) ¶ 15,668, No. 3:15-cv-01707-M, 2015 U.S. Dist. LEXIS 170943 (N.D. Tex. Dec. 23, 2015)**

The U.S. District Court for the Northern District of Texas transferred a case filed by Appliance Alliance, LLC against Sears Home Appliance Showrooms, LLC to the Northern District of Illinois, deferring to the forum selection clause in the parties' franchise agreements and other contracts. Appliance Alliance brought a lawsuit against Sears in a Texas state court for breach of the parties' franchise agreements and other claims arising out of their relationship. Sears sought removal to federal court on the basis of diversity jurisdiction, which requires that "all persons on one side of a controversy must be citizens of different states than all persons on the other side."

In the initial filings, all plaintiffs attested to being citizens of Texas, but only one defendant, Sears' district sales manager, was alleged to be a citizen of Texas. Sears subsequently discovered that the district sales manager, a non-lawyer, had been confused about the citizenship inquiry and actually had substantial permanent ties to Florida, including ownership of real property, membership in a church, and voter registration. Thus, Sears sought leave to file an amended answer to reflect that all the defendants were diverse from all the plaintiffs. Finding that the district manager was a citizen of Florida and that the defendants had simply made an honest mistake, the court granted the defendants leave to amend their filing. Based on that filing, the court concluded that the sales manager was a citizen of Florida and that it could therefore exercise diversity jurisdiction.

In response, Appliance Alliance filed a motion to add two additional defendants, who were both citizens of Texas. The court denied Appliance Alliance's motion, finding that it appeared to be naming the additional defendants for the purpose of destroying diversity jurisdiction and observing that Appliance Alliance had been "somewhat dilatory" in waiting almost two months after filing the lawsuit to add the new defendants. After concluding that federal diversity jurisdiction was proper, the court transferred the case to the Northern District of Illinois in compliance with the forum selection clause in the parties' agreements.

***AVP Metro Petroleum LLC v. Morad Sepahvand*, Bus. Franchise Guide (CCH) ¶ 15,690, No. 14-cv-0616, 2016 WL 538475 (N.D. Okla. Feb. 9, 2016)**

This case is discussed under the topic heading "Petroleum Marketing Practices Act."

***Combat Med. Sys., LLC v. Athena GTX, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,672, No. 1:15CV258, 2015 WL 8179525 (M.D.N.C. Dec. 7, 2015)**

The U.S. District Court for the Middle District of North Carolina declined to exercise personal jurisdiction over a distributor, but agreed to permit discovery regarding whether the court could exercise general jurisdiction based on the limited evidence in the record regarding the distributor's other business dealings.

Combat Medical Systems, LLC (CMS) entered into a distribution agreement with Athena GTX, Inc. that made Athena the exclusive world-wide distributor of wireless vital signs monitoring units. The parties subsequently entered into an addendum to their agreement that stated, in part, that CMS could require Athena to buy back inventory. CMS filed an action in North Carolina against Athena alleging that, in breach of the addendum, Athena did not fully pay for inventory that it acquired under the buy-back provision. Athena moved to dismiss, contending that the North Carolina court lacked jurisdiction. In the alternative, Athena urged that the case be transferred to the Southern District of California. In response, CMS argued that the court should permit discovery before dismissing the case to explore whether the court may have personal or general jurisdiction over Athena.

The court found insufficient evidence that Athena had maintained such continuous and systematic contacts with North Carolina to warrant an exercise of personal jurisdiction. The court observed that Athena neither maintained offices nor owned property in North Carolina, that Athena made only one in-person contact with CMS's staff in North Carolina to provide training after the agreement was signed, and that CMS's then-CEO flew to Athena's office in Texas for negotiations. Further, the parties designated that California law govern the agreements. While the court gave some weight to the fact that invoices were sent to and from North Carolina and noted that the size and duration of the contract also suggested some contacts to North Carolina, the court ultimately declined to exercise personal jurisdiction.

The court did, however, grant CMS's discovery motion on the issue of whether the court could exercise general jurisdiction. It observed that Athena's briefs addressed only the scope of its business in North Carolina with CMS, but did not address whether it did business with any other company in North Carolina. Absent any attestation regarding CMS's other contacts with North Carolina, the court agreed that additional discovery was appropriate.

***Pompano Imports, Inc. v. BMW of N. Am., LLC*, Bus. Franchise Guide (CCH) ¶ 15,723, No. 15-23491, 2016 WL 958629 (S.D. Fla. Mar. 8, 2016)**
The U.S. District Court for the Southern District of Florida reconsidered its earlier order denying the plaintiff's motion to remand the case to state court for lack of subject matter jurisdiction and remanded the case because it concluded that the defendants had failed to demonstrate by "clear and convincing evidence" that "there is no possibility" that the plaintiff could establish a cause of action against a non-diverse defendant.

The case arose from a decision by BMW of North America, LLC to establish one of the defendants, Auto Club XXVII, Inc. (BMW of Delray), as a new dealership. BMW of Delray was not licensed or in operation yet at the time of the decision. The plaintiff, Pompano Imports, Inc., doing business as Vista Motor Company, is a Florida corporation with its principal place of business in Florida and a "licensed distributor" of BMW products. Vista owned and operated two BMW dealerships under two dealership agreements with BMW, which reserved to BMW the right to appoint additional dealers, whether located near Vista or otherwise as BMW deemed "necessary and appropriate" in its sole discretion. Vista filed suit to prevent BMW from establishing BMW of Delray and named BMW of Delray in two counts of its six-count complaint. BMW removed the case to federal court, stating in its notice of removal that Vista had fraudulently joined BMW of Delray in a preemptive attempt to defeat diversity jurisdiction in federal court. Both defendants filed motions to dismiss the complaint. Vista moved to remand the case to state court, which the court initially denied, but then reconsidered.

An action filed in state court that is removed to federal court on the basis of diversity jurisdiction must be remanded if there is not complete diversity of citizenship or if one of the defendants is a citizen of the state in which suit was filed. Although there was no dispute that complete diversity was lacking due to BMW of Delray's presence as a party in the case, the defendants contended that BMW of Delray's citizenship should be disregarded under the doctrine of fraudulent joinder, under which the removing party must satisfy a "heavy" burden of providing by clear and convincing evidence that either "(1) there is no possibility the plaintiff can establish a cause of action against the resident defendant, or (2) the plaintiff has fraudulently pled jurisdictional facts to bring the resident defendant into state court." The court noted that the standard for assessing whether a plaintiff has a possibility of stating a claim against the non-diverse defendant is a lax one. In order to determine whether the case must be remanded the district court evaluates the factual allegations in the light most favorable to the plaintiff and must resolve any uncertainties about state substantive law in favor of the plaintiff. If there is "even a possibility" that a state court could find that the complaint states a cause of action against a resident defendant, the federal court must find that joinder was proper and remand.

Although the court found that while there was merit in the defendants' motions to dismiss (and discussed them at length without ruling on them), the defendants had failed to demonstrate by clear and convincing evidence that the joinder was fraudulent. The court was unable to say for certain that no state court would find that the first two counts of the complaint stated a cause of action against BMW of Delray. Accordingly, the court remanded the dispute to state court.

***Red Robin Int'l Inc. v. Lehigh Valley Rest. Group, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,687, No. 15-cv-02602, 2016 WL 397559 (D. Colo. Feb. 2, 2016)**

The U.S. District Court for the District of Colorado denied a Red Robin franchisee's motion to dismiss a complaint for lack of personal jurisdiction because the Pennsylvania-based franchisee had a substantial connection to Red Robin in Colorado. The court declined, however, to exercise personal jurisdiction over the franchisee's guarantors because none of the individual guarantors had any contact with Colorado or purposefully directed commercial activity toward Red Robin there.

In 1995, franchisor Red Robin International, Inc. entered into a franchise agreement with franchisee Lehigh Valley Restaurant Group, Inc. (LVRG) to establish a Red Robin franchise in Easton, Pennsylvania. At the time, Red Robin was a Nevada corporation with headquarters in California and LVRG was a Pennsylvania corporation with a principal place of business in Pennsylvania. Three individuals guaranteed LVRG's franchise agreement obligations. One resided in Tennessee while the other two were in Pennsylvania. In 1996, Red Robin moved its headquarters to Colorado. The parties subsequently signed a second agreement in Arizona, which superseded, in part, the original franchise agreement. They later signed eighteen additional franchise agreements for additional locations. LVRG continued to operate the Easton restaurant until the franchise agreement expired in November 2015.

Red Robin sued LVRG and the guarantors in the U.S. District Court for the District of Colorado for failure to comply with post-termination obligations. The court rejected LVRG's argument that the court lacked personal jurisdiction over it. Citing the U.S. Supreme Court's opinion in *Burger King v. Rudzewicz*, 471 U.S. 462 (1985), the court noted that although LVRG entered into a franchise agreement with a corporation that, at the time, was a Nevada corporation headquartered in California, LVRG purposely had contact with Red Robin in Colorado over many years. LVRG representatives routinely traveled to Colorado to do business and submitted royalty and advertising payments to Red Robin in Colorado over a nineteen-year period. On the other hand, the court could find no evidence that any of the three individual guarantors purposefully directed commercial activity toward Red Robin in Colorado. For this reason, it granted LVRG's motion to dismiss with respect to the guarantors.

***Wings to Go, Inc. v. Reynolds*, Bus. Franchise Guide (CCH) ¶ 15,681, No. CCB-15-2556, 2016 WL 97833 (D. Md. Jan. 8, 2016)**

The plaintiff, Wings to Go, Inc., had a franchise agreement with the defendant Coaches Enterprises, LLC that was personally guaranteed by defendants Wade Reynolds and Michael Harrison for the operation of a Wings to Go in Arkansas. Wings to Go alleged that Coaches operated the franchise for approximately five years until the sale of the business to Bulldog Enterprises, LLC. Harrison was the sole member of Bulldog. After the sale, Bulldog removed the Wings to Go name from the restaurant and began operating a substantially similar restaurant under the name "Coach's." Wings to Go filed suit against all of the defendants, alleging that Bulldog engaged in trademark infringement and unfair competition, tortiously interfered with business relations, and engaged in a civil conspiracy to violate a franchise agreement while inducing the other defendants to breach that agreement. Bulldog challenged personal jurisdiction in the U.S. District

Court for the District of Maryland, claiming that Bulldog was a non-resident entity that transacted no business in Maryland.

A federal district court sitting in diversity has personal jurisdiction over a non-resident defendant where (1) the applicable state long-arm statute confers jurisdiction and (2) the assertion of jurisdiction comports with due process. The court held that, applying the conspiracy theory of personal jurisdiction, it had jurisdiction over Bulldog.

On the first prong of the test, the court noted that Maryland courts recognize the conspiracy theory of personal jurisdiction, under which the long-arm statute is satisfied for all members of a conspiracy when (1) two or more individuals conspire to do something; (2) they could reasonably expect to lead to consequences in a particular forum, if one co-conspirator engages in acts in furtherance of the conspiracy; and (3) the acts are of a type which, had the non-resident committed them, would subject the non-resident to personal jurisdiction under the long-arm statute. In such an instance, the overt acts are attributable to the other co-conspirators, who thus become subject to personal jurisdiction in the forum, even if they have no direct contact with the forum. The court determined that the first three prongs of the test were met because Wings to Go stated a prima facie claim of civil conspiracy that Bulldog, Harrison, and Reynolds knowingly entered into an unlawful agreement to induce Coaches to breach the franchise agreement. With respect to the fourth element, the court held that Harrison's alleged activities caused tortious injury in Maryland and therefore imputed Harrison's jurisdictional contacts to Bulldog.

The court then turned to the second prong of the long-arm jurisdiction test: whether the exercise of personal jurisdiction as to Bulldog comported with constitutional due process requirements. Citing *Compass Marketing, Inc. v. Schering-Plough Corp.*, 438 F. Supp. 2d 592, 595 (D. Md. 2006), the court noted that the key question in this inquiry was whether "the potential conspirator has fair warning that his participation could subject him to the jurisdiction of a foreign forum." A co-conspirator can only be held liable in a particular forum if he reasonably expected at the time of entering the conspiracy that the other co-conspirator would act in a manner sufficient to subject itself to personal jurisdiction in that forum. The court concluded that Bulldog reasonably expected Harrison to take actions that would subject Harrison to personal jurisdiction in Maryland. Accordingly, the court denied Bulldog's motion to dismiss for lack of personal jurisdiction.

LABOR AND EMPLOYMENT

2016 Mich. Pub. Act 17; 2016 Mich. Pub. Act 18; 2016 Mich. Pub. Act 19; 2016 Mich. Pub. Act 20

In February 2016, the Michigan Legislature amended four different statutes to explicitly provide that a franchisee is the "sole employer" of its employees.

The four bills, House Bill Nos. 5070, 5071, 5072, and 5073, amend the Michigan Occupational Safety and Health Act, the Public Act 390 of 1978, the Workforce Opportunity Wage Act, and Michigan Employment Security Act, respectively. The legislation was proposed as a response to the 2015 ruling by the National Labor Relations Board holding that a franchisor could be considered a joint employer with a franchisee of the franchisee's employees. *See Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery, and FPR-II, LLC, d/b/a Leadpoint Business Services, and Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters, Petitioner*, 362 NLRB 186 (2015). All four bills took effect on May 23, 2016.

2015 Wis. Sess. Laws 203
In March 2016, the Wisconsin Legislature amended several state statutes to establish that a franchisor is neither an employer of the franchisee, nor an employer of the franchisee's employees. The bill creates two exceptions to this general rule. A franchisor may assume the role of employer, either of the franchisee or of the franchisee's employees, if the franchisor agrees to that role in writing, or if the franchisor is found "to have exercised a type or degree of control over the franchisee or the franchisee's employees that is not customarily exercised by a franchisor for the purpose of protecting the franchisor's trademarks and brand."

NONCOMPETE AGREEMENTS

***Aamco Transmissions, Inc. v. Romano*, Bus. Franchise Guide (CCH) ¶ 15,710, No. 13-5747, 2016 WL 792498 (E.D. Penn. Mar. 1, 2016)**
The U.S. District Court for the Eastern District of Pennsylvania revised a covenant not to compete that restricted a former AAMCO Transmissions, Inc. franchisee from operating a transmission repair business within a ten-mile radius of any AAMCO center nationwide.

The court found that the covenant was reasonably necessary for AAMCO to protect the franchise offering, but that its geographic scope was too broad. The court noted that, after the amicable sale of its AAMCO franchise rights, the franchisee opened a transmission repair business ninety miles away from its former franchised AAMCO business and invested substantial time, energy, and resources in the new business. The court found no evidence that the franchisee used AAMCO's name, trademark, or goodwill to solicit business, and observed that none of the clients of the franchisee's AAMCO business were customers of the franchisee's new shop. The court also observed that, while the franchisee had operated an AAMCO franchised business for twenty-one years, he had gleaned significant independent expertise during his fifteen years of experience in the automotive industry before acquiring the AAMCO franchise. Finally, the court also emphasized that the violation was unintentional and credited the franchisee's testimony that he was unaware of the noncompete provision. Therefore, the court reduced the geographic scope of the covenant to ten miles from the franchisee's prior AAMCO franchised business—without reference to any other AAMCO centers—and held that the franchisee had not violated the provision as modified.

***Daekyo Am., Inc. v. Gunsberger*, Bus. Franchise Guide (CCH) ¶ 15,676, No. 505946/15 (Cal. Super. Ct. Dec. 15, 2015)**
This case is discussed under the topic heading "Injunctive Relief."

***Exec. Home Care Franchising LLC v. Marshall Health Corp.*, Bus. Franchise Guide (CCH) ¶ 15,715, No. 15-1887, 2016 WL 703801 (3d Cir. Feb. 23, 2016)**
This case is discussed under the topic heading "Injunctive Relief."

***JTH Tax, Inc. v. Olivo*, Bus. Franchise Guide (CCH) ¶15,722, No. 2:15CV345, 2016 WL 595297 (E.D. Va. Feb. 12, 2016)**
The U.S. District Court for the Eastern District of Virginia granted a motion for default judgment filed by the plaintiff, JTH Tax, Inc., doing business as Liberty Tax, and awarded damages and granted a permanent injunction.

In 2010, Liberty entered into a franchise agreement with defendant Daniel Olivo for a territory in New York. The franchise agreement required Olivo to make royalty payments and pay an advertising fee each month. The franchise agreement also contained a covenant not to compete that prohibited Olivo from preparing or filing tax returns and offering bank products in the territory or within twenty-five miles for two years after the termination of the franchise agreements. A non-solicitation provision barred Olivo from soliciting any former customers for two years after termination. At the same time, Olivo executed a promissory note financing the operation of the office. The promissory note contained a cross default provision.

In April 2015, Liberty terminated the agreement for multiple breaches; in May 2015, it sent Olivo a cease-and-desist letter demanding compliance with the post-termination obligations, to which Olivo did not respond. Liberty filed suit in August 2015. After Olivo failed to respond or appear, Liberty sought entry of default and a default judgment.

The court noted that default judgments are to be granted sparingly and that the Fourth Circuit has a "strong preference" that defaults be avoided and claims disposed of on the merits. Accepting all well-pleaded allegations as true, the court concluded that Liberty had demonstrated breach of numerous provisions of the franchise agreement. The court also entered an injunction, applying the four-factor test articulated in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). The court found that Liberty had demonstrated risk of irreparable injury because Olivo's continued breach of the noncompete and non-solicitation threatened loss of customers and damage to goodwill and Liberty's relationship with other franchisees. The court found that the legal remedies were inadequate because the irreparable injury was difficult to calculate and quantify. The court held that the balance of hardships favored Liberty: although Olivo was prohibited from working in a tax preparation business in the territory for the contractual period, that hardship was balanced by the fact that the court was simply enforcing Olivo's obligations and he could compete outside the territory. Finally, the court held that the public interest was served by injunctive relief because the enforcement of a valid covenant not to compete aids the public interest by preventing consumer confusion and upholding the sanctity of contract.

PETROLEUM MARKETING PRACTICES ACT (PMPA)

AVP Metro Petroleum LLC v. Sepahvand, Bus. Franchise Guide (CCH) ¶ 15,690, No. 14-CV-0616-CVE-PJC, 2016 WL 538475 (N.D. Okla. Feb. 9, 2016)

The U.S. District Court for the Northern District of Oklahoma remanded a collection action between a petroleum distributor and a gas station operator to Oklahoma state court for lack of subject matter jurisdiction after holding that the action did not arise under the federal Petroleum Marketing Practices Act (PMPA).

AVP Metro Petroleum and Morad Sepahvand, doing business as Moe's Mart, entered into a motor fuel marketing agreement, which provided that AVP would provide petroleum to Moe's Mart in exchange for payment as well as a promissory note. AVP later sent Moe's Mart a notice of termination of the motor fuel marketing agreement and demanded accelerated payment under the promissory note after Moe's Mart failed to pay. AVP sued Moe's Mart in Oklahoma state court for breach of contract. Moe's Mart counterclaimed, alleging that AVP violated the PMPA by failing to comply with certain provisions of the PMPA regarding agreement termination. Moe's Mart also removed the matter to the federal district court. AVP moved for summary judgment, arguing that the undisputed facts demonstrated it was entitled to judgment as a matter of law.

The court considered sua sponte whether it had subject matter jurisdiction to hear the parties' dispute. It noted that federal courts have subject matter jurisdiction to hear civil actions that arise under the Constitution and laws or treaties of the United States. Whether AVP and Moe's Mart's dispute arose under federal law turned on the question whether AVP's complaint was based on federal law. The court noted that Moe's Mart's counterclaim for violation of the PMPA did not provide a basis for removal of the case to federal court where AVP's complaint had alleged only state law claims for breach of contract. It also held that the PMPA did not govern AVP's attempt to collect monies from Moe's Mart. After a review of the complaint and the notice of removal, the court determined there was no basis for its exercise of subject matter jurisdiction over the matter and remanded to state court.

RELEASES

7-Eleven, Inc. v. Khan, Bus. Franchise Guide (CCH) ¶ 15,699, No. 3:15-cv-01011, 2016 WL 223694 (D. Conn. Jan. 19, 2016)

In June 2015, 7-Eleven, Inc. and one of the defendants, Unionville, Inc., entered into a termination and settlement agreement under which the franchise agreement between the two was terminated. Unionville purchased from 7-Eleven certain unspecified assets for a sum of $20,000. On June 15, 2015, the turnover date of the store, 7-Eleven and Natasha Khan, another defendant, and Unionville entered into a release of claims and termination agreement. Earlier that day, 7-Eleven had attempted to remove certain gasoline tanks on the store premises, which it contended it owned, while the defendants resisted the removal and argued that the tanks were part of the unspecified assets purchased under the termination and settlement agreement. 7-Eleven brought suit against Khan, Unionville, and Warren Shuck (with whom it had a lease for the store premises) for conversion of the gasoline tanks. 7-Eleven initially sought, and was denied, a preliminary injunction. Afterwards, Khan and Unionville, moved for leave to file several counterclaims against 7-Eleven, including claims for misrepresentation, breach of covenant of good faith and fair dealing, violations of the Connecticut Unfair Trade Practices Act, and violations of the Connecticut Franchise Act. 7-Eleven opposed the filing of the proposed counterclaims on several grounds, including that the release signed by the defendants precluded their ability to bring such claims.

The U.S. District Court for the District of Connecticut found that the release was broad enough to bar all of the claims the defendants asserted in their counterclaim. The defendants argued, however, that (1) if the court found that the release barred its counterclaims, it should also bar 7-Eleven's own claims because a mutual release had been executed; and (2) they had evidence that the release was procured fraudulently. As to the first, the court granted the defendants leave to file a motion and memorandum in support of their argument because such a request must be made by motion. With respect to the defendants' second argument, the court found that their argument that the release was procured fraudulently was in direct contradiction to their prior reliance on the release in their arguments before the same court in the preliminary injunction hearing, as well as in their prior argument that the release should bar 7-Eleven's claims for conversion. Under the doctrine of judicial estoppel, which prohibits parties from deliberately changing positions if their circumstances change, the court held that, at such a late stage in litigation, it would be improper to allow the defendants to change their position as to the validity of the release and, therefore, the release barred the defendants' ability to bring their proposed counterclaims.

STATE DISCLOSURE/REGISTRATION LAWS

***Brava Salon Specialists, LLC v. Label.M USA, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,721, No. 15-cv-631-bbc, 2016 WL 632649 (W.D. Wis. Feb. 16, 2016)**
This case is discussed under the topic heading "Choice of Forum."

***Lofgren v. AirTrona Canada*, Bus. Franchise Guide (CCH) ¶ 15,679, No. 2:13-cv-13622, 2016 WL 25977 (E.D. Mich. Jan. 4, 2016)**
This case is discussed under the topic heading "Definition of a Franchise."

STATUTORY CLAIMS

***Broderick Assocs., Inc. v. Fansteel, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,695, No. 1:14-cv-01133, 2016 WL 274874 (S.D. Ind. Jan. 22, 2016)**
This case is discussed under the topic heading "Contract Issues."

***Manitou N. Am., Inc., v. McCormick Int'l, LLC*, Bus. Franchise Guide (CCH) ¶15,686, No. 324063, 2016 WL 439354 (Mich. Ct. App. Feb. 2, 2016)**
This case is discussed under the topic heading "Antitrust."

***Moxie Venture L.L.C. v. The UPS Store, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,685, Civ. No. 15-3704 (RHK/JJK), 2016 WL 128136 (D. Minn. Jan. 12, 2016)**
This case is discussed under the topic heading "Choice of Forum."

***Retail Digital Network, LLC v. Appelsmith*, Bus. Franchise Guide (CCH) ¶ 15,674, No. 13-56069, 810 F.3d 638 (9th Cir. Jan. 7, 2016)**
Retail Digital Network, LLC (RDN) was a middleman in the advertising industry that installed liquid crystal displays (LCDs) in retail stores and entered into contracts with third parties to advertise their products on the LCDs. Manufacturers and distributors of alcoholic beverages in California refused to enter into contracts with RDN for fear of violating California Business and Professions Code Section 25503(f)-(h). Section 25503 forbids manufacturers and wholesalers of alcoholic beverages from giving anything of value to retailers for advertising their alcoholic products. Using the example from the court, a California liquor store "can hang a Captain Morgan Rum sign in the store's window, but the Captain can't pay [the store directly or indirectly] for doing so." RDN sought declaratory relief that Section 25503(f)-(h) was unconstitutional under the First Amendment and an injunction against enforcement of the law.

Relying on *Actmedia, Inc. v. Stroh*, 830 F.2d 957 (9th Cir. 1986), the U.S. District Court for the Central District of California granted summary judgment in favor of Appelsmith, the director of the California Department of

Alcoholic Beverage Control. In *Actmedia*, the Ninth Circuit held that Section 25503 was consistent with the First Amendment under intermediate scrutiny. Since then, the Supreme Court decided *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011), in which the Court held the First Amendment required heightened judicial scrutiny for content-based restrictions on non-misleading commercial speech regarding lawful products. Because the district court had applied intermediate scrutiny rather than heightened scrutiny, the Ninth Circuit reversed summary judgment in favor of Appelsmith and remanded on an open record for the district court to apply heightened judicial scrutiny in the first instance.

In reaching that conclusion, the Ninth Circuit examined whether RDN had standing to challenge California's law. The court concluded RDN's loss in revenue due to the law was sufficient to confer standing, and it went on to recognize that even though RDN was not a manufacturer, distributor, or retailer, the only types of businesses mentioned in the statute, RDN could face criminal penalties for facilitating advertisements paid for by manufacturers or distributors of alcoholic beverages in retail stores.

The Ninth Circuit next examined the evolution of commercial speech protection since 1986, when it last addressed the constitutionality of Section 25503 under the First Amendment. The court noted that commercial speech, which is defined as speech that does nothing more than propose a commercial transaction, has long been afforded less protection under the First Amendment than other types of speech. In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), the Supreme Court outlined a four-part test to apply intermediate scrutiny to restrictions on commercial speech. The Ninth Circuit had applied intermediate scrutiny to content-based and content-neutral regulations of commercial speech, but the court concluded *Actmedia* was irreconcilable with the Supreme Court's decision in *Sorrell* and thus the overall analytical framework of intermediate scrutiny set forth in *Actmedia* could no longer be binding. In *Sorrell*, the Court invalidated a Vermont law that placed restrictions on the sale, distribution, and use of pharmacy records for marketing purposes, a decision the Ninth Circuit found effectively modified the *Central Hudson* test.

As a result, the Ninth Circuit concluded it must first determine whether a challenged law burdening non-misleading commercial speech regarding lawful goods or services is content- or speaker-based and, if so, the law must survive heightened judicial scrutiny to remain valid. The Ninth Circuit recognized other circuits had found that *Sorrell* requires a stricter level of judicial scrutiny of content-based restrictions on non-misleading commercial speech, even if those circuits may not have settled on the contours of the more-demanding level of scrutiny.

The Ninth Circuit therefore remanded for the district court to apply heightened judicial scrutiny to Section 25503 in the first instance. Because the record before the Ninth Circuit was thin, it directed the district court to consider several factors when applying the heightened standard of review:

(1) whether California had shown a real danger that paid advertising of alcoholic beverages would lead to vertical or horizontal integration and whether California's concerns of such integration were real under the circumstances; and (2) whether the statute materially advanced the state's goal of preventing such integration and promoting temperance, and whether the state could show the requisite fit between the statute and those goals. If the state could not meet its burden as to these factors on remand, Section 25503 could not survive heightened judicial scrutiny.

***Window World of Chicagoland, LLC v. Window World, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,694, No. 15-2224, 2016 WL 315902 (7th Cir. Jan. 27, 2016)**

Between 2005 and 2009, the defendant, Window World, Inc., sold to the plaintiffs, Window World of Chicagoland, LLC and David Hampton (together, Hampton), the right to sell and install windows and doors under the Window World trademarks. In 2011, the attorney general of Illinois alerted Window World to the existence of a franchise relationship in such transactions: Window World was required to offer rescission to Hampton granting Hampton thirty-five days to rescind his agreements with Window World.

Instead of electing to do so, Hampton brought suit against Window World for violations of the Illinois Franchise Disclosure Act (IFDA), fraud, and other wrongdoings (first lawsuit). While the first lawsuit was pending, Window World filed a suit of its own under the Lanham Act seeking damages for continued use of its marks and an injunction against the future use of its marks (second lawsuit). Hampton signed for service of process in the second lawsuit but never filed a response. After the deadline to respond had passed, Window World moved for and was granted entry of a default judgment; Window World was awarded more than $100,000 in damages as well as relief in the form of a permanent injunction enjoining Hampton from using any of Window World's trademarks.

Hampton continued to operate the business under the Window World name, but paid no fees to Window World. In 2013, Hampton brought a third lawsuit, in which he stated the same claims as in the first lawsuit but also asked the district court to set aside the default judgment in the second lawsuit. Based on Hampton's belief that the first and second lawsuit had been dismissed together, the court agreed to reopen the second lawsuit and that this justified vacatur, provided however, that Hampton first pay Window World's expenses in the amount of $33,000. Hampton failed to pay the amount, however, and the court vacated its vacatur and the default judgment was reinstated.

Hampton continued to prosecute the third lawsuit. Window World asked the court to dismiss the suit under principles of "claim preclusion (res judicata)." The court did so despite Hampton's argument that because the third and second lawsuit had been consolidated, res judicata could not apply as the decision in one suit would affect the other. The court clarified that the consolidation was an administrative and not full consolidation and therefore the default judgment entered in the second lawsuit barred, on claim preclusion grounds, subsequent action. Importantly, administratively consolidated cases, as opposed to fully consolidated cases, retain their independent existence. The court went on to conclude, however, that even if the cases had been fully consolidated, because the relief Hampton was seeking was inconsistent with the unappealed final relief Window World had already received, the "law of the case" doctrine would act to bar the third lawsuit from proceeding.

TERMINATION AND NONRENEWAL

***Manitou N. Am., Inc. v. McCormick Int'l, LLC*, Bus. Franchise Guide (CCH) ¶ 15,686, No. 324063, 2016 WL 439354 (Mich. Ct. App. Feb. 2, 2016)**

This case is discussed under the topic heading "Antitrust."

***Meineke Car Care Ctr., LLC v. Asar Inc., LLC*, Bus. Franchise Guide (CCH) ¶ 15,709, No. 3:14-cv-129, 2016 WL 820952 (W.D.N.C. Mar. 2, 2016)**

The U.S. District Court for the Western District of North Carolina held franchisee ASAR Incorporated, LLC in civil contempt for failure to comply with the court's default judgment. The plaintiff, Meineke Car Centers, LLC, terminated ASAR's franchise agreement after ASAR failed to pay Meineke required fees. The court subsequently issued a default judgment order in favor of Meineke.

After ASAR failed to cease operations or otherwise comply with the default judgment order, Meineke moved for ASAR to be held in civil contempt. The court noted the following criteria were required for a finding of civil contempt: (1) a valid decree of which the alleged contemnor had actual or constructive knowledge, (2) the decree was in the movant's favor, (3) the alleged contemnor violated the term of the decree, and (4) the movant suffered damages due to the contemnor's conduct. The court found that all four criteria were met, noting that Meineke continued to suffer damages due to ASAR's use of Meineke's intellectual property as well as harm to Meineke's reputation resulting from customer complaints. The court required ASAR to pay $1,000 per day, produce various books and records, and pay Meineke's attorney fees.

***Premium Beverage Supply, Ltd. v. TBK Prod. Works, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,701, No. 15AP-495, 2016 WL 233717 (Ohio Ct. App. Jan. 19, 2016)**

The Ohio Court of Appeals reversed the trial court decision granting summary judgment to the plaintiff, Premium Beverage Supply, Ltd., holding that the defendant, Brew Kettle Production Works, LLC, was permitted to terminate a franchise and distribution agreement with Premium. The court rejected Premium's claim that Brew Kettle could not terminate the agreement because it was not a "successor manufacturer" for the purposes of Ohio law.

In 1995, Christopher McKim opened a microbrewery in Strongsville, Ohio. The business eventually expanded to include a restaurant, winery, and production brewery, all of which were owned and operated by TBK Production Works, Inc. In 2008, TBK entered into a distribution agreement with Premium. In 2013, TBK sold all of its assets to Brew Kettle, a limited liability company owned by several individuals, including McKim, who owned a thirty percent interest. After Brew Kettle purchased TBK's assets, Brew Kettle initiated the process to obtain the state licensing required for a brewery. Until Brew Kettle received those permits, it operated the day-to-day operations as an interim manager under an agreement with TBK. Then, on May 3, 2013, Brew Kettle notified Premium that it was terminating the distribution agreement with Premium. Premium filed suit claiming that Brew Kettle could not terminate Premium's exclusive franchise and that the cancellation constituted an unconstitutional taking.

After the trial court granted summary judgment in favor of Premium, Brew Kettle appealed, raising ten different assignments of error, the majority of which turned on the question of whether Brew Kettle could terminate the franchise agreement under the Ohio Alcoholic Beverage Franchise Act, Ohio Rev. Code §§ 1333.82 et seq., which governs the franchise relationship between manufacturers and distributors of alcoholic beverages. The Act proscribes the termination or lack of renewal of an alcohol distribution franchise absent prior consent unless there is just cause and sixty days' notice is provided. However, Ohio Rev. Code § 1333.85(D) contains an exception to the just cause/consent requirement. Part (D) allows the termination or nonrenewal of a franchise agreement when a "successor manufacturer" gives written notice of termination or nonrenewal within ninety days of the acquisition. If a distributor does not receive notice, the franchise relationship is established between the distributor and the successor manufacturer. If the manufacturer does terminate the relationship, the manufacturer must buy back the undistributed inventory held by the distributor and the distributor is entitled to additional compensation.

In considering Brew Kettle's motion for summary judgment, the trial court set forth two reasons for concluding that Brew Kettle could not terminate the distribution franchise. First, the trial court found that it was the terms of the sales and distribution agreement, not Ohio Rev. Code § 1333.85(D), that governed termination of the franchise. Second, Brew Kettle was not a "successor manufacturer" for the purposes of the Act, rendering Ohio Rev. Code § 1333.85(D) inoperable. However, the trial court's first reason was determined to be wrong in a recent Ohio Supreme Court case, which held that the existence of a written franchise agreement did not bar a successor manufacturer from relying on Ohio Rev. Code § 1333.85(D).

As a result, the appellate court rejected the trial court's first reason for granting Premium summary judgment.

Turning to the second reason for summary judgment in favor of Premium, the court held that Brew Kettle was considered a successor manufacturer for the purposes of Ohio Rev. Code § 1333.85(D) and that Brew Kettle did legally cancel Premium's franchise on May 3, 2013. The court first rejected Premium's argument that because Brew Kettle did not possess the required state licensing for brewers at the time Brew Kettle sent the initial termination notice to Premium, Brew Kettle could not be considered a manufacturer for the purposes of the statute.

The court then turned to the "successor" portion of the term "successor manufacturer." Premium argued that Brew Kettle was not a "successor" at the time of the initial termination notice on May 3, 2013, because the asset purchase transaction was not consummated on the February 25, 2013, closure date, but on October 31, 2013, the date when Brew Kettle received the necessary state permits. In support of this argument, Premium pointed to Section 5.1(a) of the asset purchase agreement, which stated that each of the parties would, prior to the closing date, secure any approvals, authorizations, and consents, including the required consents of the alcoholic beverage agencies. However, the court reasoned that Section 5.1(a) should be read together with Sections 6 and 7 and concluded that Section 5.1(a) was a vestige of the original intent of the parties, but that Section 6 and Section 7 captured the actual preconditions the parties agreed to after they realized that their original plan was not feasible. Therefore, the court concluded that Brew Kettle did not have to acquire the required licensing before the transaction was to become final and Brew Kettle was a "successor" for the purposes of Ohio Rev. Code § 1333.85(D) when it sent the initial termination notice on May 3, 2013.

The court also rejected Premium's argument that Brew Kettle could not avail itself of the exception to the just cause termination requirement found in Ohio Rev. Code § 1333.85(D) because McKim controlled both TBK and Brew Kettle and the Act explicitly disclaims restructuring as a qualifying "just cause." The court found that the purchase of TBK by Brew Kettle was not restructuring and was not simply a "paper transaction." Instead, it was an arms-length negotiation in which McKim's interest in the company went from 100 percent under TBK to only 30 percent under Brew Kettle.

Finally, the court rejected Premium's Takings claim. In reaching this holding, the court relied on precedent that held that no taking occurs when a private party employs Ohio Rev. Code § 1333.85(D) to terminate a distributor's franchise agreement. Accordingly, the court reversed the trial court decision and remanded so that the trial court could enter summary judgment for Brew Kettle as well as determine the amount of compensation

Brew Kettle owed to Premium under the Act that resulted from the legal termination of the franchise agreement.

***Texas Ujoints, LLC v. Dana Holding Corp.*, Bus. Franchise Guide (CCH) ¶ 15,675, No. 13-CV-1008, 2015 WL 9295394 (E.D. Wis. Dec. 21, 2015)**

Dana Holding Corporation and Dana Limited manufacture heavy-duty industrial drive lines and universal joints used in the fracking and other industries. Dana had an oral distributorship arrangement with its dealer Automotive Industrial Supply Co., Inc. (AISCO). In August 2012, DanMar Holdings, LLC entered into an asset purchase agreement with AISCO under which it purportedly acquired the oral distributorship agreement with Dana. DanMar assigned its assets to Texas Ujoints, LLC. Dana and Texas Ujoints continued to do business, although orders were filled under AISCO's account, until June 2013 when Dana sent notice to Texas Ujoints of its intention to terminate the relationship between them. Dana was unaware that Texas Ujoints was an assignee or a different entity from AISCO.

Texas Ujoints filed suit claiming that Dana breached its statutorily protected "dealer agreement" with Dana by terminating without the "good cause" required under the Texas Fair Practices of Equipment Manufacturers, Distributors, Wholesalers, and Dealers Act (FPA). Dana moved for summary judgment, claiming that no "dealer agreement" was transferred under the asset purchase agreement and that, even if there was, the agreement was oral in nature and for the purchase of goods greater than $500 and was therefore unenforceable under the statute of frauds.

The court stated that it was not aware of any authority that granted a statute of frauds defense to a statutory claim, as opposed to claim for breach of contract, and since it appeared that the nature of the parties asset transfer was to transfer the distributorship relationship, the distributorship agreement did transfer in the sale. Texas Ujoints also filed a motion for summary judgment on its claim that the "distributorship agreement" was terminated without cause. The court interpreted the sections under the FPA that acknowledged "good cause" for termination in the event of a sale of a dealer's assets to mean that where the supplier's consent is not contractually required; it follows that the dealership agreement was freely assignable and thus was properly assigned in this case and improperly terminated. Based on this reasoning, the court granted Texas Ujoint's motion.

Dana filed a motion for reconsideration. The court's reconsideration hinged on its belief that its initial interpretation of the statute was flawed and, this time, recognized a previously unanalyzed subsection in the FPA, which clearly stated that a supplier had good cause to terminate if "the dealer or dealership has transferred a controlling ownership interest in its business without the supplier's consent." In the end, the court found Dana had no knowledge that it was terminating Texas Ujoints, but rather believed it had been terminating its former distributor AISCO, and that, regardless, Dana had good cause to terminate Texas Ujoints due to its failure to obtain Dana's consent on the transfer of the distributorship. The court granted Dana's motion for reconsideration and Dana's initial motion for summary judgment dismissing the action was also granted.

TORTIOUS INTERFERENCE

***Ingenuity, Inc. v. Linshell Innovations Ltd.*, Bus. Franchise Guide (CCH) ¶ 15,713, No. 15-10214, 2016 WL 762049 (11th Cir. Feb. 26, 2016)**
Linshell Innovations Ltd. entered into a distributorship agreement with Ingenuity, Inc., granting Ingenuity the exclusive right to distribute Linshell's Linziclip hair accessory. In 2006, Ingenuity approached, and discussed with, Conair Corporation the possibility of a sub-distributorship. While a confidentiality agreement was entered into, no final distributor agreement was reached. In 2008, Linshell decided to find a new distributor and entered into an agreement with Conair. The day after signing its new distributorship agreement with Conair, Linshell terminated its agreement with Ingenuity. Ingenuity brought suit against Linshell for breach of contract and Conair for tortious interference with its contractual relationship with Linshell and breach of the 2006 confidentiality agreement. The U.S. District Court for the Middle District of Florida granted Conair's motion for summary judgment against both claims and dismissed Ingenuity's claims against Linshell for failure to prosecute.

With respect to the claims against Linshell, Linshell defaulted. Although the district court ordered Ingenuity to pursue a default judgment, it failed to do so and the district court dismissed Ingenuity's claims against Linshell with prejudice for want of prosecution. The Eleventh Circuit affirmed.

With respect to the claims against Conair, the Eleventh Circuit found that the mere fact that Conair knew when it negotiated with Linshell that Linshell had a distributorship relationship with Ingenuity at some point was insufficient to support a tortious interference claim under Florida law. In addition, the record showed that Linshell was predisposed to breach its agreement with Ingenuity and that, again in accordance with Florida law, such predisposition precluded the finding that it was induced to breach that very agreement. As to the breach of confidentiality agreement claim, the Eleventh Circuit found no evidence that showed the use of confidential information in any manner contrary to the agreement and, therefore, no reasonable jury could find that a breach had occurred. The district court's decision to grant summary judgment on both the tortious interference and breach of confidentiality agreement claims was affirmed.

***S. Gas, Inc. v. Exxonmobil Oil Corp.*, Bus. Franchise Guide (CCH) ¶ 15,712, No. 09-CV-6236, 2016 WL 816748 (D.N.J. Feb. 29, 2016)**

This case is discussed under the topic heading "Antitrust."

TRANSFERS

***Martinizing Int'l LLC v. BC Cleaners, LLC*, Bus. Franchise Guide (CCH) ¶ 15,670, No. 15-551 (MJD/BRT), 2015 U.S. Dist. LEXIS 165016 (D. Minn. Dec. 9, 2015)**

The U.S. District Court for the District of Minnesota held that a franchisee's transfer of two Martinizing dry cleaning franchises without the approval of the franchisor, Martinizing International LLC, in violation of the franchise agreements, was invalid. The court required that the purported buyer of the franchised outlets pay the franchisor unpaid royalties plus interest, unpaid transfer fees, late fees, and attorney fees due to the unauthorized transferee's violation of the Lanham Act and granted the franchisor's request for an injunction to prevent further misuse of the trademarks.

Martinizing International granted two franchises to KM Cleaners, Inc. under franchise agreements that prohibited KM from selling the franchised locations or assigning the franchise agreements without the franchisor's consent. However, KM entered into an asset purchase agreement purporting to sell the franchises to BC Cleaners, LLC. BC then began using Martinizing International's trademarks in the operation of the franchised businesses. BC continued using the trademarks after Martinizing International sent BC a cease and desist letter demanding that BC either stop using the trademarks or sign new franchise agreements.

Martinizing International filed a complaint, alleging trademark infringement under the Lanham Act and other claims. BC failed to answer the complaint. Because BC's owners did not sign personal guarantees, the court did not find that they could be liable in their individual capacities. However, it concluded that BC's failure to heed the cease and desist letter and refusal to sign new franchise agreements evidenced that its unauthorized use of the trademarks was willful. It therefore entered a default judgment in favor of Martinizing International, enjoining BC from using the trademarks and requiring BC to pay transfer fees, franchise fees, interest on the unpaid franchise fees, late fees, and attorney fees.

***Texas Ujoints, LLC v. Dana Holding Corp.*, Bus. Franchise Guide (CCH) ¶ 15,675, No. 13-CV-1008, 2015 WL 9295394 (E.D. Wis. Dec. 21, 2015)**

This case is discussed under the topic heading "Termination and Nonrenewal."

UNFAIR COMPETITION/UNFAIR AND DECEPTIVE PRACTICES

***Connelly Co. v. Primo Water Corp.*, Bus. Franchise Guide (CCH) ¶ 15,700, No. 2:14-CV-00340-JLQ, 2016 WL 225663 (E.D. Wash. Jan. 19, 2016)**

This case is discussed under the topic heading “Contract Issues.”