

FRANCHISING (& DISTRIBUTION) CURRENTS

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ANTITRUST

Martrano v. Quizno's Franchise Co., LLC, No. 08-0932, 2009 WL 1704469, Bus. Franchise Guide (CCH) ¶ 14,161 (W.D. Pa. June 15, 2009)

This case is discussed under the topic heading "Class Actions."

ARBITRATION

Med. Shoppe Int'l, Inc. v. Turner Invs., Inc., No. 4:09MC00102, 2009 WL 1295978, Bus. Franchise Guide (CCH) ¶ 14,158 (E.D. Mo. May 7, 2009)

A former drug store franchisee tried unsuccessfully to vacate an arbitration award in this case. Plaintiff franchisor and defendant franchisee, Turner Investments, Inc. (Turner), were parties to a licensing agreement providing that Turner would operate a Medicine Shoppe franchise for a term of twenty years. Pursuant to the licensing agreement, the franchisor filed an arbitration claim against Turner claiming that Turner prematurely terminated the license agreement. The franchisor sought past-due license fees, future license fees for the remainder of the twenty-year term, attorney fees, and costs from Turner.

The arbitrator awarded the franchisor \$472,164.42, and the franchisor applied to the U.S. District Court for the Eastern District of Missouri for an order confirming the arbitration award. In response, Turner asked the court to vacate the award, asserting that the award showed "manifest disregard for the law" and that "the arbitration process is fundamentally unfair to franchises and consumers." The court rejected Turner's arguments and confirmed the arbitration award.

Citing *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), the court recognized that an arbitration award may only be vacated on the grounds enumerated in § 10 of the Federal Arbitration Act (FAA) and in the absence of one of those grounds must be confirmed. The FAA provides that an arbitration award may be vacated only "(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct" that prejudiced the rights of any party; or "(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter was not made."

The court refused to entertain any of Turner's claims for vacation of the award that were not enumerated in the FAA. Even if Turner's claim that the arbitrator disregarded the law was construed as a claim that the arbitrator had made errors in determining the facts, the court held that it could not consider



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the argument. A court's "review of [an] arbitration award[] is limited, and the Court is not authorized to substitute its judgment for that of the arbitrator hired by the parties," the court noted.

The court also held that Turner's claim of bias failed. Although Turner asserted that the arbitration process generally was unfair to franchisees, the court held this was not a ground to vacate the award because Turner did not allege "evident partiality or corruption" on the part of the arbitrator. Turner also failed to provide evidence that the award was "procured by corruption, fraud or undue means" as required by § 10 of the FAA.

Mustard Franchise Corp. v. Yek, Inc., No. G040247 (consolidated with G040667), 2009 WL 1805462, Bus. Franchise Guide (CCH) ¶ 14,175 (Cal. App. June 24, 2009) (unpublished)

The California Court of Appeal determined that the trial court permissibly had construed a franchisor's "application for a preliminary injunction as a petition to confirm an arbitration award." In the prior proceeding, the arbitrator had ruled that the franchisor was entitled to immediate possession of the premises of Yek, Inc. (Yek). The appellate court determined that the trial court logically had construed the franchisor's request for an order to

show cause as a petition to confirm the arbitration award. Yek argued that the trial court violated procedural rules of timing in so doing. The court disagreed because Yek had failed to show any prejudice from the trial court's decision. Yek repeatedly had exercised its opportunity to oppose possession rulings on the merits. In addition, Yek had "had ample time to seek review or clarification from the arbitrator concerning [the] . . . order," as well as to prepare opposition to the trial court's review of the order to show cause request.

The court also determined that the trial court properly had issued an injunction in favor of the franchisor, without requiring a bond, requiring Yek to turn over possession to the franchisor.

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The court held that, under California law, such a judgment directing a party to turn over immediate possession of real property constitutes a permanent injunction that does not require a bond.

Yek also unsuccessfully argued that the trial court wrongfully had adjudicated the landlord's rights because the lease prohibited transfer of possession without the landlord's consent. The arbitrator already had rejected that argument, however, and a decision of the arbitrator "cannot be reviewed for errors of facts or law," the court ruled. Further, in the court's view, Yek's argument attempted to circumvent the rule that a party to an arbitration may only seek to vacate an award within 100 days of the award.

***Platinum Distrib., Inc. v. Cytosport, Inc.*, No. 09-2036, 2009 WL 1873502, Bus. Franchise Guide (CCH) ¶ 14,191 (W.D. Ark. June 30, 2009)**

Plaintiff distributor argued that an arbitration clause in the parties' distribution agreement was unconscionable and invalid because (i) "the parties' [d]istribution [a]greement directly conflict[ed] with, and [was] contrary to, the provisions of the Arkansas Franchise Practices Act ('AFPA'); (ii) the arbitration agreement was procured through gross inequality in bargaining power; and (iii) plaintiff did not understand the arbitration provision. The U.S. District Court for the Western District of Arkansas rejected plaintiff's arguments and granted defendant's motion to compel arbitration without even mentioning the U.S. Court of Appeals for the Ninth Circuit's decision in *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257 (9th Cir. 2006).

Applying California substantive law, the federal district court held that any substantive rights conferred by the AFPA, including a limit on the arbitrator's ability to award remedies under the AFPA, did not render the arbitration agreement unconscionable and invalid. Next, the court held that to oppose arbitration by claiming that the clause was unconscionable, plaintiff had to present factual support that the distribution agreement had been executed as a result of gross unequal bargaining power and that plaintiff had had no knowledge of the contents of the arbitration agreement. Plaintiff had failed to provide any factual evidence for its unconscionability claims, according to the court. The court held that the arbitration provision was valid.

Plaintiff also had alleged that a statutory claim that the termination violated the AFPA was different from a breach of contract claim and therefore did not fall within the scope of the arbitration clause. The court held, however, that a dispute relating to the termination of the very agreement that contains the arbitration clause fell within the broad language of the parties' agreement requiring arbitration for "[a]ny dispute between the parties in this Agreement."

***Volvo Truck N. Am., Inc. v. Crescent Ford Truck Sales, Inc.*, No. 07-3127, 2009 WL 2496556, Bus. Franchise Guide (CCH) ¶ 14,209 (E.D. La. Aug. 13, 2009)**

A truck dealer (Crescent) and manufacturer (Volvo) had entered into a five-year dealer agreement under which Crescent operated a Volvo truck dealership. The parties' agreement provided that in the event of any dispute between the parties, the parties first would attempt to negotiate the dispute, followed by mediation if

negotiations proved unsuccessful. The agreement also provided that "[i]f Negotiation followed by mediation fails to reach an equitable solution . . . within 90 days, then such dispute may be settled by final and binding arbitration. Once initiated, all parties shall cooperate with the [American Arbitration Association (AAA)] and each other to reach the final decision."

Near the expiration of the agreement's term, Volvo had issued a notice of nonrenewal. Crescent filed a petition with the Louisiana Motor Vehicle Commission (LMVC) for an interlocutory and permanent cease-and-desist order preventing Volvo from refusing to renew the agreement. LMVC issued an order maintaining the status quo between the parties and preventing the nonrenewal or expiration of the agreement. The parties proceeded to mediation, but it was unsuccessful.

Volvo maintained that arbitration should proceed. It filed a motion before LMVC to compel arbitration, which was denied. Volvo sought appeal of the LMVC decision in Louisiana state court, and LMVC stayed the termination proceeding pending the appeal.

Volvo then filed a complaint in the U.S. District Court for the Eastern District of Louisiana seeking an order directing that arbitration proceed. The parties filed cross-motions for summary judgment on the issue of whether arbitration was mandatory under their dealer agreement. The court denied Crescent's motion and granted Volvo's motion, holding that once arbitration is initiated in accordance with the AAA rules, all parties are compelled to arbitrate the dispute.

Crescent filed a motion for reconsideration, which the court denied. The court held that Crescent failed to present any ground for altering or amending the judgment. Many of the arguments in Crescent's motion for reconsideration were considered and rejected by the court in its previous decision, the court found, noting that Rule 59(e) motions "should not be used to relitigate prior matters that should have been urged earlier or that simply have been resolved to the movant's dissatisfaction."

Specifically, Crescent had argued that the court committed a manifest error of law by holding that arbitration was mandatory. According to Crescent, the arbitration clause's use of the term *may* suggested that arbitration was permissible, not mandatory. The court rejected Crescent's argument, pointing to the remainder of the clause, which stated that "[o]nce arbitration is initiated, all parties shall cooperate with the AAA and each other to reach the final decision." The court held that under that language, arbitration was not mandatory if neither party initiated it; but once initiated, both parties were required to submit to arbitration.

Crescent also had argued that Volvo waived its right to seek arbitration; the FAA does not preempt state motor vehicle codes, and the arbitration clause was a contract of adhesion lacking mutuality. The court rejected each argument. It held that Volvo did not waive its right to seek arbitration because any court or agency filing by Volvo was either compelled by Volvo's position as defendant or made seeking an order compelling arbitration. The court rejected as moot Crescent's argument that the FAA does not preempt state motor vehicle codes because, as the court recognized, Louisiana's Arbitration Act is "virtually identical" to the FAA. Finally, the court held that the dealer agreement was not an adhesion contract or lacking in mutuality.

Nothing suggested that both parties had not consented to the arbitration clause, the court ruled.

Instant Tax Serv. 10060, LLC v. TCA Fin., LLC, No. PJM 08-2365, 2009 WL 2579806, Bus. Franchise Guide (CCH) ¶ 14,206 (D. Md. Aug. 14, 2009)

This case is discussed under the topic heading “Sanctions.”

CHOICE OF LAW

Taylor v. 1-800-Got-Junk?, LLC, 632 F. Supp. 2d 1048, Bus. Franchise Guide (CCH) ¶ 14,197 (W.D. Wash. July 9, 2009)

A district court addressed whether the Washington Franchise Investment Protection Act (WFIPA) applied to a franchise operating outside of Washington under a franchise agreement that included a Washington choice of law provision. The agreement provided that it was to “be construed and interpreted according to the laws of the state of Washington,” but no aspect of the franchisee’s relationship with the franchisor occurred in the state.

Franchisee plaintiffs, which were Oregon residents, had purchased a franchise from a junk removal franchisor, a Delaware corporation headquartered in Vancouver, British Columbia, Canada. The franchise agreement granted plaintiffs a defined area in southern Oregon in which to operate their franchise. All negotiations and meetings between the parties had occurred over the phone, via e-mail, and in person at the franchisor’s Canadian headquarters.

Shortly after signing the franchise agreement, plaintiffs sued the franchisor alleging that it should have known of exclusive agreements in plaintiffs’ territory preventing them from operating in portions of their territory. The parties agreed to settle the dispute, with plaintiffs agreeing, among other things, to release the franchisor from all claims in return for termination of the franchise agreement. Plaintiffs negotiated the settlement themselves and apparently were not represented by counsel.

Plaintiffs later filed a cause of action against the franchisor for alleged breach of contract and violations of the WFIPA and the Consumer Protection Act. In its answer, the franchisor asserted that plaintiffs’ claims had been released by the parties’ settlement and that the WFIPA’s provisions did not apply to the instant dispute. According to plaintiffs, however, their claims were not barred by the settlement agreement under the WFIPA’s antiwaiver provision, which invalidated any release of WFIPA claims unless a franchisee is represented by counsel when the release is negotiated.

The court held that plaintiffs could not avail themselves of the WFIPA’s protections merely by virtue of the choice of law provision. Where a state law contains a specific territorial limitation, that limitation applies even if the parties contractually agree that the law of the state applies, the court held. Examining the WFIPA’s plain language, the court noted that the act’s scope was limited to franchise-related conduct occurring “in this state.” Under the WFIPA, an offer to sell or the sale or purchase of a franchise occurs “in this state” when (i) an offer is accepted or directed to a person in Washington; (ii) an offer originates from Washington and violates the laws of the state in which the offer is received; (iii) the offeree or purchaser is a

resident of Washington; or (iv) the franchise business offered or sold is to be operated, at least partly, in Washington. The act’s legislative history also reflected that the legislature intended to limit the WFIPA’s application. Accordingly, the WFIPA contains an express geographical limitation to its application, the court found. Because no evidence had been presented to show that any aspect of the parties’ relationship was directed at or occurred in Washington, plaintiffs could not avail themselves of the WFIPA’s antiwaiver protections.

CLASS ACTIONS

***Martrano v. Quizno’s Franchise Co., LLC, No. 08-0932, 2009 WL 1704469, Bus. Franchise Guide (CCH) ¶ 14,161 (W.D. Pa. June 15, 2009)*¹**

A group of franchisees filed a putative, statewide class action asserting Racketeer Influenced and Corrupt Organizations Act (RICO), antitrust, fraud, and other state law claims. The franchisees alleged that the franchisor fraudulently induced them to buy franchises through misrepresentations about the franchise relationship, prospects for success, and the sourcing and pricing of required products and services. The franchisor moved to dismiss on several grounds.

The court dismissed the franchisees’ antitrust claims, rejecting their brand-specific market definition. The franchisees also had alleged claims based on Pennsylvania criminal code violations, but the court dismissed those claims, holding that the code does not provide a private right of action. The court denied the balance of the franchisor’s motion, however, that sought dismissal of the franchisees’ claims under RICO and for fraud, breach of contract, negligent misrepresentation, and breach of the covenant of good faith and fair dealing.

With respect to the RICO claims, the court held that the franchisees had pleaded specific misrepresentations allegedly contained in the offering circular and that neither the franchise agreement nor the Disclosure Acknowledgement Statement signed by each franchisee waived reliance on them. The representation in the offering circular that defendants would negotiate terms of vendor arrangements “for the benefit of” franchisees could be understood to mean that such arrangements are negotiated for the exclusive benefit of franchisees, the court held.

With respect to the fraudulent inducement and negligent misrepresentation claims, the court similarly held that exculpatory clauses may be “unenforceable on public policy grounds where the alleged harm is caused intentionally or recklessly.” The franchisees “sufficiently [had] alleged circumstances giving rise to a duty to disclose,” and Pennsylvania’s “gist of the action” did not bar the franchisees’ tort claims, the court held.

The franchisor also had requested to sever the claims, pointing to a term in the franchise agreement that barred franchisees from participating in a class action or consolidated proceeding. But parties, by private agreement, may not displace federal procedural rules designed for the efficient functioning of the judiciary, the court ruled. As a matter of federal law, the court stated, the applicable standard “is furtherance of efficient judicial administration, which leaves no room for enforceability of private agreements among litigants.” Consequently, class action

waivers “are ineffective to override the court’s discretion to certify a class” or consolidate claims, the court held. In so ruling, the court expressly rejected the recent decision in *Bonanno v. Quizno’s Master, LLC*, 2008 U.S. Dist. LEXIS 21678 (D. Colo. Mar. 5, 2008), where the U.S. District Court for the District of Colorado found the identical provision enforceable and denied class certification on that basis.

CONSTITUTIONAL CLAIMS

***Scott’s of Keene, Inc. v. Piaggio USA, Inc.*, No. 09-cv-122-SM, 2009 WL 2015839, Bus. Franchise Guide (CCH) ¶ 14,192 (D.N.H. July 6, 2009)**

This case is discussed under the topic heading “Jurisdiction.”

CONTRACT ISSUES

***Citgo Petroleum Corp. v. Ranger Enters., Inc.*, 632 F. Supp. 2d 878, Bus. Franchise Guide (CCH) ¶ 14,180 (W.D. Wis. June 19, 2009)**

Plaintiff petroleum marketer (Citgo) obtained summary judgment against defendant dealer (Ranger) for breach of franchise and branding agreements based on Ranger’s failure to buy minimum amounts of fuel and violation of the branding agreements.

Under the franchise agreement, Citgo agreed to sell and deliver, and Ranger agreed to buy, specified quantities of products. In 2005, Hurricanes Katrina and Rita caused substantial shortages of Citgo’s supply of gasoline products; and, as a result, Citgo allocated gasoline products among its franchisees. In December 2005, the parties entered into an amendment to the franchise agreement, reducing the required monthly fuel volumes.

Under the branding agreements, Citgo agreed to pay the initial cost of branding a gas station and to provide Ranger quarterly rebates on gasoline in exchange for an agreement to keep a gas station branded for a certain number of years. The branding agreements provided that if Ranger debranded before the end of the commitment period, Citgo was entitled to receive reimbursement of certain amounts paid to Ranger.

The court, applying Oklahoma law, granted summary judgment on Citgo’s claim that Ranger breached the franchise agreement by failing to purchase the required minimum fuel, even though Ranger had argued that Citgo’s failure to supply fuel during 2005 constituted a material breach because it undermined Citgo’s reliability as a fuel supplier. Ranger presented insufficient facts for a reasonable jury to conclude that Citgo committed a material breach prior to the 2005 amendment, the court determined, and Citgo had a contractual right to allocate products if it was unable to meet supply requirements due to an industry shortage. As a result, Ranger “was not entitled to use . . . past breaches as a basis for its non-performance unless [Citgo] failed to provide adequate fuel supply after the 2005 amendment.”

The court also granted summary judgment on Citgo’s claim that Ranger breached the parties’ branding agreements. The court was not persuaded by Ranger’s argument that, among other things, the branding agreements were not effective because Citgo had breached the franchise agreement. Ranger asserted a defense of impossibility of performance, but the court rejected it.

Ranger had not submitted any evidence that “it could no longer purchase gas from [Citgo] and maintain its branding.” The court also rejected Ranger’s frustration of purpose defense. The nonperformance of a party under one contract (in this case, the franchise agreement) did not excuse the nonperformance of the other party under a separate agreement, the court reasoned. Further, because Ranger could not show that the Citgo breaches were material, the purpose of neither the franchise agreement nor the branding contracts had been frustrated.

Ranger also had argued that Citgo was not entitled to damages on the branding agreement claim because the parties’ contractual liquidated damages clause was a penalty and void. The liquidated damages clause required repayment of the unearned portions of advances in the form of allowances and branding materials. The court determined, however, that the clause was not a penalty but simply a means of reimbursing Citgo for the capital it expended in branding Ranger’s gas stations. The court therefore awarded Citgo liquidated damages.

The court also addressed Ranger’s counterclaim alleging that Citgo had failed to deliver agreed-upon quantities of fuel in 2005. Citgo had argued that Ranger waived any such breach of contract claim for early 2005 when it entered into the amendment in December 2005, but the court denied Citgo’s motion for summary judgment on the counterclaim. The court, however, held that Ranger’s counterclaim for damages for debranding and rebranding, lost profits, lost opportunity costs, and lost growth based on Citgo’s failure to supply the required gasoline allotments pursuant to the franchise agreement during 2005 were not well founded. The requested damages were not a foreseeable consequence of Citgo’s failure to supply gasoline, the court found.

***Haynes Trane Serv. Agency, Inc. v. Am. Standard, Inc.*, 573 F.3d 947, Bus. Franchise Guide (CCH) ¶ 14,174 (10th Cir. 2009)**

Following trial, a U.S. appeals court in Denver held that a heating and air-conditioning business franchisee failed to demonstrate that the franchisor was required to have good cause before it terminated the parties’ franchise agreement. The franchise agreement contemplated that the parties could terminate without cause.

Defendant Trane had discovered that its franchisee, Haynes, had been abusing a rebate program. After conducting an audit of Haynes, Trane discovered that Haynes had collected undeserved rebates. Trane also discovered that Haynes “had attempted to conceal [the] discrepancies [in its records] by altering and recreating invoices.” In response, Trane terminated the franchise agreement with Haynes.

Haynes sued, arguing that the franchise agreement had been modified by Trane’s statements and conduct into a contract that could not be terminated without good cause. As support, Haynes noted that he had never heard of Trane terminating a franchise without cause: Trane always had “‘emphasized a cause’” when discussing terminations, and a Trane official had “‘testified that every franchise termination of which he [had been] aware had been [terminated] ‘with cause.’”

Despite this evidence, the appeals court held that under Wisconsin law, Haynes had failed to show that Trane acted in a way that was unequivocally inconsistent with enforcing the

franchise agreement as written. Trane's "prior failure to exercise a contractual right [was] not unequivocally inconsistent with enforcing that right," the court noted. "At best, the evidence . . . showed that Trane had consistently provided cause when terminating franchises in the past." That "pattern of terminating with cause [was] not unequivocally inconsistent with [the] retention of the power to terminate," according to the court.

Haynes also argued that a prior ruling by the same appeals court mandated that Haynes' contract modification claim go to the jury. In the appeals court's prior ruling on the parties' first trial, the court had ruled that the trial court had erred in granting judgment as a matter of law on the same modification claim. A judicial determination was not the law of the case in later proceedings involving substantially different evidence, however, the court now held. The first trial had included evidence that showed a "stated policy" and "pattern of terminating for cause," according to the court. The absence of this evidence in the second trial prevented the court from applying the law of the case doctrine to the modification claim, the court ruled.

Even if the franchise agreement had not been modified, Trane should have been equitably estopped from denying a good cause requirement for termination, Haynes argued. The jury had found that Haynes had established the elements of that claim. The district court had refused to find equitable estoppel, however; Haynes was barred from equitable relief through his own misconduct. Haynes had not notified Trane about Haynes' employees retyping invoices in advance of Trane's audit. That ruling was not an abuse of discretion, the appeals court found. Because "Haynes sought an equitable decree that he was entitled to . . . his franchise," "[h]is fitness as a franchisee [was] directly related to the relief he sought," the appeals court reasoned. According to the court, "[b]y failing to inform Trane that [Haynes'] employees had been retyping invoices. . . . Haynes [had] demonstrated [its] untrustworthiness as a franchisee."

***Ingraham v. Planet Beach Franchising Corp.*, No. 07-3555, 2009 WL 909567, Bus. Franchise Guide (CCH) ¶ 14,159 (E.D. La. Apr. 1, 2009)**

Plaintiffs/franchisees sued their franchisor alleging breach of a franchise agreement after the franchisor entered into a contract with another franchisee to open a competing franchise approximately five miles from plaintiffs' location. The parties' franchise agreement prohibited the franchisor from establishing or locating another Planet Beach franchise within the protected territory, which was defined as "Philadelphia, PA 30,000 in Population."

Previously, plaintiffs successfully had moved for partial summary judgment that the definition of *territory* in the agreement was ambiguous. The franchisor now moved for summary judgment on four separate issues. As a preliminary matter, the franchisor argued that the Uniform Franchise Offering Circular (UFOC) must be read in conjunction with the franchise agreement, but the court rejected that argument. The parties had not expressly incorporated the UFOC into the agreement, the court found. Thus, the court relied only on the franchise agreement in making its ruling.

First, with respect to the franchisor's argument that the franchise agreement prohibited the franchisor from "overlapping"

(locating a second franchise within the prescribed territory) but provided no other territorial rights to the franchisee, the court found that the language of the agreement was ambiguous and denied summary judgment on that issue. The contract was ambiguous as to whether it merely guaranteed a "geographic buffer" between franchisees and specifically allowed for cross-marketing by competing franchisees in each other's territories, according to the court.

Second, the court denied the franchisor summary judgment on plaintiffs' detrimental reliance claim, which the franchisor argued was prohibited by the integration clause of the franchise agreement. Because the court found the definition of *territory* to be ambiguous, the franchisor's motion was premature. In addition, because parol evidence is admissible to illuminate the parties' intent when a contract term is ambiguous, it was not unreasonable for plaintiffs to have relied on the oral representations to assist in their understanding of the contract, the court held.

Third, the court granted the franchisor's motion for summary judgment on plaintiffs' claim for breach of the implied covenant of good faith and fair dealing. There was no specific evidence of "ill will" on the part of the franchisor other than conclusory allegations of financial greed, the court ruled.

Fourth, the court granted the franchisor's motion for summary judgment with respect to plaintiffs' claims under the Louisiana Unfair Trade Practices Act (LUTPA) and the federal FTC Act, finding that plaintiffs lacked standing. Plaintiffs were not consumers or business competitors under the LUTPA, and private persons have no standing to enforce the federal FTC Act.

***Ingraham v. Planet Beach Franchising Corp.*, No. 07-3555, 2009 WL 1076713, Bus. Franchise Guide (CCH) ¶ 14,162 (E.D. La. Apr. 17, 2009)**

In a separate opinion in the same action, the court granted the franchisor's motion in limine to exclude testimony regarding consequential damages. In so ruling, the court upheld the damages waiver provision of the franchise agreement, which provided in relevant part that "[t]he parties waive to the fullest extent permitted by law, any right to or claim for any punitive, exemplary, incidental, indirect, special or consequential damages (including, within limitation, lost profits)."

The court rejected plaintiffs' argument that the contract term was ambiguous, finding that although the inclusion of "lost profits" in the waiver was confusing, it did not make the rest of the provision particularly confusing. The court also rejected plaintiffs' argument that the franchisor had to prove the waiver had been brought to plaintiffs' attention. The new owner's signature was at the bottom of the page, the waiver language was highlighted as a separate provision, and individual plaintiff was a sophisticated businesswoman, the court noted. Accordingly, the court found that the waiver language was valid and applied to plaintiffs' damages claim in the case.

***DaimlerChrysler Fin. Servs. Ams., LLC v. Woodbridge Dodge, Inc.*, No. 06-5225 (SRC), 2009 WL 2152083, Bus. Franchise Guide (CCH) ¶ 14,182 (D.N.J. July 14, 2009) (unpublished)** DaimlerChrysler Financial filed suit in federal court on October 31, 2006, asserting various claims for breach of contract

and for replevin of the collateral securing the obligations of Woodbridge Dodge, Inc. (WDI) and Woodbridge Lincoln Mercury, Inc. (WLMI) under a Master Loan Security Agreement (MLSA), and a Recapitalization and Loss Replacement Agreement (Recapitalization Agreement) between the parties. Pursuant to the MLSA, "DaimlerChrysler Financial provided secured wholesale inventory floor plan financing to WDI and WLMI, two motor vehicle dealerships owned by" Dennis F. Adams Jr., who guaranteed those agreements together with his spouse.

Defendants contended

that the actions of DaimlerChrysler Financial rendered the dealerships' compliance with the terms of the MLSA and Recapitalization Agreements impossible. According to Defendants' version of the facts, they were induced to take the capital loans, execute personal guaranties, sign general releases and enter into the Recapitalization Agreement and its Modification by DaimlerChrysler Financial's promises.

Those promises were

to provide WDI new car inventory and a revolving used car line, the sales of which would allow WDI to raise cash and working capital and thereby enable Defendants to meet their financial obligations. However, Defendants maintain[ed], DaimlerChrysler Financial reneged on these promises despite knowing that the inventory was crucial to Defendants' profitability and business operations, on which their ability to perform under the contracts hinged.

Defendants "also argue[d] that the conditions placed by DaimlerChrysler Financial on the financing and its generally unfair dealing with Defendants caused the dealerships' operational losses and undercapitalization." That "precipitat[ed] default under the agreements and ultimately, following termination of the credit facilities, [drove] the dealerships out of business."

Defendants challenged the validity of the contracts and filed counterclaims under the New Jersey Consumer Fraud Act (CFA) and the New Jersey Franchise Practices Act (NJFPA) and for unlawful interference with prospective economic advantage, breach of implied covenant of good faith and fair dealing, and fraudulent misrepresentation. DaimlerChrysler Financial moved for summary judgment on the NJFPA and CFA claims in their entirety. It also moved for partial summary judgment on the common law counterclaims as barred in part by general releases. DaimlerChrysler Financial also sought "to strike Defendants' jury demand as waived by various contracts between the parties." Because defendants conceded that they might not obtain relief under the CFA, the court granted summary judgment to DaimlerChrysler Financial on that counterclaim.

With respect to the NJFPA claim, "DaimlerChrysler Financial argue[d] that it [was] beyond question, simply not a 'franchisor' as defined by the Act, and therefore [the] action [fell] outside the [NJFPA]'s purview." The court agreed and granted summary judgment to DaimlerChrysler Financial on that claim. "The evidence support[ed] DaimlerChrysler Financial's position" that it was "a non-bank lending institution [that] provid[ed]

wholesale floorplan and related financing to car dealerships," the court found. "Nowhere in the record [was] there any evidence," according to the court, "that DaimlerChrysler Financial [had] a franchise agreement with either WDI or WLMI."

The court also granted partial summary judgment to DaimlerChrysler Financial on defendants' common law counterclaims "to the extent they [were] based on acts, facts or events occurring on or prior to November 18, 2004." On that date, defendants had executed general releases. Those releases "expressly released all 'known and unknown' claims against DaimlerChrysler Financial which [Defendants] 'ever had, now have or hereafter can, shall or may have, for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of the date of this Release.'"

Finally, the court upheld the jury waiver provision. "Defendants were represented by counsel at all relevant times, including in connection with their entry into the contracts containing the waiver provisions," the court noted. Additionally, "there was no gross disparity in bargaining power"; the "parties were sophisticated business entities"; and "the waiver provision in the [agreements] [was] conspicuous" and "in bold print, with the provision title of 'Jury Waiver' appearing in all caps in a font larger than the surrounding text." The court rejected defendants' argument for not enforcing the waiver, finding that the NJFPA provision prohibiting "a motor vehicle franchisor from requiring [its] franchisee 'to waive trial by jury in actions involving the motor vehicle franchisor'" was inapposite; "[t]he motor vehicle franchisor [was] neither a party to the contracts at issue nor to [the] action."

McLaughlin v. Krystal Co., No. 08-0611-CG-C, 2009 WL 2514210, Bus. Franchise Guide (CCH) ¶ 14,207 (S.D. Ala. Aug. 14, 2009)

Defendant/licensor did not renew plaintiffs' Non-Traditional Location License Agreement for the operation of a Krystal restaurant in Alabama, leading to the parties' dispute. The five-year agreement, which was governed by Tennessee law, was "non-traditional" because plaintiffs' restaurant was inside a convenience store and was not freestanding. Defendant granted the nontraditional license to plaintiffs even though the agreement expressly noted that the licensor "traditionally and as a matter of clear priority prefers to grant franchises to qualified persons to own and operate KRYSTAL or KRYSTAL KWIK restaurants as free-standing restaurant units."

In the suit, plaintiffs claimed that the licensor "breached the contract by placing 'extra-contractual conditions' on their renewal right" by "requir[ing] them to relocate and build a freestanding restaurant." In response, the licensor asserted that it did not require plaintiffs to construct such a restaurant: it merely gave them the option either to relocate or remodel their existing restaurant.

Although plaintiffs asserted that the licensor had put pressure on them to relocate, the court noted that they did not assert that such pressure amounted to "undue pressure" or duress as defined by the Tennessee courts. Because "plaintiffs never complied with all of the required contingencies for renewal of their existing location" ("they did not enclose the dining room area"), "were unable to find a suitable property to [buy] for relocation[.]

and ultimately let their extended contract with [the licensor] expire without complying with the renewal requirements,” the court found that there was “no evidence [the licensor] breached any terms or requirements of the license agreement.” The court granted summary judgment for the licensor.

Meineke Car Care Ctrs., Inc. v. RLB Holdings, LLC, No. 3:08-cv240-RJC, 2009 WL 2461953, Bus. Franchise Guide (CCH) ¶ 14,212 (W.D.N.C. Aug. 7, 2009)

Meineke Car Care Centers, Inc. (Meineke) and its former franchisees and guarantors thereof became embroiled in a dispute that arose from Franchise and Trademark Agreements (FTAs) between defendants and Meineke for the operation of four franchised automotive repair shops. After terminating the FTAs, Meineke filed suit against defendants for breach of contract, seeking “amounts [allegedly] owed by [d]efendants for unpaid royalties, advertising contributions, and merchandise account debt at the time of termination and . . . lost future franchise fees and advertising contributions.” Defendants filed counterclaims for breach of contract and breach of the duty of good faith and fair dealing. The matter came before the court on cross-motions for summary judgment.

With respect to Meineke’s claim for loss of prospective fees,

Meineke allege[d] that [d]efendants’ breaches and defaults . . . directly and proximately caused Meineke to lose future royalties and advertising contributions [that] it would have received during the remaining terms of the FTA[s]. . . . Meineke contend[ed] that once a franchise is terminated, it takes Meineke approximately three years to re-franchise the terminated franchisee’s market area and/or business performance.

It also asserted that it was entitled to payments for the future franchise fees and advertising contributions under the FTAs and guarantees that defendants would have paid but for defendants’ breach.

Defendants in turn sought summary judgment on Meineke’s loss of prospective fees claim. They argued that “(1) Meineke’s FTA[s] [did] not provide for the recovery of prospective profits or royalties; (2) Meineke [could not] and ha[d] not proved that future royalties and profits would have been realized; (3) Meineke’s decision to terminate [d]efendants’ FTAs,” not any alleged breach by defendants, “[had] proximately caused the damages sought by Meineke; and (4) Meineke [had] failed to mitigate its alleged damages.”

In the court’s words, “[d]efendants have the better argument.” The court chastised Meineke for its failure “to bring to the court’s attention [that] it had twice unsuccessfully asserted its prospective damages claim in the district,” citing *Meineke Car Care Centers, Inc. v. L.A.D. 1603*, No. 3:08cv73, 2008 U.S. Dist. LEXIS 33566, at *3, 2008 WL 1840779 (W.D.N.C. Apr. 23, 2008) (“in default judgment context, [the court] rejected lost profits theory [because] ‘[a]ny percentage of zero is zero’”), and *Meineke Car Care Centers, Inc. v. Duvall*, No. 3:06cv180, 2007 U.S. Dist. LEXIS 27120, at *1–2, 2007 WL 1100841 (W.D.N.C. Apr. 12, 2007) (“[a]gainst *pro se* plaintiff, [the court] found a ‘gaping hole’ in Meineke’s proof of

prospective damages”). This court found that “Meineke’s argument is a swing and a miss, strike three.”

Under North Carolina law, the franchisee was not required to pay prospective royalty and advertising fund fees after Meineke terminated the FTAs. The provision requiring the payment of royalties and advertising fund fees was “not prospective in nature and does not require [the d]efendants to pay royalties or advertising fund fees due in the future,” and did not expressly or by its nature survive the termination of the FTAs, the court ruled.

Meineke’s “termination of the FTAs . . . terminated the [d]efendants’ ability to generate royalties and fees, irrespective of whether [d]efendants had breached before Meineke terminated. Meineke had the sole right to terminate under the FTA. Once it did, the contract provided no right to future damages,” the court found. “[Because] franchisees’ contributions were based on their revenues, the termination of the franchise agreement cut off the [d]efendants’ ability to generate revenues. Thus, there were no revenues to generate liability for royalty fees or advertising fund fees,” in the court’s view. The court granted summary judgment in favor of defendants on Meineke’s lost prospective fees claim.

Similarly, the court granted summary judgment to defendants on Meineke’s lost profits claim. “[I]t [was] not reasonably certain that [lost] profits would have been [recognized] but for the breach,” the court found. “Although Meineke had set forth a formula for computing such lost profits, it [did] not [meet] its burden of proof that [d]efendants’ business would have been profitable” because “[d]efendants’ shops struggled to keep business going,” the court wrote. Meineke also did not prove “that such profits would have been realized, but for the breach.”

Next, the court found that Meineke’s claimed lost profits could not be determined and ascertained with reasonable certainty. The court therefore rejected what it termed Meineke’s “generic calculation for lost profits based on the CFO’s claim that it usually takes three years to re-franchise a location.”

The court also held that “[f]uture damages were not reasonably within the contemplation of the parties at the time [that] the contracts were entered into. If they had been, Meineke would have contractually provided for them,” the court noted. “Meineke argue[d] that failing to award lost profits result[ed] in the franchisee receiving its bargained-for benefits yet leaving Meineke without any benefits from the agreement.” That, Meineke asserted, “convert[ed] the contract into something different,” a contract “terminable at will . . . by [d]efendants that provid[ed] no recourse for Meineke.” The court rejected this argument. The court quoted the contract as providing that “[t]he language of this Agreement will be construed according to its fair meaning and not strictly against or for any party,” and it held that it “would be unjust to construe the FTAs as permitting future damages when the words don’t provide for them.”

Meineke’s claim for lost profits also was barred by Meineke’s failure to mitigate its damages, the court held. Meineke sought “damages for three years of prospective losses even though it might [have] re-franchise[d] the business within a shorter time period,” according to the court. Further, “Meineke admit[ted] that it typically [did] not try to re-franchise a shop once it ha[d] closed, and there [was] no evidence that Meineke attempted to mitigate its damages under the FTAs by re-franchising.”

Meineke was entitled to summary judgment on its claims for past due fees, however. “The parties had a valid contract[,] . . . [d]efendants breached the contract by prematurely closing the [s]hops,” and the FTAs provided for payment of all outstanding fees immediately upon termination, the court reasoned. The court also granted summary judgment to Meineke on defendants’ counterclaims for breach of contract and breach of the duty of good faith and fair dealing.

***Bucciarelli v. Nationwide Mut. Ins. Co.*, No. 08-cv-14349, 2009 WL 2766712, Bus. Franchise Guide (CCH) ¶ 14,200 (E.D. Mich. Aug. 26, 2009)**

This case is discussed under the topic heading “Fraud.”

***Gulf Distribution, Ltd. v. GAP Int’l Sales, Inc.*, No. 08-15266 D.C., CV-06-02584-CRB, 2009 WL 2585678, Bus. Franchise Guide (CCH) ¶ 14,204 (9th Cir. Aug. 24, 2009) (unpublished)**

This case is discussed under the topic heading “Statutory Claims.”

DAMAGES

***Citgo Petroleum Corp. v. Ranger Enters., Inc.*, 632 F. Supp. 2d 878, Bus. Franchise Guide (CCH) ¶ 14,180 (W.D. June 19, Wis. 2009)**

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

***Haynes Trane Serv. Agency, Inc. v. Am. Standard, Inc.*, 573 F.3d 947, Bus. Franchise Guide (CCH) ¶ 14,174 (10th Cir. 2009)**

This case is discussed under the topic headings “Contract Issues” and “Fraud.”

***Ingraham v. Planet Beach Franchising Corp.*, No. 07-3555, 2009 WL 1076713, Bus. Franchise Guide (CCH) ¶ 14,162 (E.D. La. Apr. 17, 2009)**

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

DISCRIMINATION

***EEOC v. Papin Enters., Inc.*, No. 6:07-cv-1548-Orl-28GJK, 2009 WL 2256023, Bus. Franchise Guide (CCH) ¶ 14,188 (M.D. Fla. July 28, 2009)**

The Equal Employment Opportunity Commission (EEOC) filed suit against a sandwich franchisor and two of its franchisees. EEOC alleged that defendants discriminated against an employee because it did not accommodate her practice of wearing a nose ring, which the employee said she did for religious reasons. EEOC sought injunctive relief, compensatory damages, and punitive damages.

At trial, the jury found that the employee did not wear her nose ring out of a sincerely held religious belief. EEOC nevertheless contended that it was entitled to injunctive relief and punitive damages because of the franchisor’s practice of deciding whether or not to grant waivers of its uniform requirements for religious reasons. According to EEOC, those practices were unlawful because the franchisor required franchise employees to provide substantiation for their assertions that a particular

modification to the uniform standards was required by their religion, and this alone violated Title VII.

The court held, however, that EEOC was not entitled to any relief because the allegations in the complaint focused solely on defendants’ treatment of the employee, not on the franchisor’s broader practices. EEOC had not shown that the franchisor’s practices had caused anyone to be denied a faith-based accommodation to which he was entitled under Title VII. The court also noted that the franchisor no longer asked for supporting documentation from employees who desired a modification of the uniform requirements for religious reasons, and that practice had not risen to the level of malice or reckless indifference to federal rights.

The court rejected all claims for damages. EEOC had only pleaded punitive damages with regard to the employee, not for its own benefit. Because the jury determined that the franchisor had not discriminated against the employee, there was no basis for an award of damages to her.

***Sandra Reese v. Dunkin’ Brands, Inc.*, No. 08-1179-JDB, 2009 WL 1884010, Bus. Franchise Guide (CCH) ¶ 14,190 (W.D. Tenn. June 26, 2009)**

Plaintiff, a former employee of a donut franchised outlet and a pro se litigant, filed suit against the franchisor under Title VII of the Civil Rights Act of 1964 alleging sexual harassment, discrimination, and wrongful termination. The franchisor moved to dismiss the complaint asserting that the franchisor was not plaintiff’s employer and could not be liable for employment-related acts. The court construed the franchisor’s motion as one for summary judgment.

Plaintiff had not claimed that the franchisor was her employer, and she had not provided any evidence requiring the court to impose liability on the franchisor for conduct by one of its franchisees. Lacking a responsive brief from plaintiff, the court relied heavily on an affidavit from the franchisor. The affidavit attested that each franchised shop was independently owned and operated by individual franchisees and that the franchisor had “no control over any aspect of ‘hiring, firing, scheduling, supervising, paying, and otherwise directing or dealing with employees in the performance of their job duties.’” Accordingly, the court granted the franchisor’s motion for summary judgment.

FORUM SELECTION CLAUSES

***Fog Motorsports #3, Inc. v. Arctic Cat Sales, Inc.*, No. 2008-930, 2009 WL 2568289, Bus. Franchise Guide (CCH) ¶ 14,201 (N.H. Sup. Ct. Aug. 21, 2009)**

Dealer Fog Motorsports #3 brought an action against manufacturer Arctic Cat Sales, Inc. for violation of the New Hampshire Dealership Act. The manufacturer moved to dismiss, contending that the dealer was “required to litigate its claims in Minnesota pursuant to [a] forum selection clause” contained within the agreement between the parties.

A court may not enforce a forum selection clause when it is required by statute to entertain the action, the appellate court concluded, even though written forum selection clauses providing that actions would be brought in another state typically were enforceable. The court therefore overturned the trial

court's decision and held that the New Hampshire Dealership Act required that a New Hampshire court entertain the action. The court remanded a choice of law issue to the trial court.

FRAUD

Haynes Trane Serv. Agency, Inc. v. Am. Standard, Inc., 573 F.3d 947, Bus. Franchise Guide (CCH) ¶ 14,174 (10th Cir. 2009)

Haynes operated a Trane heating and air-conditioning franchise. A dispute arose between the parties when Trane discovered that Haynes had been abusing a Trane rebate program. The rebate program provided that if a franchisee "risked being underbid by its competition, it could request a lowered price quote from Trane" and, if granted, "sell the product at the reduced price and 'claim back' . . . a portion of the reduction from Trane." After an audit, Trane discovered that Haynes had collected undeserved claimbacks and "attempted to conceal [the] discrepancies [in its records] by altering and recreating invoices." Trane terminated the franchise agreement.

Haynes sued for breach of contract, and Trane counterclaimed, alleging fraud for abuse of the rebate program. "Trane alleged that [Haynes] knowingly had submitted false claimbacks and schemed to cover up those erroneous submissions by creating phony invoices." At trial, the jury "entered a special verdict that [Haynes] had 'followed a pattern or practice of fraudulent conduct in submitting claims for payment under the [rebate] program.'"

Haynes appealed, contending "that Trane's fraud counterclaim [was] barred by Colorado's economic-loss rule." Haynes argued that the same duty alleged by Trane under tort law was "memorialized" in the parties' contract, "which required [Haynes] to submit accurate claimbacks and granted Trane a right to recover any amount 'improperly claimed.'"

Colorado's economic loss rule requires that a tort duty must arise from a source other than the relevant contract and must not be a duty imposed by contract, the appeals court noted. Trane's fraud claim was not barred by the economic loss rule, the court ruled, because the alleged tort duty was not duplicated in the parties' contract. "Trane's claimback policy [was] not contained in a contract between Trane and [Haynes] but solely in the 'Sales Plan[s]' that Trane provided to its [franchisees] to describe Trane's practices regarding claimbacks," the court noted. The appeals court further observed that although Trane had earlier alleged the existence of a contract regarding the claimback policy, the district court had expressed doubt and had granted judgment against Trane on its contract claim.

The appeals court also found that "the district court erred in appointing a special master to calculate Trane's [fraud] damages." The district court had determined that having a jury calculate damages would be an inadequate legal remedy because that process would require a jury to go through the claimbacks to determine damages and would prolong the trial unduly. The appeals court disagreed. There was no support for the view that a prolonged trial alone provides an inadequate remedy at law, the appeals court found. In deeming a remedy inadequate, courts must "consider whether [there are] techniques available [that can] assist a jury in . . . [its] difficult task[]." In this case, the appeals court found that summaries of the claimbacks could

be "used to shorten the proceedings and relieve the jury from . . . reviewing each . . . claimback." Thus, the district court should not have appointed a special master.

The appeals court further ruled that the "entire fraud claim, and not simply the question of [the amount of] damages, [needed to] be retried." Because Haynes had made distinct arguments as to why each claimback was not fraudulent, the jury needed to resolve the specifics of liability for each claimback, the court reasoned. Because the jury had not fixed the exact scope of Haynes' liability, the entire fraud claim needed to be retried, according to the court of appeals.

Sherman v. Ben & Jerry's Franchising, No. 1:08-CV-207, 2009 WL 2462539, Bus. Franchise Guide (CCH) ¶ 14,198 (D. Vt. Aug. 10, 2009)

Plaintiffs, former owners/franchisees of a Ben & Jerry's store in Virginia, filed suit against their ice cream franchisor. Plaintiffs alleged "that [d]efendants fraudulently [had] induced them to enter into a . . . franchise agreement by misrepresenting key information." They also claimed that the franchisor "drove the[ir] [franchised] shop to economic failure by refusing to provide ongoing assistance, siphoning customers away by distributing products through local restaurants and alienating customers with politically divisive marketing campaigns." Defendants moved to dismiss the complaint.

The federal district court first dismissed the fraudulent inducement count. "Plaintiffs explicitly [had] disclaimed reliance on any representation outside the [franchise agreement] by agreeing" that the franchise agreement, its attachments, and documents referenced in the agreement "constitute the entire Agreement . . . concerning the subject matter hereof, and supersede any prior agreements, no other representations having induced [franchisee] to execute this Agreement." The court noted that although "general disclaimers and merger clauses do not necessarily bar fraudulent inducement claims under Vermont law[,] . . . [t]he parties' agreement in this case . . . contained more than just a vague or general merger clause": Item 19 of the offering circular and the franchise agreement "also included specific, clearly stated warnings and disclaimers relating to [p]laintiffs' expected profits." "Where a seller expressly disclaims any express or implied warranty concerning specific representations, and a buyer expressly acknowledges the disclaimer and the need to conduct an independent investigation, that party may not sue on a claim she was defrauded into entering the contract in reliance on those very representations," the court ruled.

Next, the court dismissed plaintiffs' fraudulent nondisclosure claims. Plaintiffs claimed that the franchisor "fraudulently [had] withheld information" from Item 19 of the offering circular and from its extranet. According to plaintiffs, this resulted in their having "realized reduced sales and revenue relative to their expectations, reasonably formed based on data provided by Ben & Jerry's." The disclaimers and warnings in the offering circular plainly "triggered a duty to investigate," the court held, so "[p]laintiffs' reliance was not justified." The court dismissed plaintiffs' fraud, negligent misrepresentation, and estoppel claims premised on Item 19 for the same reason.

The court dismissed some but not all of plaintiffs' breach of

contract claims and dismissed each of plaintiffs' statutory claims. Plaintiffs did not have a direct right of action under the Virginia Retail Franchising Act § 13.1-563; plaintiffs' legal conclusions that the franchisor violated the Virginia Disclosure Registration Act (without stating "what right [they] were allegedly induced to surrender or how [d]efendants influenced them to surrender the right") did not state a claim under the Virginia Disclosure Registration Act; and plaintiffs, Virginia citizens, did not have standing to sue under the Vermont Consumer Fraud Act, the court ruled.

Bucciarelli v. Nationwide Mut. Ins. Co., No. 08-cv-14349, 2009 WL 2766712, Bus. Franchise Guide (CCH) ¶ 14,200 (E.D. Mich. Aug. 26, 2009)

A former insurance agent of defendant insurance company and his agency sued Nationwide Mutual Insurance Company (Nationwide) for fraud, violation of the Michigan Franchise Investment Law (MFIL), breach of contract, retaliation, and unjust enrichment. The agent alleged that Nationwide had engaged in improper practices, including pressuring the agent to take out loans for expansion. Nationwide moved for judgment on the pleadings as to the noncontract claims, and the agent moved to amend the complaint. After granting plaintiffs' motion to amend the complaint, the court considered Nationwide's motion for judgment on the pleadings as applied to the amended complaint.

The court denied the motion with respect to plaintiffs' claims of fraud in the inducement and intentional misrepresentation to the extent that the fraud claims were based on pro formas. Not enough information existed simply "to rule as a matter of law that the representations in the pro forma were solely related to future promises," the court held, "as opposed to representations about existing facts that were verifiable."

The court granted the motion as to the fraud claim, however, "to the extent [that] it [was] based on allegations . . . that [the agent] was fraudulently induced to take [action] by statements by unknown persons. . . . [S]uch allegations fail[ed] to identify who at Nationwide pressured him to take out loans and how he was pressured and therefore fail[ed] to satisfy" Federal Rule of Civil Procedure 9(b).

The court denied the motion as to plaintiffs' MFIL claim. The court reasoned that the parties' independent contractor arrangement met the "offering, selling or distributing goods or services" element of the MFIL franchise definition even though only the insurer, not the agent, could "sell" insurance. The agent could "offer" goods or services by soliciting orders for insurance coverage. The agent also alleged that he had paid a franchise fee in the form of purchases of office furniture and computers required by the insurer as a condition of entering into the agency contract. That allegation raised a factual issue about whether the purchases had been for a "bona fide wholesale price" that could not be decided on Nationwide's motion for judgment on the pleadings, the court ruled.

The court granted Nationwide's motion with respect to plaintiffs' unjust enrichment claim; plaintiffs did not dispute Nationwide's argument that they could not state a claim for unjust enrichment in view of the parties' express contract governing the same subject matter. The court also granted Nationwide's

motion for judgment on the pleadings on plaintiffs' claim for punitive damages. "[N]o Michigan authority authoriz[ed] punitive damages awards for fraud claims, MFIL claims, or unjust enrichment claims," the court held.

Kiddie Acad. Domestic Franchising LLC v. Faith Enters. DC, LLC, No. WDQ-07-705, 2009 WL 2169060, Bus. Franchise Guide (CCH) ¶ 14,185 (N.D. Md. July 17, 2009)

A child-care center franchisor sued defendant franchisee parties in federal court for breach of contract, alleging that the franchisees had failed to make required royalty payments. In response, the franchisees counterclaimed for fraudulent inducement and negligent misrepresentation relating to franchise pro formas prepared by the previous franchise owner. The franchisees had shown the pro formas to the franchisor before purchasing their franchise.

The franchisees' fraud claims centered on statements by one of the franchisor's officers that the pro formas "looked okay" to him and that the franchises were in the "mid to high teens" in profitability.

Addressing the franchisees' claim of fraudulent inducement, the court concluded that a reasonable jury could find that the franchisor had made a false representation when its chief development officer told the franchisees, before their purchase, that the pro formas "look okay to me" without challenging the accuracy of the pro formas. The franchisor contended that the statement was inadmissible hearsay. Relying on Federal Rule of Evidence 801(d)(2)(B), however, the court found that even though the pro formas were prepared by a nonparty, the statement was not hearsay because the franchisor accepted the documents when their employee reviewed them and pronounced that they "looked okay." The franchisor's statement that the centers generally had profits in the "mid to high teens" was inadmissible hearsay, however.

A reasonable jury could find that the franchisor had knowingly made or made with reckless indifference a false statement, the court held. The franchisor's officer had knowledge of the franchises; the franchisor had financial statements from the franchises that differed from the pro formas; and the franchisor had sufficient time to check the accuracy of the pro formas before responding to the franchisees.

Ultimately, however, the court granted the franchisor's motion for summary judgment on the fraudulent inducement counterclaim and breach of contract claim, concluding that the franchisees had failed to demonstrate reasonable reliance on the pro formas. The franchisees possessed documents that contradicted the conclusions of the pro formas and had acknowledged that they were aware of the discrepancy between the pro formas, the court noted. The court further rejected the franchisees' affirmative defense of fraudulent inducement under New York law, concluding that Maryland law governed the interpretation of franchise agreements.

Martrano v. Quizno's Franchise Co., LLC, No. 08-0932, 2009 WL 1704469, Bus. Franchise Guide (CCH) ¶ 14,161 (W.D. Pa. June 15, 2009)

This case is discussed under the topic heading "Class Actions."

GOOD FAITH AND FAIR DEALING

***Dunkin' Donuts Franchised Rests. LLC v. Grand Cent. Donuts, Inc.*, No. CV 2007-4027, 2009 WL 1750348, Bus. Franchise Guide (CCH) ¶ 14,169 (E.D.N.Y. June 19, 2009)**

The U.S. District Court for the Eastern District of New York granted in part and denied in part defendant donut shop franchisees' requests to compel discovery.

Plaintiff/franchisor brought suit to enforce its termination of defendants' franchise agreements and to assert breach of contract and trademark infringement claims. The franchisees counterclaimed, alleging breach of contract and breach of the implied covenant of good faith and fair dealing. They asserted that the franchisor relied on "manufactured reasons" for denying new store requests and had declared the franchisees in default to profit from the terminations.

In discovery, the court granted the franchisees' motion to compel the franchisor to provide documents relating to its "approval of store expansions where an existing franchisee was operating below a certain performance level." The court also compelled the franchisor to provide its policies and practices regarding franchise terminations. If the franchisor had exercised its right to terminate the franchise agreements in bad faith, then the franchisor may be liable for breach of the implied covenant of good faith and fair dealing even if there was no breach of the express terms of the contracts, the court held. The franchisees were entitled to discovery to support their claims that the franchisor "acted with improper ulterior motives" and that the sought information was largely relevant, the court ruled.

Certain of the franchisees' discovery requests were too broad as formulated, however, the court concluded. The court therefore limited the scope of particular requests to new stores opened by existing franchisees within a specified geographic area from the time that the franchisees' new store requests were denied until three years thereafter. The court also struck the franchisees' request for all documents that related to the franchisor's "refranchising budget" as vague and overbroad.

***Luso Fuel Inc. v. BP Prods. N. Am., Inc.*, No. 08-CV-3947, 2009 WL 1873583, Bus. Franchise Guide (CCH) ¶ 14,166 (D.N.J. June 29, 2009)**

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

***Ingraham v. Planet Beach Franchising Corp.*, No. 07-3555, 2009 WL 909567, Bus. Franchise Guide (CCH) ¶ 14,159 (E.D. La. Apr. 1, 2009)**

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

***DaimlerChrysler Fin. Servs. Ams., LLC v. Woodbridge Dodge, Inc.*, No. 06-5225 (SRC), 2009 WL 2152083, Bus. Franchise Guide (CCH) ¶ 14,182 (D.N.J. July 14, 2009) (unpublished)**

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

***Meineke Car Care Ctrs., Inc. v. RLB Holdings, LLC*, No. 3:08-cv240-RJC, 2009 WL 2461953, Bus. Franchise Guide (CCH) ¶ 14,212 (W.D.N.C. Aug. 7, 2009)**

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

INJUNCTIVE RELIEF

***TGI Friday's Inc. v. Great Nw. Rests., Inc.*, No. 3:09-CV-0083-D, 2009 WL 2568269, Bus. Franchise Guide (CCH) ¶ 14,202 (N.D. Tex. Aug. 20, 2009); 2009 WL 2576374, Bus. Franchise Guide (CCH) ¶ 14,203 (N.D. Tex. Aug. 20, 2009)**

The franchisor of the TGI Friday's (TGIF) mark brought a trademark infringement against its former franchisees, seeking a preliminary injunction against defendants' continued use of the franchisor's trademarks and service marks in connection with eleven restaurants in California, Oregon, and Washington. The eleven franchise agreements between TGIF and defendants were all "substantially similar," and they all "expressly provide[d] . . . that defendants must immediately cease use of [the franchised] marks upon termination of the agreements." The franchisor terminated the franchisees for failure to pay royalties. The franchisees conceded that they did not stop using the marks upon termination but instead continued to operate as TGI Friday's locations.

"Defendants argue[d] that [the franchisor] [was] responsible for their inability to pay [royalties] because [its] food distribution system . . . [was] discriminatory and cost-prohibitive to them." However, under applicable Texas law, "if a defendant believed that TGIF breached the contract, it had two options: continue to perform the contract and sue for partial breach, or cease performance and treat the contract as terminated. . . . A defendant could not cease performing its obligations under the franchise agreement—e.g., paying the franchise fees—while continuing to treat the agreement as valid and enjoying the benefits granted under the agreement—e.g., using TGIF's marks," the court found. Further, "any claims defendants may have [had] against [the franchisor], including breach of contract or breach of a duty of good faith and fair dealing, [had] no apparent effect on [the franchisor]'s right to terminate the agreements pursuant to their terms," the court held.

Defendants contended that their use of the franchised marks was not unauthorized because the franchisor continued, after termination, to assist with their operations, "inspect their restaurants, . . . send menus and other promotional materials, and . . . list the restaurant locations on its website." The court was not persuaded. Such actions do not indicate that the franchisor "waived its termination of the franchise agreements or consented to defendants' continued use of its marks," the court ruled. "Defendants' argument ha[d] been rejected by several [other] courts," the court noted. "[W]hen a terminated franchisee persists in passing itself off as a licensed franchise, it is natural for [a] franchisor to attempt to monitor the [terminated] franchisee," the court stated. A franchisor's decision to do so "should not intrude upon [its] right or entitlement to a preliminary injunction." Because the franchisor continuously had insisted that defendants stop using its marks, as they were obligated to do, defendants could not reasonably have believed that TGIF authorized or consented to such use. Accordingly, TGIF had a substantial likelihood of success on the merits of its claim that the use of its marks was unauthorized.

The franchisor also had established a substantial threat of irreparable injury, even without the presumption of irreparable injury that arises upon a finding of likelihood of confusion in a

trademark case. By virtue of “defendants’ continued passing off of their restaurants as TGIF franchises after termination,” the franchisor had “lost control over its valuable trademarks and the quality of the restaurants operating under its name,” the court found. “This lost control pos[ed] a substantial threat of injury to [the franchisor]’s reputation and . . . goodwill.” That injury was irreparable and could “not be remedied through monetary damages,” the court ruled.

In the court’s view, “[t]he magnitude of the threat[ened] [injury] [was] exacerbated” because defendants “continue[d] to operate ten restaurants” under the marks, and those restaurants had been the only TGI Friday’s locations in Washington, Oregon, and the Sacramento area of California. The franchisor “ha[d] therefore lost control of its trademarks, reputation, and customer goodwill in all of the Pacific Northwest and part of northern California,” the court noted.

Even assuming that the franchisor’s reputation was not at risk because defendants were meeting the franchise’s system standards, as defendants argued, that “[did] not negate the substantial threat” of injury to the franchisor, the court found. “Courts have held that a franchisor suffers a risk of injury to its reputation and the value of its marks even if the alleged infringer offers superior services,” according to the court.

Finally, even if no “‘presumption’ of irreparable harm” applied, both “case law and the reality of franchise arrangements demonstrate[d] that when a former franchisee continue[d] to pass itself off as a licensed franchise,” a franchisor usually faces “a substantial threat of irreparable harm,” the court noted. The court found that this case was no exception, and there was “a substantial threat that [the franchisor] [would] suffer irreparable injury” if a preliminary injunction was not issued.

The balance of hardships also favored the issuance of a preliminary injunction, in the court’s view, and the public interest supported injunctive relief. In granting the preliminary injunction, the court ordered the franchisor to post a \$100,000 bond, rejecting defendants’ request for a \$10 million bond. According to the court, “[t]he fairest measure for the security amount . . . [would be] the cost to defendants of removing [the franchised] marks from their restaurants and otherwise complying with [their] [contractual][,] post-termination requirements . . . , together with the legal fees and [litigation] expenses . . . that defendants [would] incur,” although the court admittedly had “no basis in the record . . . to calculate or even estimate [those] costs.”

***Bad Ass Coffee Co. of Haw., Inc. v. JH Nterprises, L.L.C.*, 636 F. Supp. 2d 1237, Bus. Franchise Guide (CCH) ¶ 14,193 (D. Utah 2009)**

A coffee shop franchisor sought a preliminary injunction against defendant former franchisee after defendant began operating a competing coffee shop immediately after the term of its franchise agreement ended. Granting the franchisor’s motion, the court held that the franchisor met all elements required to secure a preliminary injunction. Most important, in the court’s view, the franchisor was “substantially likely to prevail” on its claim that the franchisee violated the noncompete provisions contained within the franchise agreement between the parties. The franchisee had continued to operate a competing coffee shop in the same location

and in a fashion very close to its operations before the termination of the franchise despite having changed its shop’s name.

***Garcia v. BP Prods. N. Am., Inc.*, No. 09-2675, 1:09-cv-03529, 2009 WL 2474623, Bus. Franchise Guide (CCH) ¶ 14,211 (7th Cir. Aug. 13, 2009) (unpublished)**

This case is discussed under the topic heading “Statutory Claims.”

***Megadance USA Corp. v. Knipp*, 623 F. Supp. 2d 146, Bus. Franchise Guide (CCH) ¶ 14,164 (D. Mass. June 8, 2009)**

This case is discussed under the topic heading “Procedure.”

***Best W. Int’l, Inc. v. Sharda, LLC*, No. CV-08-1219-PHX-DGC, 2009 WL 1749458, Bus. Franchise Guide (CCH) ¶ 14,176 (D. Ariz. June 22, 2009)**

This case is discussed under the topic heading “Procedure.”

***Emergency Accessories & Installation, Inc. v. Whelen Eng’g Co., Inc.*, No. 09-2652 (JEI/AMD), 2009 WL 1587888, Bus. Franchise Guide (CCH) ¶ 14,178 (D.N.J. June 3, 2009)**

This case is discussed under the topic heading “Statutory Claims.”

***Beatty Caribbean, Inc. v. Nova Chems., Inc.*, No. 08-2259 (ADC-CVR), 2009 WL 2151303, Bus. Franchise Guide (CCH) ¶ 14,183 (D.P.R. July 16, 2009)**

This case is discussed under the topic heading “Statutory Claims.”

JURISDICTION

***Budget Rent A Car Sys., Inc. v. Missoula Acceptance Co.*, No. 08-2706 (KSH), 2009 WL 1883966, Bus. Franchise Guide (CCH) ¶ 14,177 (D.N.J. June 30, 2009)**

After a car rental franchisor terminated two subfranchisors, it sued a group of subfranchisees that had dealt with the subfranchisors. The franchisor sought a declaration that its termination of the subfranchise agreements was lawful, among other claims. Defendants, organized and operating in Texas and Montana, moved to dismiss for lack of personal jurisdiction or improper venue. They moved, in the alternative, to transfer the case to Idaho. A magistrate judge issued a report and recommendation, which the district court reviewed de novo.

The district court agreed with the magistrate judge that the franchisor’s move from Illinois to New Jersey in 2002 was a key fact. The subfranchisees had contracted with the terminated Montana and Texas subfranchisors before 2002 outside of New Jersey. Their franchise agreements were not with the franchisor. The subfranchisees were in court in New Jersey only through the “compounded fortuity” of the franchisor’s relocation and the subfranchisors’ terminations, the court noted. By terminating the subfranchisors, the franchisor had left the subfranchisees no choice but to deal with the New Jersey–based franchisor or cease operations. Thus, the subfranchisees’ efforts to deal with the franchisor after the termination of their subfranchisors did not amount to “reaching into” New Jersey, the court found.

The franchisor further argued that the subfranchisees’ car

rentals to New Jersey residents in Montana or Texas created sufficient contacts with the forum, but the court disagreed. “[E]lementary hornbook law” required systematic and continuous contacts, and the subfranchisees’ car rentals did not meet that test. Similarly, the subfranchisees’ telephone and facsimile communications with the franchisor “into New Jersey” concerning operations outside of the state did not confer jurisdiction. Their dealings with a New Jersey telephone directory office concerning listings in Montana or Texas did not confer jurisdiction either, the court held.

Accordingly, the subfranchisees’ motion to dismiss for lack of jurisdiction and venue was granted. Dismissal, rather than transfer, was appropriate. The court refused to transfer the case to Idaho because no parties had sufficient contacts there. A transfer to Texas or Montana also was not appropriate, the court decided *sua sponte* because the subfranchisees, as a group, were not all subject to jurisdiction in either of those states.

***Scott’s of Keene, Inc. v. Piaggio USA, Inc.*, No. 09-cv-122-SM, 2009 WL 2015839, Bus. Franchise Guide (CCH) ¶ 14,192 (D.N.H. July 6, 2009)**

A motorcycle dealer filed a claim in state court against Piaggio, a motorcycle manufacturer and distributor, asserting that the manufacturer violated a New Hampshire statute, including a provision that prohibited motor vehicle manufacturers from offering to sell or selling any new motor vehicle at a price lower than the actual price offered to any other motor vehicle dealer for the same model. According to the dealer, the manufacturer violated the statute when it lowered the wholesale price of motorcycles from a prior model year, putting the dealer at a competitive disadvantage with other dealers. The manufacturer removed the action to the U.S. District Court for the District of New Hampshire based on diversity jurisdiction. In response, the dealer sought remand to state court.

The manufacturer took the position that to the extent that the dealer sought to apply New Hampshire state law to sales that the manufacturer had made to dealers in other states, the dormant commerce clause of the U.S. Constitution was violated. The dealer, on the other hand, asserted that because the New Hampshire Supreme Court had not yet interpreted the statute being applied, under the *Pullman* abstention doctrine, the federal court should refrain from opining on the statutory meaning or application and instead remand the case to state court.

The federal court rejected the dealer’s arguments, holding that abstention (as articulated in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941)) is a limited exception to the general rule that federal courts have a “virtually unlimited obligation . . . to exercise the jurisdiction given them.” The *Pullman* doctrine is only appropriate when certain criteria are satisfied, and, according to the court, none of them was in this case. Instead, certification of the issue might be appropriate, the court found. Because certification allows federal courts to put novel state law questions directly to the state’s highest court, the court had no reason to remand the case to state court.

***C.A.L.L. Group, Inc. v. Exxon Mobil Corp.*, No. 08-CV-391-BP, 2009 WL 2513604, Bus. Franchise Guide (CCH) ¶ 14,208 (D.N.H. Aug. 14, 2009)**

A franchisee sued franchisor ExxonMobil and a third party after the franchisor did not renew the franchisee’s two franchises and the franchisee’s effort to sell one of its gas stations failed. The franchisee claimed that defendants were liable for breach of contract, breach of the implied covenant of good faith and fair dealing, and other violations of New Hampshire law. The franchisor removed the action to federal court, claiming federal court jurisdiction over the claims related to the nonrenewal of the franchise agreements because they were within the scope of the federal Petroleum Marketing Practices Act (PMPA).

Applying the test for complete preemption outlined by the U.S. Court of Appeals for the First Circuit in *Fayard v. Northeast Vehicle Services*, 533 F.3d 42 (1st Cir. 2008), the court held that if plaintiff franchisee intended to pursue claims for nonrenewal or termination, those claims would fall under the PMPA and trigger federal jurisdiction. Alternatively, if the franchisee disavowed all termination and nonrenewal claims, the court stated that it would choose not to exercise supplemental jurisdiction over the remaining state law claims and would remand those issues to state court. If the franchisee chose the latter approach, the court cautioned that it would issue an order estopping the franchisee from reasserting in federal court at a later date any termination and nonrenewal claims arising under the PMPA. The court gave the franchisee thirty days to decide on its position.

***Megadance USA Corp. v. Knipp*, 623 F. Supp. 2d 146, Bus. Franchise Guide (CCH) ¶ 14,164 (D. Mass. June 8, 2009)**

This case is discussed under the topic heading “Procedure.”

NONCOMPETITION COVENANTS

***Atl. Bread Co. Int’l, Inc. v. Lupton-Smith*, 285 Ga. 587, 679 S.E.2d 722, Bus. Franchise Guide (CCH) ¶ 14,172 (Ga. 2009)**

The Georgia Supreme Court applied strict scrutiny to an in-term noncompete found in a series of franchise agreements and held that the restriction was unenforceable under Georgia law. A bakery/deli franchisor had notified its franchisee that it was terminating the parties’ franchise agreements for violation of the terms of the agreement after the franchisor learned that the franchisee was operating a “coffee and lounge” business. The franchisor cited a clause in the parties’ franchise agreements that prohibited the franchisee and its principal shareholder, during the term of the agreements, from “directly or indirectly engag[ing] in, or acquir[ing] any interest in . . . , advis[ing], help[ing], guarantee[ing] loans or mak[ing] loans to, any bakery/deli business whose method of operation is similar to that employed by store units within the [franchisor’s] System.” The clause did not include a territorial limitation.

The franchisee and its principal filed for a temporary restraining order to prevent the termination, which the court entered by consent until the parties’ franchise agreements expired. The franchisor then purchased the franchised stores’ tangible assets. The franchisee parties nevertheless claimed damages for wrongful termination, and the trial court entered partial summary judgment in their favor, holding that the agreements’ restrictive covenants

were unenforceable. The appellate court affirmed.

On appeal, the Georgia Supreme Court first noted that non-competition agreements are partial restraints of trade and, to be enforceable, must be reasonable in scope. The franchisor argued that the clause at issue was a “loyalty provision” instead of a non-compete, presumably because it appeared in a franchise agreement rather than in the employment context. The court was not persuaded. The clause was a partial restraint of trade, no matter what label the franchisor sought to apply to it. The clause therefore was subject to “strict scrutiny, receiving the same treatment as non-competition covenants found in employment contracts.” The court noted that its prior decision in *Jackson & Coker v. Hart*, 261 Ga. 371, 405 S.E.2d 253 (1991), was consistent with requiring such covenants to be reasonable in territory, time, and scope. In that case, the court had refused a legislative effort to remove the reasonableness inquiry, according to the court.

The franchisor urged a less strict scrutiny standard of review because the restraint applied during the franchise agreements instead of after termination. The court, however, refused to distinguish between in-term and post-term restrictive covenants, citing Georgia precedent. “All such restraints on trade in a franchise agreement, regardless as to when they are in effect, must be reasonable as to time, scope and territorial limitation,” the court concluded.

Because the in-term clause was subject to strict scrutiny, the clause could not be “blue penciled” to insert a territorial limitation. Without a territorial limit, the clause was unreasonable and unenforceable, the court held, affirming the appellate court.

PROCEDURE

***Cliff DeTemple v. Leica Geosys, Inc.*, No. 08-CV-281, 2009 WL 1871710, Bus. Franchise Guide (CCH) ¶ 14,173 (E.D. Wis. June 24, 2009)**

A terminated distributor’s statutory claims were four days too late to survive, a federal court held. The Wisconsin Fair Dealership Law (WFDL) required claims to be brought “within one year after the cause of action accrues or be barred.” The statute of limitations began running when the distributor received written notice of termination. It was tolled while the distributor served on active military duty but began running again after the distributor’s return from active duty. Because the end date of the limitations period fell on a Saturday, under the federal rules it expired on the following Monday. That date was March 24, 2008. The distributor filed his suit on March 28, 2008. The WFDL claims were therefore too late and time-barred.

The court also dismissed the distributor’s contract claims, without prejudice, in view of a valid Georgia forum selection clause in the distributorship contract. The distributor had argued that the parties had unequal bargaining power, rendering the forum clause unreasonable, unfair, and unenforceable. But unequal bargaining power alone did not eviscerate the forum selection clause, the court noted, pointing to *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991). In any event, the parties had negotiated other parts of the agreement, which demonstrated some bargaining power.

The forum selection clause did not violate public policy under the WFDL (even if those claims had not been time-barred), according to the court. The WFDL does not require claims to be brought exclusively in Wisconsin and instead provides that a dealer may sue in “any court of competent jurisdiction.” The court refused to agree that the federal court in Georgia was not a competent jurisdiction, whether or not that court might be less familiar with the statute. More important, the WFDL claims had been barred, and the contract claims were subject to the forum selection clause without regard to WFDL policy.

***In re Arbitration Between DWF Blimpie, Inc. & Kahala Franchise Corp. & KBI Holdings, LLC*, AAA No. 13 114 01751 08, Bus. Franchise Guide (CCH) ¶ 14,157 (AAA May 19, 2009)**

A contractual, one-year statute of limitations barred a subfranchisor’s termination and related claims against a sandwich franchisor, an arbitrator ruled. The subfranchisor claimed in arbitration that the franchisor, via its predecessor-in-interest, had imposed unreasonable performance requirements, had failed to assist the subfranchisor, had deprived it of fee revenue, had not provided reasonable cure periods, and had terminated the subfranchisor in breach of the subfranchise agreement.

The arbitrator found that whether or not the termination was lawful, the subfranchisor knew of the lion’s share of the claimed events as they occurred. The subfranchisor also had received termination notices that asserted defaults that were key to the parties’ dispute and were within the subfranchisor’s knowledge at the time. The contractual statute of limitations applied.

Although the subfranchisor argued that barring its claims would be unfair, it would be more unfair to impose liability on the franchisor when the subfranchisor had waited to make its claims, the arbitrator ruled. The franchisor had taken over the system approximately eighteen months after its predecessor-in-interest had issued the termination notices, which had gone unchallenged by the subfranchisor during that time. The arbitrator ruled that the subfranchisor’s claims were time-barred and dismissed as a matter of law, without a factual hearing.

***Megadance USA Corp. v. Knipp*, 623 F. Supp. 2d 146, Bus. Franchise Guide (CCH) ¶ 14,164 (D. Mass. June 8, 2009)**

Two Georgia dance store franchisors sued terminated franchisees in Massachusetts federal court for unauthorized trademark use. The franchisees moved to dismiss or transfer the case to the U.S. District Court for the Northern District of Georgia, where a prior case had been filed.

The franchisees operated licensed dance studios in Georgia under two franchise agreements. The agreements had different forum selection clauses. One chose Florida, where the franchisors had been located at the time of signing, as the forum for disputes. The other set the forum as the place closest to the franchisor, i.e., Massachusetts, the state where the franchisors now were located.

In early 2009, the franchisors notified the franchisees that their agreements would be terminated in thirty days for failure to pay fees. After those thirty days expired, the franchisors notified the franchisees that they were required to stop using the franchised trademarks because the agreements had been terminated. Two days before termination, however, the franchisees

sued the franchisors in Georgia state court. The franchisors removed that action to federal court in the Northern District of Georgia and then had moved for partial dismissal of the case and transfer of the rest to the Massachusetts federal court. Those motions had not yet been ruled on.

The “first filed” rule typically required the second court to defer to the first court, the Massachusetts district court noted. If the first-filing parties knew that a suit was about to be filed against them and raced to the courthouse to file first, however, that rule did not apply. The court found that this case had “the flavor of such a situation,” thereby “somewhat diminish[ing] the impact” of the first-filed rule.

But the first-filed rule did not apply in any event, the court found. The franchisees had signed franchise agreements requiring forums outside of Georgia. They therefore could not invoke the first-filed doctrine to support a Georgia forum. Massachusetts was the “only sensible choice” because the franchisors were located there now, not in Florida.

The franchisees further claimed that the court lacked personal jurisdiction over them, but the court quickly disposed of that argument. The franchisees had chosen the forum in their agreements. Furthermore, the U.S. Supreme Court had held, in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), that franchisees “deliberately affiliated” with their franchisor’s home state “such that the possibility of litigation there was reasonably foreseeable.” That principle applied equally to these franchisees. With respect to venue, the court again found Massachusetts to be “sensible,” noting that Georgia was as inconvenient to the franchisors as Massachusetts was to the franchisees.

The court denied the franchisees’ motion to dismiss or for transfer. The court also granted the franchisors’ unopposed motion for a temporary restraining order and preliminary injunction but delayed issuing an order for thirty days to provide time for the franchisees to de-identify completely and voluntarily.

***Best W. Int’l, Inc. v. Sharda, LLC*, No. CV-08-1219-PHX-DGC, 2009 WL 1749458, Bus. Franchise Guide (CCH) ¶ 14,176 (D. Ariz. June 22, 2009)**

An Arizona federal district court was not charitable to the former franchisees and their counsel that resisted a hotel franchisor’s motion for summary judgment. The franchisor had moved for summary judgment for breaches of contract and an open account and for liquidated damages. Its claims arose from its termination of the parties’ franchise agreement after the franchisees allegedly had failed an annual quality inspection, as well as from the franchisees’ continued use of the franchisor’s trademarks after termination.

The franchisees responded to the summary judgment motion by first contending that they needed additional time for discovery under Federal Rule of Civil Procedure 56(f). The court made short work of that contention, listing the ways in which the franchisees and their attorney had failed to meet the federal procedural standards. They had not provided more than general assertions as to what discovery might reveal, had not provided a sworn affidavit or proper declaration, and had not pursued discovery diligently to that point, the court found. The court sharply criticized the franchisees’ conduct in the case, finding

that the franchisees’ counsel’s repeated disregard of the rules had caused delay, expense, and inconvenience.

For similar reasons, the court denied the franchisees’ motion to withdraw admissions. Those admissions were in play because the franchisees had failed to respond to the franchisor’s request for admissions within the required thirty days for doing so. The franchisees also did not have a strong case on the merits, the court determined, making the severe consequences of the discovery rule appropriate. As further support for the ruling, the court recited a list of the franchisees’ counsel’s noncompliance with the federal and local rules, including failure to seek admission with the court before filing documents, repeated failure to file court documents on a timely basis, failure to appear at a hearing, failure to comply with court procedures and rules, and failure to respond timely to the summary judgment motion despite having been sanctioned once by the court.

The franchisees’ declarations did not create triable issues of fact in view of the franchisor’s evidence and the matter deemed admitted, the court held. Summary judgment was entered for the franchisor. Its request for permanent injunction was denied, however. The franchisor had not moved for summary judgment on that claim, had not provided legal citations in support of the claim, and had not asserted that the franchisees continued to use the trademarks in conjunction with their hotel, according to the court.

***Maiorino v. Park Tysen Assocs., L.L.C.*, No. 104713/08, 2009 WL 2005254, Bus. Franchise Guide (CCH) ¶ 14,181 (N.Y. Sup. Ct. July 10, 2009) (unpublished)**

An individual injured in an automobile accident in the parking lot of a franchised Pizza Hut restaurant filed suit against the restaurant franchisor two days before the expiration of the personal injury statute of limitations. Plaintiff served the franchisor and, after the expiration of the statute of limitations, sought to amend the summons to add the franchisee (which had a similar name as the franchisor) as well as a third entity that was related to the franchisor, while keeping the franchisor as a defendant.

The New York rule of civil procedure that permitted “the amendment of a summons outside of the [s]tatute of [l]imitations when there [was] a misnomer in the description of the . . . defendant” did not apply, the court ruled. Plaintiff sought to add separate and distinct entities. Under the franchise agreement, the franchisor and the franchisee were separate entities with merely a business relationship.

The court also rejected plaintiff’s argument that the franchisee and third party knew or should have known that suit would be brought against them because the franchisor had forwarded the summons and complaint to the franchisee and it was later separately served. The franchisor was not an agent for service of its franchisees, the court noted. The court also refused to apply the relation-back doctrine. The sharing of office space, employees, and business address by the franchisor and a related entity did “not translate into the application of the relation back doctrine.” The franchisor and franchisee were not “united in interest” because the franchisor was not vicariously liable for the franchisee, and the franchisee would be required to indemnify the franchisor in the event of a claim. Accordingly, the court denied plaintiff’s motion to amend the summons.

***DaimlerChrysler Fin. Servs. Ams., LLC v. Woodbridge Dodge, Inc.*, No. 06-5225 (SRC), 2009 WL 2152083, Bus. Franchise Guide (CCH) ¶ 14,182 (D.N.J. July 14, 2009) (unpublished)**
This case is discussed under the topic heading “Contract Issues.”

***Momentum Mktg. Sales & Serv., Inc. v. Curves Int’l, Inc.*, Nos. W-07-CA-048, W-07-CA-095, W-07-CA-125, Bus. Franchise Guide (CCH) ¶ 14,215 (W.D. Tex. July 24, 2009)**
This case is discussed under the topic heading “Statutory Claims.”

SANCTIONS

***Instant Tax Serv. 10060, LLC v. TCA Fin., LLC*, No. PJM 08-2365, 2009 WL 2579806, Bus. Franchise Guide (CCH) ¶ 14,206 (D. Md. Aug. 14, 2009)**

ITS, a franchisor of retail tax preparation and electronic tax return filing businesses, “entered into a written franchise agreement” with Douglas, a franchisee,

on July 24, 2006[,] to operate a franchise in Lanham, Maryland. Several months after executing the franchise agreement, the parties entered into an oral agreement for Douglas to open four additional franchises. . . . [A] written agreement was not executed as to [those] [new] offices and they were structured to operate independently.

Nevertheless, the parties “understood and agreed that [the new locations] would operate according to the terms and conditions of the written agreement, which in fact they did.”

“On June 28, 2007, Douglas [commenced] arbitration against ITS based on the [franchisor]’s alleged failure to pay her and for allegedly depriving her of pertinent information.” Douglas’s list of claims included breach of contract, wrongful termination of franchise agreement, conversion, breach of fiduciary duty, negligence, fraud, and unjust enrichment. “The arbitrator granted ITS’s Motion for Partial Summary Judgment as to all but the breach of contract claim and, after an evidentiary hearing on that claim, ordered that Douglas recover nothing on her demand.”

Douglas then filed a complaint in federal court in Maryland, “alleging essentially the same claims she had advanced in the arbitration. Apparently seeking to avoid the res judicata effects of the arbitration proceeding, she took the step of adding ITS 10060, her wholly-owned LLC, as a plaintiff.” She alleged that ITS 10060 “was a third party beneficiary of the contract between Douglas and ITS, and [noted] that it had not been a party to the arbitration.” After suit was filed, counsel for ITS had several communications with Douglas’s counsel asking them to withdraw the suit and warning of a Federal Rule of Civil Procedure 11 motion for sanctions.

ITS successfully moved for summary judgment. ITS “argu[ed] that each of the counts in the [c]omplaint was res judicata,” “that ITS 10060 was in privity with [Douglas],” and that the arbitration had covered all of the franchised locations. As a result of the summary judgment, Douglas had no claims remaining. ITS next filed a motion for sanctions, contending that Douglas and her attorneys should be sanctioned for filing the complaint, amended complaint, and opposition to ITS’s

summary judgment motion. As support, ITS argued that “Douglas’s claims were [plain]ly barred by res judicata” and that “ITS counsel [had] alerted Douglas and her attorneys to that fact” several times. ITS requested an award of attorney fees and costs incurred to defend the litigation in the amount of \$91,281.28.

“In response, Douglas and her counsel recycle[d] the same arguments” that they had made on summary judgment, according to the court. They also tried

to assert new arguments that they believe[d] justified the filing of the suit. In particular, they argue[d] that a significant choice of law issue applie[d] to [a] [claimed] oral modification of the franchise agreement, which would alter the determination about whether disputes related to the four other stores could have been previously arbitrated.

They also “assert[ed] that the[ir] RICO claim could not previously have been arbitrated because it [was] contrary to public policy to arbitrate such claims. In a word, they [argued] that Douglas’s claims were not frivolous.”

The court disagreed. After finding that ITS’s attorney fees and costs were reasonable, the court examined the minimum amount needed to deter the conduct of Douglas and her attorneys. The court noted that a sanction in excess of \$90,000 was too much. “That was far more than needed to deter, and given the size and nature of Douglas’s counsel’s practices and given her own, unknown resources, far more than [those parties] could reasonably be expected to pay.” “[D]eterrence [would] be best achieved,” the court ruled, “through . . . a sanction of \$30,000 to be paid jointly and severally by Douglas’s attorneys, and an additional sanction of \$10,000 to be paid by Douglas individually.”

“[Although] it [was] true that courts should not impose monetary sanctions on parties if the Rule 11 violation [was] legal in nature, . . . in this case” the court determined that Douglas should be held accountable. She was involved in preparing her filings and had “signed an affidavit directly contradicting her sworn arbitration positions,” the court noted, “which substantially contributed to the [rule] violation.” Although the court did not award ITS the full amount it sought, the sanctions imposed were “enough to make an emphatic point to Douglas and her attorneys, all of whose conduct the Court finds indefensible.”

STATE DISCLOSURE/REGISTRATION LAWS

***Pinchin v. Nick-N-Willy’s Franchise Pizza Co., LLC*, No. 63417-8-I, Bus. Franchise Guide (CCH) ¶ 14,179 (Wash. Ct. App. July 22, 2009)**

A Washington appellate court held that Nick-N-Willy’s, a pizza restaurant franchisor, and its area developer were not entitled to discretionary appellate court review of a Washington trial court’s grant of partial summary judgment to a franchisee rescinding the franchise agreement between the franchisee and the franchisor. The trial court had ruled that the area developer was a subfranchisor under the Washington Franchise Investment Protection Act (WFIPA) and was thus required to register under the WFIPA. The area developer’s failure to register under the WFIPA entitled the franchisee to rescind the franchise

agreement with the pizza franchisor.

Nick-N-Willy's and its area developer argued that the area developer was only a sales representative and not a subfranchisor. They reasoned that the area developer was not a subfranchisor because the area developer had no authority to commit or bind the pizza franchisor to any terms of the franchise agreement and had a limited role of only soliciting purchasers. Such activities, they argued, did not constitute "the right to grant, sell or negotiate the sale of franchise."

The appellate court disagreed, finding that their argument depended on a narrow reading of the word *negotiate*. It was undisputed that the area developer played a role in the sale of the pizza franchise to the franchisee. Specifically, the appellate court found that in communicating with the franchisee and laying the groundwork for the franchisor's interview of the franchisee, it seemed unavoidable that the area developer was part of the negotiation process. Further, the appellate court held that the inability to enter into binding franchise agreements is not critical where the area developer satisfies the disjunctive "or" provision of the statutory definition.

Nick-N-Willy's and its area developer further challenged whether the area developer was required to file a duplicate offering circular even if it was considered a subfranchisor. The appellate court noted that subfranchisors are subject to the same requirements and exemptions that apply to franchisors and that the Securities Division (the agency charged with enforcement of the statutory scheme) had declared that the WFIPA requires dual registration of both the franchisor and subfranchisor.

Although the court acknowledged that it was debatable whether a dual registration requirement applies when the franchisor has complied with the registration requirements and it recognized that some commentators question whether dual registration is consistent with the text or intent of the WFIPA, the court specifically noted that in this case some important information relevant to the purchase of a franchise was not included in the pizza franchisor's registration. In particular, the appellate court noted that the franchise agreement compelled the franchisee to accept certain sales, site and opening assistance, and supervisory services from the area developer. Given this, the appellate court found that it was arguable that the financial and background information of the area developer might be material to a reasonably cautious franchise purchaser. Thus, even though the failure to include information on the area developer in a franchisor's registration could be regarded as a highly debatable issue, the court held that Nick-N-Willy's and its area developer did not establish that a supplemental registration extending to information pertinent to the area developer presented an obvious or probable error, permitting discretionary review of the trial court's grant of partial summary judgment.

Finally, the appellate court held that even if there was a showing of obvious or probable error, Nick-N-Willy's and its area developer failed to satisfy the other requirements for discretionary review. The statutory rules state that discretionary review is available only in limited circumstances, such as where "[t]he superior court has committed an obvious error which would render further proceedings useless" or "has committed probable error and the decision of the superior court substantially alters the status quo

or substantially limits the freedom of a party to act." The appellate court held that further proceedings in the instant case did not appear useless because other issues could still be litigated even if partial summary judgment on registration was reversed.

STATUTORY CLAIMS

***Garcia v. BP Prods. N. Am., Inc.*, No. 09-2675, 1:09-cv-03529, 2009 WL 2474623, Bus. Franchise Guide (CCH) ¶ 14,211 (7th Cir. Aug. 13, 2009) (unpublished)**

The U.S. Court of Appeals for the Seventh Circuit affirmed the district court's denial of an injunction to Garcia, a gasoline franchisee, and refused to grant an appellate injunction. Garcia had operated a gas station owned by BP, the franchisor. Every three years, BP had sent Garcia a renewal notice. In early 2009, however, BP notified Garcia that BP intended to sell the station. Garcia then received an offer to buy the property from another oil company, contingent on that company buying it from BP. The sale from BP failed to close, however, and Garcia later learned that BP intended to sell the station to a different buyer who, in turn, intended to resell it to someone other than Garcia.

In early June 2009, BP notified Garcia that it was unilaterally extending his franchise agreement one month, until the end of September. The notice informed Garcia that the extension was not a renewal of his agreement nor did it change the other terms of the franchise agreement, subject to the Petroleum Marketing Practices Act (PMPA). Within days, Garcia sued and moved for a temporary restraining order and preliminary injunction to prevent the sale of the station. The district court denied Garcia's request for injunctive relief, finding that Garcia had not established that BP's contemplated transfer would violate Garcia's contract or state law or that Garcia's franchise was terminated or nonrenewed.

The appeals court affirmed, holding that the district court had not abused its discretion. BP's June letter did not explicitly state that Garcia's franchise was to be terminated or nonrenewed. Garcia argued that under the parties' course of dealing, that is what the letter signified because he had not received his typical renewal letter from BP. But BP reasonably could have chosen not to follow the normal course during negotiations to sell the station, the court noted.

Garcia also argued that the letter was a termination or nonrenewal letter because it followed all of the PMPA's specific requirements for such a letter. The court disagreed, noting that the PMPA required a franchisor to state its intention to terminate or nonrenew in any such letter, and BP had not done that. Accordingly, because the sale had closed days before Garcia's motion had been filed without Garcia's franchise having been terminated or nonrenewed by the new owner, an injunction was not yet appropriate or necessary.

***Momentum Mktg. Sales & Serv., Inc. v. Curves Int'l, Inc.*, W-07-CA-048, W-07-CA-095, W-07-CA-125, Bus. Franchise Guide (CCH) ¶ 14,215 (W.D. Tex. July 24, 2009)**

A group of fitness club franchisees filed a complaint against their franchisor and its chief executive officer (CEO) alleging a variety of claims, including violation of various state Little

FTC statutes. The franchisor and CEO had successfully moved to dismiss several claims previously, and the CEO later moved to dismiss the remaining claim against him, alleging violation of the Texas Deceptive Trade Practices Act (TDTPA).

The franchisees responded that the CEO had waived his right to move to dismiss the TDTPA claim because he had not included it in his earlier motion to dismiss. The court disagreed, noting that Federal Rule of Civil Procedure 12(g), cited by the franchisees, was expressly limited and did not apply.

Turning to the substance, the court held that even taking the franchisees' allegations as true for purposes of the motion, they had not stated a TDTPA claim against the CEO. To have stated a claim, the franchisees had to allege that the CEO "engaged in false, misleading, or deceptive acts or practices." The complaint alleged that the CEO "incentivized" his salespeople to "over-saturate the market," hired his friends as his salespeople, forced his sales team to sign a new commission agreement, and hired a friend as his lawyer. But hiring friends was not false, misleading, or deceptive conduct and neither was incentivizing salespeople through a commission-based system. If it were, the court noted, Realtors, insurance agents, car dealerships, and even law firms with billable hour-and-bonus structures could not lawfully operate in Texas.

The franchisees' allegation that the CEO had forced a new commission agreement on his sales team was irrelevant because none of those employees was a plaintiff. The franchisees' remaining allegation in their complaint that "[t]he actions of Defendants, as fully set forth above, constitute deceptive and unconscionable acts and practices" was conclusory and did not state a TDTPA claim, according to the court. The court therefore dismissed the claims against the CEO under Federal Rule of Civil Procedure 12(b)(6).

***Emergency Accessories & Installation, Inc. v. Whelen Eng'g Co., Inc.*, No. 09-2652 (JEI/AMD), 2009 WL 1587888, Bus. Franchise Guide (CCH) ¶ 14,178 (D.N.J. June 3, 2009)**

Plaintiff EAI sold and installed emergency lighting and other emergency response vehicle equipment and brought this suit seeking a temporary restraining order to restrain Whelen from terminating the Master Distributor Agreement between the parties. The threshold issue considered by the court was whether EAI would likely prove that the New Jersey Franchise Practices Act (NJFPA) applied to the Master Distributor Agreement. A franchise exists under the NJFPA if "(1) there is a 'community of interest' between the franchisor and the franchisee; (2) the franchisor granted a 'license' to the franchisee; and (3) the parties contemplated that the franchisee would maintain a 'place of business' in New Jersey," the court noted.

"Whelen argue[d] that it had not granted EAI a license as contemplated by the [NJ]FPA, [but] rather . . . ha[d] . . . granted . . . limited permission to sell a name brand product." However, because Whelen authorized EAI to use its mark "solely for the purpose of promoting such Whelen products *in accordance with this Agreement*"; and under the agreement EAI had to "maximize the sale of Whelen Products"; "use its best efforts to promote, introduce, demonstrate, and solicit orders for, and sell products manufactured by Whelen"; and "protect and promote the good

name of Whelen," the court concluded that the license granted to EAI was more than just a limited license given to a retailer of a product. Accordingly, the court found that EAI would likely prove that Whelen granted it a license to use Whelen's trademarks and trade name as contemplated by the NJFPA.

Because the court also found that EAI would likely prove that it maintained a place of business in New Jersey and that a community of interest existed between the parties because "[w]ithout Whelen's product, EAI would have no business," the court found that EAI would likely prove that the Master Distributor Agreement established a franchise and the NJFPA applied.

Next, the court decided that because Whelen's termination notice only gave five days' notice of termination, "EAI [was] likely [to] prove that Whelen failed to comply with the [NJ]FPA" by giving less than sixty days' notice. With respect to EAI's argument that Whelen did not have good cause for the termination, the court agreed that Whelen's reference to EAI's bid protest regarding a competitor did not assert a breach of the agreement. Thus, EAI was likely to prove termination without good cause. Noting that "if Whelen [was] allowed to terminate the [agreement], it would be, in effect, the death knell for EAI," the court found that EAI met its burden of establishing that it would suffer irreparable injury absent an injunction. Finally, the court found "that the balance of the harms favor[ed] EAI" and that the public interest favored issuing a temporary restraining order. Thus, the court issued a temporary restraining order against Whelen's termination of the agreement between the parties.

***Shell Trademark Mgmt. BV v. Ray Thomas Petroleum Co., Inc.*, No. 3:07cv163-RJC, 2009 WL 1686979, Bus. Franchise Guide (CCH) ¶ 14,163 (W.D.N.C. June 15, 2009)**

An oil company terminated its franchise agreements with defendant wholesaler and operator, RTP, and its guarantor because RTP was commingling Shell-branded gasoline with other gasoline and selling it to consumers as Shell gasoline. Plaintiff oil company sought summary judgment on its breach of contract claims and its claims that RTP violated the Lanham Act, the North Carolina Unfair and Deceptive Business Practices Act (UDBPA), and the South Carolina Unfair Trade Practices Act (UTPA). Plaintiff also sought summary judgment to enforce the terms of the guaranty, as well as on RTP's counterclaims. Defendants brought cross-motions for summary judgment on their counterclaims that plaintiff improperly terminated the agreements and violated the PMPA. The guarantor sought summary judgment that he was not liable on his guaranty.

The court first considered and rejected RTP's claims that the termination of the franchise relationship violated the PMPA. RTP argued that the notice was inadequate because the PMPA required termination within sixty days of discovering the commingling or misbranding. Because Shell provided less than ninety days' notice of termination, the termination had to be based on events of which Shell had actual or constructive knowledge no more than sixty days before the notice. Shell provided notice on September 26, 2006, of its intent to terminate the franchise effective October 31, 2006. The court found that although Shell had "sound concerns and suspicions" of commingling or misbranding more than sixty days before the notice, it did not have "actual or constructive

knowledge of the misbranding until it concluded its investigation on August 29, 2006.” Therefore, the notice was timely.

Next, the court granted summary judgment on Shell’s Lanham Act claims. It was undisputed that RTP had commingled and misbranded Shell gasoline and “explanations and excuses [did] not protect the [defendant] from the trademark laws,” the court noted. The court recognized that Shell was entitled to RTP’s profits from the misbranded sales and ordered a hearing to determine those profits. The court also granted summary judgment on Shell’s claims for breach of the various contracts between the parties, including a previous settlement agreement resulting from earlier commingling by RTP. The court went on to award summary judgment to Shell on its UDBPA claims against RTP based on undisputed evidence of RTP’s Lanham Act violation, as well as on Shell’s UTPA claims against RTP, finding that RTP’s deceptive actions affected commerce, impacted the public interest, and caused actual damage to Shell. The court also granted Shell’s motion for summary judgment on RTP’s counterclaims against Shell under the UDBPA and UTPA.

The court then turned to the guaranty. The guaranty provided that

Guarantor . . . guarantees prompt and full payment at maturity of all indebtedness heretofore or hereafter incurred by [RTP] to Shell for purchases of petroleum products, other merchandise or services, for rents, or on any other account (whether evidenced by open accounts, promissory notes, drafts, trade acceptances or otherwise) and all renewals, extensions and changes in form of any part or all of such indebtedness, and all costs of collecting the same.

The court held that the guarantor was liable under the guaranty for amounts owing under the jobber agreements as well as the costs of collecting those amounts. The court also found the guarantor liable for the profit that Shell would have realized had RTP bought the minimum amount of gas it was required to buy each month under the agreements, but not for future monthly minimums. Finally, the court found that “[t]he plain language of the Guaranty [did] not hold [the guarantor] liable for breach of contract damages.” Because Shell wrote the guaranty and Shell was “a sophisticated billion dollar company” (unlike the guarantor, who had “far less bargaining power, fewer monetary resources, and he most likely desired to be personally liable for as little as possible”), if Shell wanted to hold the guarantor for damages for breach of contract, it “could have included that in the agreement,” the court ruled.

***Beatty Caribbean, Inc. v. Nova Chems., Inc.*, No. 08-2259 (ADC-CVR), 2009 WL 2151303, Bus. Franchise Guide (CCH) ¶ 14,183 (D.P.R. July 16, 2009)**

Plaintiff distributor Beatty Caribbean Corp. (Beatty) filed a complaint and motion for preliminary injunction against defendant NOVA Chemicals, Inc. (NOVA), alleging that NOVA impaired the parties’ distribution agreement beginning in the early 1990s for the sales and marketing of chemical products in Puerto Rico and the Caribbean (including Jamaica, Haiti, Trinidad & Tobago, Dominican Republic, and Barbados). Beatty alleged that NOVA’s decision to reduce the commission it paid to Beatty from 5 percent to 3 percent was “without ‘just cause’” and otherwise

unlawful under Puerto Rico’s Law 75 and/or Law 21.

The court noted that Puerto Rico’s Law 75 limits a principal’s ability to end a relationship unilaterally “except for ‘just cause.’” Law 21, “which was enacted on equal footing for sales representatives, [also] governs the business relationship between principals and the locally appointed distributors who market their products.” Plaintiff had at least established prima facie that it was a dealer subject to the protections and remedies afforded by Law 75, the court found. The court based its finding on the existence of a verbal distribution agreement, even though the court noted that exclusivity under that agreement was disputed and would require further evidence on the merits. Among other things, “Beatty assumed the risk, including billing and collection of the EPS from NOVA”; Beatty received a 6 percent discount “to cover [its] five percent (5%) commission and the credit risk that NOVA would not assume in such market”; “Beatty incurred the expenses of keeping office facilities in Puerto Rico, marketing and promoting of the products, selling of the products, telephone and communication with clients, [and] follow-up of the orders”; Beatty “incurred . . . travel and lodging expenses [related] to clients in the Caribbean islands”; and “Beatty sought clients and monitored and arranged shipments.”

However, after careful consideration, the court denied Beatty’s request for preliminary injunctive relief, finding that although Beatty had established “that defendant NOVA ha[d] impaired [Beatty’s] commercial relationship by its unilateral determination to decrease the sales commissions previously paid,” Beatty “failed to establish, by a preponderance of the evidence, that it [would] suffer irreparable injury if the injunction [was] not granted.” Any harm to Beatty would be “solely financial[] and in fact would consist of economic damages easily recoverable.” The “balancing of the equities” also favored Nova.

***Gulf Distribution, Ltd. v. GAP Int’l Sales, Inc.*, No. 08-15266 D.C., CV-06-02584-CRB, 2009 WL 2585678, Bus. Franchise Guide (CCH) ¶ 14,204 (9th Cir. Aug. 24, 2009) (unpublished)**

A clothing distributor sued manufacturer Gap International Sales, Inc. (Gap) for breach of contract, predicated its claims on protections provided by the California Franchise Relations Act (CFRA). The district court granted summary judgment in favor of the manufacturer, concluding that the contract between the parties was not a “franchise agreement” under the CFRA.

The Ninth Circuit affirmed, concluding that the undisputed facts established that the distributor was merely a distributor of the manufacturer’s merchandise, in particular in Middle Eastern countries, but was not substantially associated with the manufacturer’s trademarks, a necessary element of the CFRA franchise definition. The parties’ agreement expressly prohibited the distributors from adopting any trademark or trade name that suggested an association between Gap’s trademarks and the distributor. Additionally, the distributor had not established that it had paid a franchise fee, as opposed to paying for goods at fair market value, the court ruled.

The dissenting opinion cited cases from other jurisdictions in support of its position that the “question is whether the distribution arrangement pursuant to the contract was such that [the

distributor's] customers 'associated' [the distributor's] business operation with Gap's reputation and goodwill." The majority was not persuaded by citations outside of California, however.

***Dep't of Transp. v. Singh*, 914 N.E.2d 511, Bus. Franchise Guide (CCH) ¶ 14,214 (Ill. App. Ct. 2 Dist. July 31, 2009)**

Franchisee Singh filed a "motion for apportionment of an award received by [franchisors] BP Products of North America and Amoco Oil Company (BP) upon the condemnation of [the] property that was owned by [the franchisors] and leased by Singh."

The Illinois Department of Transportation (IDOT) had filed a complaint to condemn part of the premises leased by the franchisee and owned by the franchisors. "[A]fter a quick-take hearing, the trial court awarded [the franchisors] . . . preliminary just compensation," ultimately concluding that the franchisors were entitled to a total of \$918,000. Immediately thereafter, the franchisors terminated the lease with the franchisee.

The franchisee filed its motion for apportionment under the Petroleum Marketing Practices Act (PMPA). In its motion, the franchisee "claimed that [the] condemnation of the property would result in [a] total cessation of his business" and "that he would suffer \$320,000 in lost 'business goodwill.'" The franchisee argued that "he was entitled to apportionment in that amount from the compensation received by [the franchisors]."

The trial court denied the franchisee's motion, holding that "the PMPA entitles a franchisee to [just] compensation for loss of business only where the franchisor was itself awarded compensation for loss of business. The court reasoned that the condemnation award . . . [would] not have . . . included compensation for loss of business because Illinois law generally does not permit" such an award. The Illinois appellate court agreed, rejecting the franchisee's appeal and concluding that the PMPA mandates compensation for a franchisee for loss of business only where such an award is permitted under state law.

***State v. JTH Tax, Inc.*, No. CGC-07-460778, Bus. Franchise Guide (CCH) ¶ 14, 216 (Cal. Sup. Ct. June 15, 2009)**

This case is discussed under the topic "Vicarious Liability."

***Taylor v. 1-800-Got-Junk?, LLC*, 632 F. Supp. 2d 1048, Bus. Franchise Guide (CCH) ¶ 14,197 (W.D. Wash. July 9, 2009)**

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

***Cliff DeTemple v. Leica Geosys., Inc.*, 08-CV-281, 2009 WL 1871710, Bus. Franchise Guide (CCH) ¶ 14,173 (E.D. Wis. June 24, 2009)**

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

***Ingraham v. Planet Beach Franchising Corp.*, No. 07-3555, 2009 WL 909567, Bus. Franchise Guide (CCH) ¶ 14,159 (E.D. La. Apr. 1, 2009)**

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

***DaimlerChrysler Fin. Servs. Ams., LLC v. Woodbridge Dodge, Inc.*, No. 06-5225 (SRC), 2009 WL 2152083, Bus. Franchise Guide (CCH) ¶ 14,182 (D.N.J. July 14, 2009) (unpublished)**

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

***Sherman v. Ben & Jerry's Franchising*, No. 1:08-CV-207, 2009 WL 2462539, Bus. Franchise Guide (CCH) ¶ 14,198 (D. Vt. Aug. 10, 2009)**

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

***Bucciarelli v. Nationwide Mut. Ins. Co.*, No. 08-cv-14349, 2009 WL 2766712, Bus. Franchise Guide (CCH) ¶ 14,200 (E.D. Mich. Aug. 26, 2009)**

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

TERMINATION AND NONRENEWAL

***Luso Fuel Inc. v. BP Prods. N. Am., Inc.*, No. 08-CV-3947, 2009 WL 1873583, Bus. Franchise Guide (CCH) ¶ 14,166 (D.N.J. June 29, 2009)**

Plaintiff Luso Fuel Inc. (Luso) alleged a violation of the New Jersey Franchise Practices Act (NJFPA), breach of the duty of good faith and fair dealing, misrepresentation, tortious interference, and unjust enrichment, among other claims, against defendant BP Products North America, Inc. (BP) based on BP's nonrenewal of the ground lease for a franchised location. The district court granted BP's motion to dismiss on all counts.

BP and Luso were parties to a Commission Marketer Agreement and a Commission Marketer Lease Agreement (Agreements) governing the operation of a gasoline station. BP leased the property on which the gasoline station was located and subleased it to Luso. The Agreements were "expressly limited by [BP]'s right to possess the underlying property," and the terms of each Agreement were subject to the term of the ground lease, which BP could elect to renew. BP lost its right to renew the ground lease beyond December 31, 2008, and, as a result, notified Luso that the Agreements would terminate after their initial term.

Luso argued that BP "did not have 'good cause' to terminate [the] franchise" and had acted in an arbitrary and capricious manner under the NJFPA, even though the ground lease expired, because Luso "had substantially performed its obligations under the Agreements." The court held that the termination was for good cause and not arbitrary and capricious because the Agreements expressly granted BP the right to elect not to renew the ground lease. The court regarded the termination as the execution of a negotiated contractual right and concluded that the occurrence of such termination could not be seen as arbitrary and capricious when it was specifically contemplated and addressed in the Agreements. The court found Luso's argument that it relied on BP's oral representations that BP would renew the ground lease immaterial; the Agreements included a merger clause excluding extraneous evidence to modify the Agreements' terms. In addition, the court noted that the parol evidence rule supported exclusion of such evidence.

Next, the court dismissed each of the common law claims asserted by Luso. The court reasoned that application of the implied covenant of good faith and fair dealing in this context would alter the clear terms of the Agreements. Luso's reliance on verbal representations that BP would extend the ground lease were considered inherently unreasonable by the court when the express terms of the Agreements specified otherwise. Further, the court found Luso's arguments that BP interfered with its

third-party contracts by seeking to end the franchise relationship and destroy the goodwill developed by Luso lacking in merit. BP's actions were not malicious or improper because such actions were conducted pursuant to the bargained-for terms of the Agreements, the court found. Finally, Luso's unjust enrichment and other quasi-contractual claims were inappropriate, the court ruled, because the Agreements had not been invalidated by the court and had express terms governing the subject matter at issue.

***MaintainCo, Inc. v. Mitsubishi Caterpillar Forklift Am., Inc.*, 408 N.J. Super. 461, 975 A.2d 510, Bus. Franchise Guide (CCH) ¶ 14,195 (N.J. Super. Ct. App. Div. July 30, 2009) (unpublished)**

The Superior Court of New Jersey upheld a verdict in favor of plaintiff dealer for constructive termination of its dealership agreement in violation of the New Jersey Franchise Practices Act (NJFPA) but reversed the award of expert fees to plaintiff.

In 1982, Mitsubishi entered into a dealership agreement with plaintiff whereby plaintiff was granted the right to sell Mitsubishi forklifts in its New Jersey dealer facilities. The dealership agreement required plaintiff to "exert its very best efforts to promote the sales and servicing of [Mitsubishi's] Products." Although the dealership agreement gave plaintiff rights to an "area of primary responsibility" and did not specifically grant plaintiff exclusivity to such area, Mitsubishi acknowledged that it repeatedly had assured plaintiff that it had exclusivity. After Mitsubishi entered into another dealership agreement with a third party for plaintiff's area of primary responsibility (on the basis that plaintiff's market share was too low) and sent letters to customers in plaintiff's area of responsibility informing them that the new third party was Mitsubishi's dealer, plaintiff sued Mitsubishi for constructively terminating its franchise in violation of the NJFPA and for breach of the dealership agreement. The trial court awarded plaintiff compensatory damages and attorney fees and costs, including expert fees, for constructive termination of the dealership agreement in violation of the NJFPA.

On appeal, Mitsubishi argued that it did not terminate plaintiff's dealership agreement. Even if it had, it argued, both Mitsubishi's bona fide business reasons to terminate the dealership agreement and plaintiff's prior breaches of the dealership agreement constituted good cause to terminate the agreement under the NJFPA. The appellate court, however, upheld the trial court's decision that Mitsubishi's new dealership agreement and additional misconduct by Mitsubishi were geared toward forcing plaintiff out of its dealership agreement, and this had caused a constructive termination of the agreement. Mitsubishi argued that it had good business reasons for wanting to terminate the agreement, including plaintiff's failure to increase its market share and plaintiff's sale of competing forklifts within the same store. But the court ruled that the New Jersey legislature, unlike other states, did not specifically recognize a valid business reason as good cause for termination under the NJFPA.

Mitsubishi also argued that it had good cause to terminate the agreement because plaintiff violated the "best efforts" clause of the agreement by selling competing product lines. The court held, however, that the best efforts clause of a distribution agreement did not prohibit a dealer from selling other product

lines, nor did it require arrangements such as separate sales staff or facilities to sell the competing lines. Because plaintiff's sale of competing product lines in its dealerships was not a breach of its contractual agreement, Mitsubishi did not have good cause to terminate the agreement.

Finally, the court held that although the NJFPA permitted an award of attorney fees and costs for a violation of the act, it did not permit an award of expert fees because the legislature did not explicitly allow an award of expert fees as it had in other statutes.

***Tolle Furniture Group, LLC v. La-Z-Boy*, No. C09-0889RSL, WL 2160981, Bus. Franchise Guide (CCH) ¶ 14,186 (W.D. Wash. July 17, 2009)**

Plaintiff operator moved for a temporary restraining order against manufacturer La-Z-Boy to prevent the manufacturer from terminating its retailer agreements after the manufacturer demanded payment of more than \$4 million that the operator owed on its account. The operator asserted that it was entitled to the restraining order because the relationship between the parties was a franchise under Washington law and therefore required the manufacturer to comply with the Washington Franchise Investment Protection Act (WFIPA) with respect to termination. The operator also claimed that the manufacturer had agreed to defer payment of the debt.

The court held that all of evidence indicated that the operator was not likely to meet its burden to obtain a preliminary injunction under the Washington law. The operator had not shown a likelihood of success on the merits, particularly that the manufacturer had agreed to defer the payment of the debt, the court found. The operator did not dispute that it had over \$5 million in past-due invoices owed to the manufacturer. The court therefore concluded that the operator had failed to comply with a provision in the parties' retailer agreements. The operator's understanding of the relationship was not based on any written agreement, and the operator could not demonstrate that any oral agreement was enforceable, the court held.

The court also rejected the operator's argument that the manufacturer violated the WFIPA. The statute permits a franchisor to terminate the relationship without notice after "three willful and material breaches of the same term of the franchise agreement occurring within a twelve month period," the court pointed out. The manufacturer had given the required notice, providing the operator with more than thirty days to attempt to cure its debt. Accordingly, the court denied the operator's motion for a temporary restraining order.

***Wendy's Int'l, Inc. v. Saverin*, No. 08-4245, 2009 WL 2018163, Bus. Franchise Guide (CCH) ¶ 14,196 (6th Cir. July 9, 2009) (unpublished)**

Franchisor Wendy's International, Inc. brought suit against a franchisee and its personal guarantor, Saverin, for breach of contract when its company, WenAmerica, defaulted on its obligations under various franchise agreements. The franchisee counterclaimed for breach of the implied covenant of good faith and fair dealing. The trial court ruled in favor of the franchisor on all counts, and the franchisee appealed.

The dispute centered on a forbearance agreement that the parties entered into after the franchisee ran into financial trouble. When a receiver was appointed for the franchise, the franchisor terminated the franchise agreements. In the lawsuit, the franchisee claimed that the franchisor breached the parties' forbearance agreement by not forbearing long enough for the franchisee to sell some or all of its restaurants. But the forbearance agreement permitted the franchisor to terminate under the circumstances, i.e., where the franchisee had defaulted on payment obligations and a receiver had been appointed.

When the franchisee was put into voluntary bankruptcy by other creditors, the franchisor sued the guarantor. The appeals court concluded that the franchisor was justified in terminating the agreements. The provisions of the agreement were clear, the court found. The franchisor was not required to forbear for a longer period than it had.

The court further held that the franchisor had not breached the implied covenant of good faith and fair dealing by terminating the franchise agreements when it did, in response to uncured payment defaults and the appointment of the receiver. The court rejected the guarantor's contention that despite the language of the forbearance agreement, the franchisor could not take action to hasten the appointment of a receiver without breaching the implied covenant. The guarantor's argument was an impermissible attempt to add a new term to the agreement, the court found. The court rejected the guarantor's remaining arguments as well and affirmed the judgment of the district court.

***Haynes Trane Serv. Agency, Inc. v. Am. Standard, Inc.*, 573 F.3d 947, Bus. Franchise Guide (CCH) ¶ 14,174 (10th Cir. 2009)**

This case is discussed under the topic headings "Contract Issues" and "Fraud."

***Meineke Car Care Ctrs., Inc. v. RLB Holdings, LLC*, No. 3:08-cv240-RJC, 2009 WL 2461953, Bus. Franchise Guide (CCH) ¶ 14,212 (W.D.N.C. Aug. 7, 2009)**

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

***Emergency Accessories & Installation, Inc. v. Whelen Eng'g Co., Inc.*, No. 09-2652 (JEI/AMD), 2009 WL 1587888, Bus. Franchise Guide (CCH) ¶ 14,178 (D.N.J. June 3, 2009)**

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

***Shell Trademark Mgmt. BV v. Ray Thomas Petroleum Co., Inc.*, No. 3:07cv163-RJC, 2009 WL 1686979, Bus. Franchise Guide (CCH) ¶ 14,163 (W.D.N.C. June 15, 2009)**

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

TORTIOUS INTERFERENCE

***DaimlerChrysler Fin. Servs. Ams., LLC v. Woodbridge Dodge, Inc.*, No. 06-5225 (SRC), 2009 WL 2152083, Bus. Franchise Guide (CCH) ¶ 14,182 (D.N.J. July 14, 2009) (unpublished)**

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

TRADEMARKS

***TGI Friday's Inc. v. Great Nw. Rests., Inc.*, No. 3:09-CV-0083-D, 2009 WL 2568269, Bus. Franchise Guide (CCH) ¶ 14,202 (N.D. Tex. Aug. 20, 2009); 2009 WL 2576374, Bus. Franchise Guide (CCH) ¶ 14,203 (N.D. Tex. Aug. 20, 2009)**
This case is discussed under the topic heading "Injunctive Relief."

***Shell Trademark Mgmt. BV v. Ray Thomas Petroleum Co., Inc.*, No. 3:07cv163-RJC, 2009 WL 1686979, Bus. Franchise Guide (CCH) ¶ 14,163 (W.D.N.C. June 15, 2009)**

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

VICARIOUS LIABILITY

***State v. JTH Tax, Inc.*, No. CGC-07-460778, Bus. Franchise Guide (CCH) ¶ 14, 216 (Cal. Sup. Ct. June 15, 2009)**

The California Attorney General (the People) sued JTH Tax, Inc. d/b/a Liberty Tax Service (Liberty) for violations of California's Unfair Competition Law (UCL) and False Advertising Law (FAL). After a bench trial and post-trial briefing, the court issued an opinion and order awarding the People penalties, restitution, and permanent injunctive relief against Liberty.

Liberty provides tax preparation services, e-filing, refund anticipation loans (RALs), and electronic refund checks (ERCs) to consumers through its more than 2,000 franchised and company-owned locations throughout California and the United States, according to the opinion. The People took issue with Liberty's practices surrounding the sale of RALs and ERCs.

As the court described it, a RAL is a short-term loan secured by a customer's anticipated tax refund and issued by a third-party bank. The loan amount is based on the anticipated refund, minus all fees, including a finance charge, tax preparation fees, and a handling fee, and is usually disbursed in one to two days. In contrast, the IRS generally takes about eight to fourteen days to process a tax refund by direct deposit into the taxpayer's bank account, or three to four weeks if the refund check is sent by mail. When the IRS deposits the refund check into the RAL account, the lender repays itself out of the refund. If the refund is not received or is less than expected, the consumer is held liable for the full amount of the loan.

With an ERC, the bank also sets up a temporary account to receive the customer's refund, according to the opinion. When the refund is received, the bank deducts the tax return preparation fees, the handling fee, and any other applicable charges and pays the remainder to the customer, usually in the form of a check to be picked up at Liberty's offices.

The court first determined that Liberty could be held liable for the acts of its franchisees in terms of the sale and marketing of RALs and ERCs because Liberty's franchisees were its agents. The court held that the issue of agency is a question of fact for the court, and the inquiry focuses on "the extent to which the control reserved to the franchisor plainly exceeds that required to police the mark." The court held that although many of Liberty's restrictions on its franchisees appeared designed to police its trademark, many others did not.

Specifically, the court found that certain restrictions on its

franchisees were not designed to police Liberty's marks, such as mandatory compliance with Liberty's operations manual, dictation of the third-party banks used by franchisees and restriction on the products and services offered by franchisees without Liberty's permission, determination of franchisee operating hours, requirements about the computers used by franchisees, detailed day-to-day operations outlined in the operations manual, reservation of the right to intervene in disputes between franchisees and their customers; requirement of a mandatory filing system, and the exercise of control over franchisee pricing and discounts.

With regard to advertising, the court found Liberty's control "particularly extensive." Liberty exercised control over advertising, not only to protect its mark, but also to dictate business strategy for franchisees, the court ruled. Likewise, the court found that Liberty controlled the products and services that franchisees were permitted to advertise, not because it was necessary to protect the franchisor's marks but because Liberty believed that certain advertising was a waste of time and money. The court held that Liberty's "right of essentially complete control over franchisee operations, and specifically advertising operations, exceeds what Liberty reasonably needs to protect its trademark and goodwill."

The court went on to discuss the People's allegations of Liberty's false, misleading, or otherwise "illegal" advertising that the People claimed violated the UCL and FAL. The court found that ads promising refunds in one day were misleading because the services offered were not the delivery of refunds but the making of loans that carried fees and were subject to repayment by the consumer. The court also found that such ads referring to getting "your money" within twenty-four hours was misleading because no one obtains a refund in twenty-four hours; only the RAL may be available in twenty-four hours. In addition, the court ruled, *inter alia*, that the ads of Liberty and its franchisees lacked statutorily mandated disclosures under state law, Liberty was liable for aiding and abetting the banks in violation of the Fair Debt Collection Practices Act and applicable state laws, Liberty's ERC handling fee was a finance charge under the Truth in Lending Act (TILA), and its failure to disclose the charge was deceptive under the UCL and FAL.

The court ordered that Liberty pay statutory penalties and restitution to the People for Liberty's violations of the UCL and FAL. The court also entered a permanent injunction addressing Liberty's failures to educate its internal staff on the illegalities of advertising and to control its franchisees, requiring that Liberty report failures to the attorney general, and requiring that Liberty serve a copy of the injunction on any prospective franchisee.

***Thompson v. McDonald's Corp.*, No. B206000, 2009 WL 1653443, Bus. Franchise Guide (CCH) ¶ 14,160 (Cal. Ct. App. June 15, 2009) (unpublished)**

An employee of a McDonald's franchised restaurant in Los Angeles, California, brought suit against McDonald's Corporation (McDonald's) for negligence stemming from a criminal incident occurring at the restaurant. The restaurant was owned and operated by franchisee Sanders-Clark & Co. (Sanders-Clark) under a franchise agreement and lease between Sanders-Clark and McDonald's.

According to the employee's complaint, the employee, Janette Thompson, was working at the restaurant's drive-through cashier window one morning when a male pedestrian approached and tapped on the drive-through window. Thompson opened the window. "The man held out a quarter and asked for change." Thompson removed her hand from the window, "and it closed completely. [While] Thompson was making change, the man opened the window, grabbed [her] . . . arm, . . . pulled her . . . body through the window," and demanded that she give him money. The man then shot Thompson in the abdomen with a handgun and fled.

Thompson filed suit against McDonald's for negligence. The complaint alleged that McDonald's "failed to exercise ordinary care in the management and maintenance of the property . . . by failing to provide adequate security." Specifically, Thompson alleged "that a bullet-resistant window or a sliding cash drawer (similar to a bank teller drawer) would have prevented the incident." McDonald's filed a motion for summary judgment asserting that as the franchisor, McDonald's "did not own, operate, or control the restaurant"; "it did not owe Thompson a duty of care because the incident was not reasonably foreseeable"; and even "assuming it had such a duty and that the duty was breached, the breach was not the cause of the incident."

The trial court granted summary judgment in favor of McDonald's. The trial court did not grant summary judgment with respect to the duty of care issue, "stating that triable issues of material fact existed with respect to McDonald's control over the restaurant and the reasonable foreseeability of the crime." However, on the causation issue, the trial court held that Thompson "had failed to present evidence supporting an 'actual causal link' between 'defendant's alleged negligence and [her] injury.'" Because the trial court found no causation as a matter of law, it granted summary judgment. Thompson appealed.

The appellate reversed. Because McDonald's did not challenge the trial court's finding on the duty issue, the court did not address the trial court's ruling with regard to duty. With regard to causation, the court held that McDonald's failed to carry its initial burden on summary judgment by presenting "evidence that its use of an *openable* window, instead of an unopenable window with a drawer, was not [the] cause of the incident" or "that the incident would have happened" regardless of whether or not it had used an unopenable window. Because "McDonald's failed to meet its initial burden of making a *prima facie* showing that the openable window was not a cause of the incident," the court held that "[t]he burden never shifted to Thompson on [this] point" and reversed summary judgment.

The court held alternatively that an issue of material fact related to causation prevented summary disposition of the matter. The court recognized that when a landlord can install an appropriate physical device to prevent injuries caused by third-party conduct, "it is . . . *possible* for the landowner's failure to install such a device to be a legal cause of a plaintiff's injury." However, the landlord's failure to install such a device is "by no stretch of the imagination" "sufficient to *prove* causation." The court held that "Thompson was required to submit evidence that it was more probable than not that, but for the landlord's negligence, the assault would not have occurred."

McDonald's argued that "causation [was] lacking because it [had] installed a self-locking window that could not be opened from the outside and that Thompson's injuries were caused by a shot 'through a . . . window *that she herself opened.*'"

Thompson presented evidence that the assailant was able to open the window after it was closed. McDonald's claimed that the window was self-locking, but Thompson claimed that the window did not automatically lock once closed. Thus, held the court, if a jury credited Thompson's evidence, it could find that installation by McDonald's "of a manually locking window instead of an automatically locking window caused the incident," and a disputed issue of material fact remained.

Because it found that McDonald's failed to carry its initial burden in "disputing Thompson's allegation that the lack of a security drawer caused the incident" and, alternatively, an issue of material fact existed as to causation, the court reversed the trial court's grant of summary judgment in favor of McDonald's.

***Sandra Reese v. Dunkin' Brands, Inc.*, 08-1179-JDB, 2009 WL 1884010, Bus. Franchise Guide (CCH) ¶ 14,190 (W.D. Tenn. June 26, 2009)**

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

***Maiorino v. Park Tysen Assocs., L.L.C.*, No. 104713/08, 2009 WL 2005254, Bus. Franchise Guide (CCH) ¶ 14,181 (N.Y. Sup. Ct. July 10, 2009) (unpublished)**

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

ENDNOTES

1. Ms. Cheng's law firm, Cheng Cohen, represented the defendant in this case.