Franchising (& Distribution) Currents

Amy Cheng, Jennifer Dolman, and Elliot R. Ginsburg

ALTERNATIVES TO FRANCHISING

***Bennett v. Itochu Int'l, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,313, 572 F. App'x 80 (3d Cir. 2014)**

Ms. Cheng

Ms. Dolman

Mr. Ginsburg

In 2007, appellants and respondents started negotiations for two cooperative business ventures: one involved an investment by respondents in appellants' firm; the second involved a joint venture to sell medication-mixing robots. For various reasons, neither of the projects materialized. On appeal, two substantive issues were raised: (1) whether respondents breached their duty to negotiate in good faith; and (2) whether appellants were entitled to rely on promissory estoppel.

With respect to the duty of good faith argument, the Third Circuit affirmed the decision of the district court for two reasons: (1) appellants failed to identify a specific promise to negotiate in good faith; and (2) the term sheet relied upon by appellants used "unambiguous language to disclaim any intent by the parties to bind each other."

The court noted that a duty to negotiate in good faith requires a binding agreement between the parties expressing their commitment to negotiate in good faith and reach an agreement. Therefore, the language in the term sheet was fatal to appellants' claim. The court also upheld the district court's

Amy Cheng (amy.cheng@chengcohen.com) is a member of the Chicago firm of Cheng Cohen LLC. Jennifer Dolman (jdolman@osler.com) is a partner with Osler, Hoskin & Harcourt LLP in Toronto. Elliot R. Ginsburg (eginsburg@yourfranchiselawyer.com) is a partner with Ginsburg & Garner, P.A. in Minneapolis. Ms. Cheng's firm represents Steak n Shake Enterprises, Inc. and Steak n Shake Operations, Inc. in Druco Restaurants, Inc. v. Steak n Shake Enterprises, Inc. *and Kumon North America, Inc. in* Kumon North America, Inc. v. Timba, *both of which are discussed in this article.*

decision with respect to the promissory estoppel argument, holding that appellants' reliance on oral promises was contradicted by the parties' signed writings, which clearly state that any binding agreement results only from a formal, written contract.

Appellants also sought to rely on an oral promise that respondents would be an equal partner in the joint venture. Appellants admitted that they knew the equal partnership was contingent on approval from respondents' investment committee. The court held that reliance on a contingent promise is unreasonable as a matter of law.

AMERICANS WITH DISABILITIES ACT

***Lemmons v. Ace Hardware Corp.*, Bus. Franchise Guide (CCH) ¶ 15,317, No. 12-cv-03936-JST, 2014 WL 3107842 (N.D. Cal. July 3, 2014)**

Portia Lemmons brought an action against her local hardware store (the franchisee) and its franchisor, Ace Hardware Corporation, for discrimination under the Unruh Act and the California Disabled Persons Act (CDPA). The claims were both predicated on violations of Title III of the Americans with Disabilities Act (ADA). Lemmons moved for summary judgment of her claims under the Unruh Act and the CDPA. Both Ace and the franchisee opposed the motion and moved for summary judgment as to Lemmons' claims against Ace on the ground that Ace was not an owner, lessee, or operator for the purposes of the ADA.

The U.S. District Court for the Northern District of California granted summary judgment to Lemmons on her claim under the Unruh Act with respect to the franchisee. The court also granted summary judgment to Ace with respect to claims brought against it. The court held that, in the absence of evidence showing Ace could dictate the physical layout of the store or that its conduct was otherwise discriminatory against Lemmons, Ace was not an operator for the purposes of the ADA.

Although Lemmons' evidence showed that, under the franchise agreement, Ace required the franchisee to abide by all federal and state laws, including those pertaining to disability access, the court held this evidence was insufficient because the contractual terms alone did not grant Ace control of the physical layout of the store. It held a franchisor will be seen as the operator only where there is evidence that the franchisor has control over a store such that it can ensure nondiscrimination against the disabled.

ANTITRUST

***Dunlap v. Cottman Transmissions Sys., LLC*, Bus. Franchise Guide (CCH) ¶ 15,325, 539 F. App'x 69 (4th Cir. 2013)**

This case is discussed under the topic heading "Tortious Interference."

ARBITRATION

***Druco Rest., Inc. v. Steak n Shake Enter., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,354, 765 F.3d 776 (7th Cir. 2014)**

The Seventh Circuit affirmed a federal district court's refusal to stay litigation and compel nonbinding arbitration of claims brought by Steak n Shake franchisees in three separate actions, finding the parties' agreements to arbitrate illusory under Indiana law.

Plaintiffs Druco Restaurants, Inc., Scott's S&S, Inc., and People Sales & Profit Co. (PSPC) are all current Steak n Shake franchisees with several restaurants in Missouri, Pennsylvania, and Georgia. All of the franchise agreements they signed contain a venue and dispute resolution provision, and all but one of those provisions (known as the Brunswick Agreement) states that: Steak n Shake "reserves the right to institute at any time a system of nonbinding arbitration or mediation[;]" the franchisee "will be obligated to participate in such system, at [Steak n Shake's] request, in the event of a dispute[;]" and the Federal Arbitration Act (FAA) applies to the arbitration clauses.

Steak n Shake adopted its arbitration policy about one month after plaintiffs filed suit in Indiana federal court, seeking declaratory judgment and other relief from Steak n Shake's pricing and promotion policy, which requires system wide adherence to corporate menu pricing and promotions. According to plaintiffs, under the terms of their franchise agreements, they, not Steak n Shake, may set their own menu prices and decide whether to participate in corporate promotions. The arbitration policy Steak n Shake adopted provides, in relevant part:

> If a lawsuit is filed in which claims are based on or arise out of a franchise agreement between the Company and a franchisee, and the franchise agreement at issue permits the Company to require the franchisee to participate in nonbinding arbitration or mediation, the parties shall, at the request of the Company, submit to nonbinding arbitration or mediation as described in the applicable franchise agreement. . . . If the underlying franchise agreement permits the Company to require participation in arbitration, the proceedings will be conducted . . . according to the then-current Commercial Arbitration Rules of the American Arbitration Association. . . . All matters relating to an arbitration will be governed by the [FAA] except that the decision of the arbitrator will be nonbinding.

Pursuant to the arbitration clauses and arbitration policy, Steak n Shake initiated arbitration proceedings with the American Arbitration Association (AAA) and moved the district court to compel nonbinding arbitration of all of the plaintiffs' claims, except for those relating to the Brunswick Agreement, which were not subject to arbitration, and to stay the lawsuits pending the outcome of arbitration. The district court denied the motions in all three cases, finding that the agreements to arbitrate were illusory because there was no limit on Steak n Shake's ability to arbitrate (or to avoid arbitration) on a whim. According to the district court, performance of the arbitration clause was entirely optional for Steak n Shake, and Steak n Shake retained the ability to terminate its system of arbitration at any time.

***Moody v. Metal Supermarket Franchising Am. Inc.*, Bus. Franchise Guide (CCH) ¶ 15,293, No. C 13-5098 PJH, 2014 WL 1993806 (N.D. Cal. May 15, 2014)**

Plaintiff (Moody) purchased a metal supply franchise from defendant (MSFA). In connection with the sale, Moody entered into a franchise agreement with MFSA that contained an arbitration provision requiring both sides to submit disputes to arbitration, but permitted only MFSA to turn to courts for injunctive relief. After a dispute arose, MFSA sought to compel arbitration, and Moody sought to invalidate the arbitration provision on the grounds that its lack of mutuality made it unconscionable.

In arguing his position, Moody relied primarily on precedent established in an employment law case, in which a one-sided arbitration provision was found unconscionable even though the plaintiff was represented by an attorney and negotiated other provisions of the agreement. However, the district court pointed out that in reaching that decision the court deciding the employment law case applied a sliding scale test, holding the higher the substantive unconscionability, the lower the requirement for procedural unconscionability. In that case, the dispute resolution provision contained not just a one-sided arbitration provision, but also required the plaintiff to engage in discussions with his supervisors before submitting the dispute to arbitration, thereby giving the defendant a peek at the plaintiff's case. The fact that the employee was represented by counsel was therefore outweighed by the high degree of substantive unconscionability of the provision. With respect to the present case, the court held that Moody's arbitration provision was less substantively unconscionable, so the precedent of the employment case did not apply. The court granted MFSA's motion to compel arbitration.

MFSA also sought reimbursement of attorney fees from Moody. The court held that MFSA was not entitled to such fees because the attorney fee provision in the franchise agreement granted the prevailing party fees and costs only for claims for money owed by the franchisee or for breach of the franchise agreement by the franchisee. In the present case, Moody's cause of action was for clarification of the parties' rights and obligations related to certain contractual provisions, not for money owed or breach of the agreement; therefore, the attorney fees provision did not apply.

***Pla-Fit Franchise, LLC v. Patricko, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,306, No. 13-CV-489-PB, 2014 WL 2106555 (D.N.H. May 20, 2014)**

This case reinforces the principle that a party may seek preliminary injunctive relief in an otherwise arbitrable dispute without forfeiting its right to arbitration. Defendants, former Pla-Fit franchisees, entered into franchise agreements for two gyms in Massachusetts. Within months of entering into the agreements, the franchisees disputed with the franchisor on a variety of financial and operational issues that ultimately resulted in the franchisees filing a lawsuit in the U.S. District Court for the District of Massachusetts for breach of contract, conversion, and violation of the Massachusetts Consumer Protection Statute.

The franchise agreements at issue both contained mandatory arbitration provisions, and Pla-Fit successfully moved the Massachusetts court to compel arbitration on that basis. Before the matters were compelled to arbitration, Pla-Fit sent the franchisees default notices for certain chronic violations of the franchise agreements and demanded that the franchisees cure such defaults within thirty days. The parties negotiated several extensions, but were ultimately unable to resolve these issues. On November 11, 2013—about four months after the motion to compel arbitration was granted but before either party commenced any arbitration proceeding—Pla-Fit sent the franchisees termination notices. On November 14, 2013, Pla-Fit commenced this action in the District of New Hampshire, filing a complaint seeking preliminary and permanent injunctive relief for trademark infringement, a declaratory judgment that the franchisees continued to operate a competitive businesses in violation of their franchise agreements, and damages for breach of contract. The next day, Pla-Fit filed a motion for preliminary injunction. Notably, in the complaint, Pla-Fit did not expressly reserve its right, or otherwise disclose its intention, to arbitrate those claims ancillary to its claims for injunctive relief.

A few weeks later, the franchisees agreed to de-brand their stores, mooting the motion for preliminary injunction. On December 13, 2013, Pla-Fit sent the franchisees a proposed order dismissing the New Hampshire action and submitting all disputes to arbitration. The franchisees did not agree and shortly thereafter filed an answer and counterclaims, which were substantially similar to the claims the franchisees brought in the Massachusetts action. On January 6, 2014, Pla-Fit filed a motion to compel arbitration in the New Hampshire action.

The franchisees argued that Pla-Fit waived its right to arbitration by invoking the court's jurisdiction without expressly reserving its right to arbitrate. At the outset, the court discussed the proper standard of review for a motion to compel arbitration and noted a divide in authority between the Federal Rule of Civil Procedure 12(b)(6) standard and the summary judgment standard. The court reasoned that the standard applied depends on the materials submitted in support of the motion. Because the parties submitted documents that generally cannot be considered under the Rule 12(b)(6) standard, including affidavits and other exhibits, the court held that it would resolve the motion to compel under the summary judgment standard.

Next, the court acknowledged that a party can waive its right to arbitrate by implication, but refused to apply a blanket rule that a party automatically waives its right to arbitrate by initiating a lawsuit. "Instead, any arbitration waiver claim must be judged on its own facts and all relevant circumstances." Here, the court noted that Pla-Fit filed its lawsuit in part to protect itself from the franchisees' alleged trademark infringement. Under *Teradyne, Inc.*

v. Mostek Corp., 797 F.2d 43, 51 (1st Cir. 1986), a party may seek preliminary injunctive relief in an otherwise arbitrable dispute without forfeiting its right to arbitration. Although noting that the best practice is to expressly reserve the right to arbitrate in the complaint, the court observed that Pla-Fit revealed its proposal to arbitrate to the franchisees within days after its request for injunctive relief was mooted.

The franchisees argued they were nevertheless prejudiced by Pla-Fit's actions in commencing the New Hampshire lawsuit. The First Circuit emphasized prejudice as a key factor in any waiver analysis, and stated the elements to a prejudice inquiry include: (1) the length of the delay, (2) the litigation activities engaged in, and (3) whether a party has been unfairly misled in the process. *See Restoration Pres. Masonary, Inc. v. Grove Eur., Ltd.*, 325 F.3d 54, 61 (1st Cir. 2003). The court held that Pla-Fit failed to establish prejudice under any of these prongs.

First, as to the length of the delay, the court noted that Pla-Fit informed the franchisees of its intention to arbitrate less than three weeks after the franchisees agreed to de-brand, and Pla-Fit moved to compel arbitration within two months after the parties were unable to reach a mutual agreement to arbitrate. Also important to the court's delay analysis was the fact that neither party had engaged in any discovery other than the submission of a joint discovery plan.

Second, the franchisees argued that because of Pla-Fit's actions they were forced to (1) retain local counsel, (2) answer the complaint, (3) de-brand more quickly than they would have otherwise, (4) file pro hac vice motions for their counsel, and (5) file the discovery plan mentioned earlier. The court observed that the franchisees would have had to do the first three tasks in order to respond to the motion for preliminary injunction even if Pla-Fit had immediately invoked its right to arbitrate all other matters in the complaint. The last two tasks were given little weight because the franchisees voluntarily undertook them after Pla-Fit filed its motion to compel arbitration.

Third, the court held that the primary reason Pla-Fit filed the complaint was to protect its trademark rights. Because the franchisees knew or should have known that Pla-Fit wished to arbitrate any remaining claims, they were not unfairly misled.

Finally, the court rejected the franchisees' argument that Pla-Fit acted in bad faith. The court disregarded their argument that they were entitled to joint arbitrations because the arbitration provision did not provide for such relief. Accordingly, the court granted the motion to compel arbitration and stayed the lawsuit until such arbitration occurred.

***Trouard v. Dickey's Barbecue Rest., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,348, No. PWG-14-1703, No. GLR-14-1650, 2014 WL 3845785 (D. Md. Aug. 1, 2014)**

Plaintiffs entered into a franchise agreement with defendant franchisor and incurred significant debt in opening and operating the franchised restaurant instead of realizing profits that they had expected. Plaintiffs' attorney contacted defendant, claiming the defendant and some of its principals violated the Maryland Franchise Registration and Disclosure Law. The attorney asked defendant to discuss mediation. The franchisor, however, then filed a demand for arbitration and plaintiffs argued the arbitration clause in the franchise agreement was unenforceable under the Maryland Franchise Law.

Plaintiffs then filed suit against defendants, alleging fraud and violations of the Maryland Franchise Law and seeking declaratory judgments and injunctive relief from the pending arbitration. Thus, the U.S. District Court for the District of Maryland had to determine whether the arbitration clause was valid and enforceable. Plaintiffs filed a motion for preliminary injunction seeking relief from the pending arbitration and defendants filed a cross-motion to compel arbitration and to stay the action in court.

The court held that Congress enacted the Federal Arbitration Act to promote the enforceability of arbitration agreements, and the question was whether the franchise agreements included a valid arbitration provision pertaining to this dispute. Because arbitration is a matter of contract, the court applied contract law to determine whether the arbitration clause was valid and enforceable. In particular, the court looked to whether or not the arbitration clause at issue was ambiguous when read in conjunction with the "Maryland Clause" in the agreement, which provided for modification of contract provisions inconsistent with state law and stated that the provisions of the franchise agreement do not require the franchisee to waive its right to file a lawsuit alleging a cause of action under the Maryland Franchise Law.

The franchisor argued that the arbitration clause could function in harmony with the "Maryland Clause" to mean that a franchisee generally has the right to filed suit in Maryland but that the franchisees here voluntarily waived that right in the franchise agreement and were therefore bound to the arbitration clause. Under this reading, the arbitration clause would be valid and enforceable. On the other hand, the franchisees argued that the "Maryland Clause" controlled and operated to free them from the arbitration clause.

The court held that the contract language was ambiguous. Because the franchise agreement was ambiguous as to whether the parties intended to arbitrate as opposed to litigate franchise claims arising under the Maryland Franchise Law and whether the franchise agreement required such claims to be brought in Texas or Maryland, the court held that these issues must be resolved through a jury trial.

***Yogo Factory Franchising, Inc. v. Ying*, Bus. Franchise Guide (CCH) ¶ 15,291, No. 13-630 (JAP) (TJB), 2014 WL 1783146 (D.N.J. May 5, 2014)**

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

ATTORNEY FEES

***Autofair 1477, L.P. v. Am. Honda Motor Co., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,359, No. 2012-914, 2014 WL 4122442 (N.H. Aug. 22, 2014)**

Plaintiff, a franchisee auto dealer (Autofair), appealed an order granting summary judgment to defendant franchisor (American Honda) on Autofair's petition for attorney fees. Autofair successfully petitioned the New Hampshire Motor Vehicle Industry Board to reduce "chargebacks" imposed by American Honda following an audit into warranty repair work on motor vehicles.

Autofair filed a petition for attorney fees and costs pursuant to the New Hampshire Dealership Act, which provided in part that a prevailing party is entitled to reasonable attorney fees when the Board finds the other party has violated the Act. While the appeal was pending, the legislature amended the Act to add a definition of "chargeback." At dispute was whether this section could be applied retrospectively.

The Supreme Court of New Hampshire held that if American Honda could propose chargebacks without violating the Act prior to the amendment, even though the amended Act prohibited those same proposed chargebacks, then the amendment placed a new disability on American Honda and could not be applied retrospectively. The court found that prior to the amendment, the Act prohibited American Honda from making certain chargebacks. In contrast, following the amendment, the Act prohibited even announcing an intention to impose chargebacks.

Because the proposed chargebacks would not violate the Act prior to the enactment of the amendment, but would violate it under the amended scheme, the court found the Act could not be applied retrospectively. On this basis, the court affirmed the trial court's order granting summary judgment.

***Laguna v. Coverall N. Am., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,299, 753 F.3d 918 (9th Cir. 2014)**

The United States Court of Appeals for the Ninth Circuit upheld a district court's approval of a settlement that included an attorneys fee award of $994,800 to plaintiffs' counsel. After two years of litigation, Coverall North America, Inc. (Coverall) and a group of its franchisees reached a settlement in a class action filed by the franchisees, alleging Coverall misclassified its California franchisees as independent contractors, breached its franchise agreements, and committed fraudulent and unfair practices by removing customer accounts from franchisees without cause in order to resell them. Amit Singh, a class member, was the sole objector to the proposed settlement, and in particular, to the proposed award of $994,800 in attorney fees. The district court approved the settlement and Singh appealed.

At the outset, the Ninth Circuit noted that when a class action settlement is submitted for approval, the initial decision to approve or reject is committed to the sound discretion of the district court. Here, the district court determined that the settlement was fundamentally fair, adequate, and reasonable over Singh's objections to: (1) the conditional assignment of customer accounts to the franchisees until the franchisees paid the franchise fees in full, (2) former franchisees each receiving $475 and a $750 credit toward a new franchise, (3) new franchises having a 30-day rescission right to receive all money they paid, except for the $75 investigation fee, and (4) attorney fees of $994,800.

Taking the fee award first, the Ninth Circuit determined that the district court had an independent obligation to ensure the award itself was reasonable even though the parties agreed to it. But, the court continued that in the context of a settlement where fees are the subject of compromise, the district court need not inquire into the reasonableness of the fees with the same level of scrutiny as when the fee amount is litigated.

Depending on the circumstances, there are two methods that may be used to calculate a reasonable attorneys' fee award. The lodestar method is appropriate when the relief sought is primarily injunctive in nature, so the Ninth Circuit concluded that the district court correctly used the lodestar method in gauging the fairness of the attorneys' fee award in this case because the settlement provisions were mostly injunctive in nature.

The Ninth Circuit found that the district court had correctly calculated the lodestar amount and had reasonably concluded that the agreed upon award was appropriate. In its analysis, the district court noted that the case was contentiously litigated for over two years and in that time plaintiffs' counsel had collectively billed over 4,500 hours. Based on that number, the district court calculated the lodestar amount to be almost $3 million. Thus, the attorney fees award of $994,800—not even one-third of the lodestar—was reasonable. The district court then cross-checked the reasonableness of the award by applying the percentage-of-recovery method using a benchmark figure of 25%, which is an appropriate gauge in common fund settlement cases. Here, Singh valued the settlement at $56,525 while the plaintiffs ascribed a $20 million valuation. The district court found that Singh's figure did not give any value to the injunctive relief, and it correctly surmised that even if the plaintiffs' value was high, the value of the settlement only needed to be $4 million for the fees awarded to plaintiffs' class counsel to be within the normal bounds of reasonableness under the percentage-of-recovery method.

Singh's principal argument against the reasonableness of the fee award was that the actual value of the settlement, which he characterized as primarily the amount of cash payments, was so low (i.e., $475 per plaintiff in the class). Although the Ninth Circuit observed that Singh had correctly noted the benefit obtained for the class was important in determining whether to adjust the lodestar amount, any such adjustment was equitable and squarely within the discretion of the district court. The Ninth Circuit added that Singh presented no evidence that the district court abused its discretion in declining further adjustment from the lodestar and that the district court acted within its proper discretion when it concluded the settlement contained significant benefits for the class plaintiffs beyond the cash recovery. For all of these reasons, the Ninth Circuit affirmed the district court's award of $994,800 to the class action plaintiffs' counsel.

Next, turning to the settlement as a whole, the Ninth Circuit determined that the district court did not abuse its discretion in finding the settlement to be fundamentally fair under the Churchill factors. These include the strength of the plaintiffs' case; the risk, expense, complexity and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of class members to the proposed settlement. In particular, the Ninth Circuit restated with approval the district court's evaluation of the various risks of continuing in litigation: California employment law and other Supreme Court decisions would make obtaining class certification difficult or might prove fatal to class certification; Coverall was in a difficult financial position which increased risks to the plaintiffs; and there was no governmental entity involved. And, it noted that the settlement contained significant benefits to the plaintiffs, especially in the assignment of accounts.

Singh argued that the district court was under a special obligation to make clear fact-based findings on the value of the nonmonetary terms. The Ninth Circuit disagreed, stating that district courts have no obligation to make explicit monetary valuations of an injunction term and that such valuations would be difficult and imprecise.

Singh also argued that there were "warning signs" of collusion that should have made the district court exercise a heightened review. The Ninth Circuit found that the first warning sign of disproportionate distribution to counsel was not present because the district court found the fee award to be reasonable. The Ninth Circuit agreed. The next warning sign—presence of a reversion clause—was present because the payment to the former franchisees would revert to the franchisor if the franchisees did not file. However, the Ninth Circuit found that the district court balanced this factor with the overall settlement benefits.

In addition, Singh claimed a violation of the Class Action Fairness Act and requested rejection of the settlement. The Ninth Circuit found that Singh did not have standing because the remedy for a violation of that Act was to be exempt from the settlement—not rejection, and Coverall had properly notified the California Attorney General. Finally, the Ninth Circuit found there was no abuse of discretion in requiring objectors be available for depositions as it is a common requirement.

***Meineke Car Care Ctrs., LLC v. ASAR Inc.*, Bus. Franchise Guide (CCH) ¶ 15,366, No. 3:14-cv-129-RJC, 2014 WL 3952491 (W.D.N.C. Aug. 13, 2014)**

This case is discussed under the topic heading "Injunctive Relief."

***Moody v. Metal Supermarket Franchising Am. Inc.*, Bus. Franchise Guide (CCH) ¶ 15,293, No. C 13-5098 PJH, 2014 WL 1993806 (N.D. Cal. May 15, 2014)**

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

BANKRUPTCY

***Jack in the Box, Inc. v. Mehta*, Bus. Franchise Guide (CCH) ¶ 15,305, No. 5:13-CV-04444 EJD, 2014 WL 2069530 (N.D. Cal. May 19, 2014)**

Jack in the Box, Inc. (JIB) sued two former franchisees in Northern California, alleging various claims relating to the franchisees' failure to make timely payments under the franchise agreement and lease. Before the court was a motion by JIB to amend the court's prior orders and approve a private foreclosure sale between JIB and a bank that lent money to the franchisees and therefore had a security interest in collateral in the franchisees' restaurants. The franchisees objected to the foreclosure sale.

In 2012, the franchisees executed a promissory note and security agreement with the bank that granted the bank a security interest in the interior fixtures and furnishings used to operate the franchised restaurants. JIB consented to the bank obtaining a security interest in the collateral and agreed that its own security interest would be subordinate to that of the bank. After JIB initiated the lawsuit against the franchisees, the bank moved the court to intervene. While the intervention motion was pending, the court granted an order, which permitted JIB to take over operations of the franchisees' restaurants (Turnover Order). The Turnover Order enjoined creditors from taking any actions that would in any way interfere with JIB's control of the restaurants. JIB and the bank jointly sought a modification of the Turnover Order to allow for the foreclosure sale of certain assets of the restaurants from the bank to JIB.

The court examined the California Commercial Code sections which apply to remedies available to secured parties and noted that all disposition of assets in any way must be "commercially reasonable." Although the code expressly identifies three conditions of a commercially reasonable sale, those conditions are not exclusive and the issue is "generally a question of fact and depends on all of the circumstances existing at the time of the sale."

The specific terms of the asset purchase agreement between JIB and the bank were filed under seal, and the court only noted that JIB agreed to purchase from the bank all of the bank's collateral. JIB argued that the foreclosure sale was "commercially reasonable" for three reasons. First, the asset purchase agreement was negotiated at arm's length and between sophisticated business entities that were interested in selling at the highest price and buying at the lowest price. Second, the nature of the collateral is more valuable if purchased "in place" as opposed to being sold off in pieces at a private sale. Third, the sale includes terms consistent with the code's requirements regarding notice and the transfer of ownership rights.

The franchisees argued that JIB had no standing to negotiate such a sale and the approval of the sale would violate the franchisees' due process rights. The court rejected that argument because it ignores that the franchisees' defaulted on their financing agreement with the bank. Any argument that JIB had no standing was irrelevant because the bank was entitled to "sell, lease, license, or otherwise dispose of any or all of the collateral" under California Commercial Code § 9610.

The franchisees also argued that the foreclosure sale was premature before trial. The court disagreed and noted that the trial related to issues between JIB and the franchisees and had no bearing on the financing arrangement between the franchisees and the bank. Lastly, the court rejected the franchisees' argument that the franchisees could have negotiated a higher price for the sale of the collateral, reasoning it was mere "speculation."

Because the terms of the sale were commercially reasonable, the court granted the motion to amend the Turnover Order and approved the foreclosure sale.

***KFC Corp. v. Kazi*, Bus. Franchise Guide (CCH) ¶ 15,322, No. 3:12-cv-564-H, No. 3:13-cv-291-H, 2014 WL 2930833 (W.D. Ky. June 26, 2014)**

Following Chapter 11 Bankruptcy filing by four franchisees owned by defendant (Kazi) operating 142 KFC restaurants, plaintiff KFC Corporation (KFC) sought to collect various debts covered by guarantees signed by Kazi for each restaurant. Kazi moved for summary judgment dismissing KFC's claim on the basis that the guarantees were not enforceable.

In dismissing the motion, the district court for the Western District of Kentucky found that the guarantees were enforceable under the second prong of Kentucky's guarantee statute since they expressly referred to the instruments being guaranteed. The court found each guarantee expressly referred to the franchise agreement and specifically identified each restaurant by its geographic street and address. As a result, the court held KFC could enforce the guarantees to collect royalty payments, advertising payments, de-imaging costs and equipment lease payments. Each of these obligations was specifically contemplated in each restaurant's franchise agreement, and the subject of each guarantee expressly referred to the corresponding restaurant's franchise agreement. However, the court found that a $250,000 liability cap in each guarantee applied for each restaurant.

BREAKAWAY FRANCHISEES

***Acceleration Prods., Inc. v. Arikota, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,346, No. 2:14-CV-00252, 2014 WL 3900875 (D. Utah Aug. 7, 2014)**
This case is discussed under the topic heading "Non-Compete Agreements."

***Bans Pasta, LLC v. Mirko Franchising, LLC*, Bus. Franchise Guide (CCH) ¶ 15,303, No. 7:13-cv-00360-JCT, 2014 WL 637762 (W.D. Va. May 23, 2014)**
A breakaway franchisee moved to dismiss the franchisor's counterclaims for breach of contract and misappropriation of trade secrets, but the court ruled that the franchisor stated plausible breach of contract claims and denied the motion. In this case, a Roanoke franchisee claimed that the franchisor of Mirko's Pasta restaurants fraudulently induced it into entering the franchise agreement by making claims concerning the financial viability of a Mirko's Pasta franchise. The franchisee (Bans) filed a lawsuit seeking rescission and re-opened its location as a different Italian restaurant. The franchisor (Mirko) counterclaimed for breach of contract, breach of personal guaranty, and misappropriation of trade secrets. Mirko alleged that the franchisee wrote a letter, which constructively terminated the franchise agreement, but continued to operate an Italian restaurant at the location while using Mirko's proprietary signage, recipes and specifications for roughly five months prior to de-identifying and re-opening.

The franchisee argued that Mirko failed to state any claim upon which relief could be granted. The U.S. District Court for the Western District of Virginia disagreed, holding that the franchisor properly pleaded its claims for breach of contract because it alleged that Bans breached its obligations by, among other things, failing to continuously operate the restaurant, operating another business at the location, using Mirko's proprietary marks without authorization, disclosing Mirko's confidential information, not returning the confidential operations manual, and failing to pay royalties owed. The court rejected the franchisee's argument that Mirko's counterclaims failed to make adequate factual allegations to support its breach of contract and guaranty claims.

The franchisee also argued that Mirko could not assert its breach of contract claims seeking injunctive relief. It could not establish any threat of irreparable injury because the competing restaurant at the location had already been shut down. The court disagreed, holding instead that Mirko could seek injunctive relief enjoining disclosure of confidential information and the return of the operations manuals, at a minimum.

Finally, the franchisee challenged Mirko's misappropriation of trade secrets claim because it could not plead a plausible claim on the statutory element that it acquired the knowledge of the trade secret by "improper means." The court found Mirko's allegations legally sufficient—that it divulged confidential information to the franchisee, that the franchisee agreed to keep that information confidential, but used that information in a competing restaurant. The motion to dismiss the franchisor's counterclaims was therefore dismissed.

***Ledo Pizza Sys., Inc. v. Singh*, Bus. Franchise Guide (CCH) ¶ 15,335, No. WDQ-13-2365, 2014 WL 3810524 (D. Md. July 31, 2014)**

Plaintiff franchisor moved for a default judgment against a franchisee for claims of breach of contract, unfair competition in violation of the Lanham Act, trademark dilution under the Lanham Act, unfair competition and trade name infringement under Maryland common law, and tortious interference with contract. The franchisee failed to pay fees when due and after termination, failed to stop identifying the business as a Ledo Pizza store, and continued to sell food at the business following termination despite the covenant not to compete in the franchise agreement.

The U.S. District Court for the District of Maryland awarded the franchisor a default judgment for its claim of unfair competition under the Lanham Act because it owned a valid trademark, defendant used the mark in commerce without authorization, defendant used the mark in the sale of goods, and the defendant's use of the mark was likely to cause confusion among consumers. The franchisor was also awarded a default judgment for its claim of trademark dilution under the Lanham Act because it was able to show that the trademark was famous, defendant was making commercial use of the mark in commerce, defendant's use began after the mark became famous, and the defendant's use of the mark diluted the quality of the mark by diminishing the capacity of the mark to identify and distinguish goods and services.

The franchisor was also awarded a default judgment for its claim for unfair competition and trade name infringement under Maryland common law because it showed that the defendant was using its mark without the right to do so. Plaintiff was awarded damages, attorney fees and costs, and a permanent injunction. The court awarded a permanent injunction because it held that the franchisor would suffer irreparable harm due to a loss of reputation and harm to goodwill. The equities also tipped in the franchisor's favor because the franchisor worked with the franchisee to provide an opportunity to avoid termination prior to actual termination.

***Meineke Car Care Ctrs., LLC v. ASAR Inc.*, Bus. Franchise Guide (CCH) ¶ 15,366, No. 3:14-cv-129-RJC, 2014 WL 3952491 (W.D.N.C. Aug. 13, 2014)**

This case is discussed under the topic heading "Injunctive Relief."

***Scooter's Chicken Int'l, LLC v. Sunday Dinner, LLC*, Bus. Franchise Guide (CCH) ¶ 15,338, No. 13-6766, 2014 WL 3687314 (E.D. La. July 23, 2014)**

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

CHOICE OF FORUM

***Caribbean Rest., LLC v. Burger King Corp.*, Bus. Franchise Guide (CCH) ¶ 15,298, No. 14-1200(PG), 2014 WL 2465133 (D.P.R. June 3, 2014)**

The U.S. District Court for the District of Puerto Rico approved a transfer of venue to Florida despite Puerto Rico's law stating that any stipulation to litigate outside of Puerto Rico is null and void. Burger King Corporation (BKC), a Florida corporation with its principal place of business in Florida, entered into 182 franchise agreements with Caribbean Restaurants, LLC (Caribbean), a Delaware company with its principal place of business in Puerto Rico, for locations to be operated in Puerto Rico. A dispute arose over BKC's alleged attempt to take control over Caribbean's expenditure of advertising, promotion, and public relation funds. Caribbean filed suit in the district court, alleging BKC breached its contracts and requesting damages, injunctive relief, and declaratory relief. BKC moved to dismiss under Federal Rule of Civil Procedure 12(b)(6) or, alternatively, sought to transfer venue to the Southern District of Florida.

The district court decided to treat BKC's motion to dismiss solely as a motion to transfer under 28 U.S.C. § 1404(a) and analyzed the request under the Supreme Court's decision in *Atlantic Marine Construction Co., Inc. v. U.S. District Court*, 134 S. Ct. 568 (2013). Under *Atlantic Marine*, the party acting in violation of a forum-selection clause bears the burden of showing that public interest factors overwhelmingly disfavor a transfer "insofar as all private interests" weigh in favor of a transfer.

Here, the court first evaluated whether the clause in the agreements stating that Florida was "the exclusive venue and proper forum" was valid. Caribbean argued that the venue clause was not valid under Puerto Rico Law 75 (Dealer's Contracts Act Law) which provides that

> [a]ny stipulation that obligates a dealer to . . . litigate any controversy that comes up regarding his dealer's contract outside of Puerto Rico, or under foreign law or rule of law, shall be likewise considered as violating the public policy set forth by this chapter and is therefore null and void.

Despite such strong statutory language, the court followed a prior Puerto Rico decision, holding that the legislature of Puerto Rico did not intend for Law 75 to allow dealers to skirt the express terms of contracts into which they willingly entered. The court found the forum selection clause here to be valid because Caribbean did not allege fraud or overreaching on the part of BKC with respect to the inclusion of the forum selection clause in the franchise agreements, Caribbean was represented by legal counsel in its contract negotiations, and it elected to enter the agreements despite seeing the provision.

Having found the forum selection clause valid, the court turned to an analysis of whether public interest overwhelmingly disfavors transfer. Relevant public interest factors include: administrative difficulties, the value in having local controversies decided at home, and the benefit of a forum familiar with the law governing a dispute. Caribbean did not meet its burden to show that any of these public interest factors favored litigation in Puerto Rico. Rather, the court stated that the Puerto Rico court had one of the most congested criminal and civil dockets, so this factor weighed heavily in favor of transfer. The court also disagreed with Caribbean's argument that the issue concerned economic interests in Puerto Rico, holding instead that it was a contract dispute regarding a contract explicitly executed and accepted in Florida and governed by Florida law. The court also disagreed with Caribbean's argument that Puerto Rico's familiarity with Law 75 was a strong factor against transfer as all other issues involved Florida law, a federal judge in Florida would be more familiar with Florida law, and in any event, a court outside of Puerto Rico had previously heard a Law 75 claim. The court held that all public interest factors weighed in favor of transfer and, therefore, granted BKC's motion to transfer to the Southern District of Florida, the forum selected by the parties in their agreements.

***Delta Alcohol Distribs. v. Anheuser-Busch Int'l, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,320, No. 13-CV-14829, 2014 WL 2815743 (E.D. Mich. June 23, 2014)**

Delta Alcohol Distributors commenced an action against Anheuser-Busch International, Inc. for misrepresentation, defamation, and fraud after Anheuser-Busch terminated its relationship with Delta based on alleged breaches by Delta of the Foreign Corrupt Practices Act. In response, Anheuser-Busch brought a motion to dismiss the action on the basis of a forum selection clause in the distribution agreement.

In granting the motion, the Eastern District of Michigan relied on a letter agreement between the parties stating "all disputes shall be submitted to the exclusive jurisdiction of the courts of Geneva." The court rejected Delta's submission that the forum selection clause should not apply where the claim was based on actions Anheuser-Busch took after the relationship had been terminated because the clause did not contain any limiting language.

The court held that where a forum selection clause is applicable, the court must determine whether dismissal on forum non conveniens grounds is appropriate. Following the Supreme Court in *Atlantic Marine Construction Co., Inc. v. U.S. District Court*, 134 S. Ct. 568, 582 (2013), the court found that where there is an applicable forum selection clause only public-interest factors may be considered under the forum non conveniens analysis. In the case at bar, it found the courts of Geneva, Switzerland, to be an available and adequate alternative forum. Moreover, the letter agreement being governed by Swiss law weighed in favor of adjudication in the Geneva courts. Finally, the majority of the alleged conduct occurred in Iraq and not Michigan. For these reasons, the court granted Anheuser-Busch's motion to dismiss.

***Saladworks, LLC v. Sottosanto Salads, LLC*, Bus. Franchise Guide (CCH) ¶ 15,327, No. 13-3764, 2014 WL 2862241 (E.D. Pa. June 23, 2014)**
The U.S. District Court for the Eastern District of Pennsylvania held that franchisor Saladworks, LLC was permitted to bring its complaint in the State of Pennsylvania against a California-based franchisee and its owner. The court found that the franchise agreement contained a valid forum selection clause that selected Pennsylvania and dismissed the franchisee's California public policy concerns.

Saladworks sought to amend its complaint to plead the existence of a forum selection clause and defendants sought to dismiss the complaint for lack of jurisdiction or to transfer venue to California. In finding that the forum selection clause was valid, the court granted Saladworks' motion and dismissed defendants' motions.

Defendants argued there was strong California public policy restricting California-based franchise actions to be heard in California. The court considered and disregarded the California Business & Professions Code, which states that a "provision in a franchise agreement restricting venue to a forum outside this state is void with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating within this state." The court held that only the public policy of the jurisdiction in which the action is brought should be considered. It also held that it should not deprive Saladworks of the benefit of its bargain to have the action heard in Pennsylvania.

CLASS ACTIONS

***Laguna v. Coverall N. Am., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,299, 753 F.3d 918 (9th Cir. 2014)**
This case is discussed under the topic heading "Attorney Fees."

***McPeak v. S-L Distrib. Co., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,351, No. 12-348 (RBK/KMW), 2014 WL 4388562 (D.N.J. Sept. 5, 2014)**
The U.S. District Court for the District of New Jersey held that it was premature to dismiss class action allegations claiming violations of the New Jersey Franchise Practices Act (NJFPA) at the complaint stage due to alleged deficiencies in predominance, ascertainability, and Article III standing.

In 2006, Joseph McPeak entered into an agreement with S-L Distribution Company, Inc., granting him an exclusive right to sell and distribute certain products in a specified geographic region in southern New Jersey. The distributor agreement classified McPeak as an independent contractor, explicitly stating that he was not considered a franchisee, partner, agent, or employee of S-L and that he was not to conduct his business under S-L's name or use its marks without prior written consent.

In November 2011, S-L gave notice to McPeak that it was terminating the distributor agreement. He filed suit alleging that S-L improperly terminated his franchise in violation of the NJFPA. S-L moved to dismiss the action, claiming that McPeak was not a franchisee entitled to protection under the NJFPA. The court granted the motion to dismiss but allowed McPeak to file an amended complaint. McPeak did so, and S-L moved to strike the class action allegations, the requests for injunctive and declaratory relief, the demand for certain damages, the jury demand, and several factual allegations from the amended complaint. The court granted in part and denied in part S-L's request.

First, S-L argued that certification of McPeak's NJFPA claim as a class action was improper on its face because it lacked commonality and thus failed the predominance requirement set forth in Federal Rule of Civil Procedure 23(b)(3). S-L asserted that since a claim under the NJFPA requires proof that each plaintiff is a franchisee and such status was expressly disclaimed in the contracts between S-L and each potential class member, there could be no common proof. While the court acknowledged that some of McPeak's allegations were individual to him, it concluded that it did not automatically follow that no common facts could be developed through the course of discovery. Following the Third Circuit's caution against striking class allegations prior to discovery based on lack of predominance, the court held that although it may be difficult for McPeak to produce evidence of a franchise under the NJFPA through evidence common to the class, the complaint itself did not lead to the conclusion that no such evidence could ever be produced.

S-L also argued that the class was not ascertainable through objective criteria—that is, class members would be impossible to identify without extensive and individualized fact-finding. McPeak identified the class as all individuals or entities that operated out of a warehouse in New Jersey that were parties to a distributor agreement with Snyder's-Lance Distribution, Inc. on November 1, 2011. The court found that all persons meeting this definition could be ascertained through objective methods, such as through S-L's records of its distributor agreements. S-L's objections would be properly addressed through a summary judgment motion or at the class certification stage.

Finally, S-L argued that McPeak's proposed class included persons without Article III standing, arguing that the proposed class definition lacked facts sufficient to establish the existence of a franchise for all purported class members. But, the court found that if all persons with a distributor agreement with S-L and warehouse space in New Jersey were franchisees under the NJFPA, they would each appear to have standing. McPeak was entitled to develop such evidence through discovery.

As to the collateral issues, the court dismissed McPeak's request for injunctive and declaratory relief as he was not entitled to this relief (because he sold his distributor route and no longer had any interest in the distributor agreement), and the named plaintiff in a putative class action must have standing himself to pursue injunctive relief on behalf of a class. The court also dismissed his demand for consequential, incidental, special, and punitive damages as those categories of damages were waived by the distributor agreement, and McPeak did not object to their dismissal. The court declined to strike McPeak's jury demand on the basis of a jury waiver clause in the distributor agreement, holding this issue was premature. The parties were entitled to develop whether the waiver was made knowingly and voluntarily throughout discovery. The court held that this was particularly true as the law in the Third Circuit was unsettled as to which party bears the burden of proof. And, finally, the court denied S-L's motion to strike McPeak's factual allegations referring to rent, which S-L argued were contradicted by exhibits attached to the complaint. The court held that disputed issues of fact were not properly addressed through motions to strike as Rule 12(f) only allows a court to strike a "redundant, immaterial, impertinent, or scandalous matter," none of which was present here.

***Rodriguez v. It's Just Lunch, Int'l*, Bus. Franchise Guide (CCH) ¶ 15,292, 300 F.R.D. 125 (S.D.N.Y. 2014)**

Plaintiffs are former clients and certain franchisees of It's Just Lunch, Int'l (IJL). Plaintiffs brought claims alleging fraud and unjust enrichment by IJL and its franchisees and proposed certification of both a national class of plaintiffs and a New York class of plaintiffs. The Southern District of New York granted the plaintiffs' motion in part and denied it in part.

The court certified the national class to pursue fraud claims after determining that the class met the standards established in Federal Rule of Civil Procedure 23. In reaching its decision, the court particularly focused on the fact that IJL trained its sales staff to use a specific sales script that included a number of potentially fraudulent statements that were to be made verbatim. For example, the script included a statement that the sales person already had multiple matches in mind for that prospective client. IJL also provided copies of this script to its franchisees for use by their sales teams. The court relied on evidence related to this script to satisfy a number of prongs of the test for class certification, such as the claims raised common questions of law and fact and the named plaintiffs' claims are typical of the national class's claims. In reaching its decision to certify a national class for the fraud claims, the court also found the number of plaintiffs to be sufficiently numerous (10,000 individuals), the class to be easily ascertainable (because of the records of services kept by IJL), and all other prongs of Rule 23 to be satisfied. Further, the court held that variances in state fraud statutes were not material enough to preclude a finding that common issues predominated over individual issues.

With respect to the unjust enrichment claims, the court also certified a class of plaintiffs in New York on the grounds that IJL and its franchisees routinely charged more than $1,000 for one year of service in violation of the New York General Business Law. However, the court denied class certification for a national class pursuing unjust enrichment claim on the grounds that variations in state unjust enrichment laws were significant, and plaintiffs did not sufficiently address how these various elements could be established through class-wide proof.

CONTRACT ISSUES

***Alsa Corp. v. PPG Indus., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,294, No. 13-11403-JGD, 2014 WL 1921152 (D. Mass. May 13, 2014)**

Plaintiff was the exclusive distributor in the United States of a European company's "soft-feeling" paint. Plaintiff entered into a contract with defendant in which plaintiff and defendant agreed to work together to develop markets for the soft-feeling paint. The parties' dispute arose from defendant's termination of the parties' contract, which plaintiff alleged was pretextual so that defendant could avoid its obligations to plaintiff, such as the obligation to pay royalties on the sale of the paint.

The court granted defendant's motion to dismiss plaintiff's claims of fraudulent inducement, fraud, and breach of fiduciary duties under Pennsylvania's common law "gist of the action" doctrine. This doctrine precludes plaintiffs from "recasting ordinary breach of contract claims into tort actions." However, this doctrine does not preclude tort claims when the parties have a contractual relationship, unless the plaintiff can point to separate or independent events giving rise to the tort, the tort claims are improper. The court also dismissed plaintiff's claim for breach of contract because plaintiff failed to allege any specific term of the parties' contract that defendant breached.

***Bennett v. Itochu Int'l, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,313, 572 F. App'x 80 (3d Cir. 2014)**

This case is discussed under the topic heading "Alternatives to Franchising."

***Century 21 Real Estate LCC v. Ed/Var Inc.*, Bus. Franchise Guide (CCH) ¶ 15,312, No. 5:13-cv-00887 EJD, 2014 WL 3378278 (N.D. Cal. July 10, 2014)**

Plaintiff Century 21 Real Estate LLC brought an unopposed motion for summary judgment against defendant franchisees. After signing a franchise agreement, defendants failed to pay royalty and advertising fees and failed to report the royalty-bearing transaction. After three notices of default that the defendants did not cure, Century 21 terminated the franchise agreement. Defendants paid none of the fees owed and continued using Century 21's marks.

As an initial matter, the U.S. District Court for the Northern District of California decided that New Jersey state law applied since, although defendants were California-based, the franchise agreement stipulated that New Jersey state law applied. In addition, New Jersey had a substantial relationship to at least one party, Century 21, because its principal place of business was in the state.

The court granted summary judgment on all of Century 21's claims and accepted all of its evidence. Century 21 was awarded nearly $200,000 for its breach of contract claim and another $2,367 for the infringement of its trademarks. The court also awarded a permanent injunction enjoining the defendants from using the Century 21 marks or holding themselves out as Century 21 franchisees.

***Copans Motors, Inc. v. Porsche Cars N. Am., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,307, No. 14-60413-CV, 2014 WL 2612308 (S.D. Fla. June 11, 2014)**

This case is discussed under the topic heading "Unfair Competition/Unfair and Deceptive Practices."

***Degla Group for Invs., Inc. v. BoConcept U.S.A., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,341, No. CV 09-05278 MMM (AGRx), 2014 WL 3893367 (C.D. Cal. Aug. 8, 2014)**

Two brothers formed a company (Degla) to enter into a franchise agreement with a Danish furniture franchisor (BoConcept). The brothers did not want to sign a personal guaranty for the franchise, so instead they printed their names in the acknowledgment section of the franchise agreement that stated

> The following persons (the "Principals") represent all individuals that hold an interest in Franchisee, directly or indirectly. By signing this acknowledgment, the Principals consent to the execution of this Agreement by Franchisee, and agree to be bound by those terms of the Agreement that relate to their duties and obligations as Principals.

The brothers printed their names as an attempt to identify themselves as principals of the franchisee without agreeing to be bound by the personal guaranty.

Degla became delinquent on payments owed to BoConcept and BoConcept terminated the franchise agreement. Degla sued BoConcept alleging breach of contract and unlawful termination and BoConcept filed counterclaims alleging breach of the franchise agreement. BoConcept alleged that the brothers breached the contract and that they were personally obligated under the terms of the franchise agreement because of the personal guaranty. The brothers argued that because they only printed their names in the acknowledgment section of the franchise agreement, they were not bound personally.

Following trial, the U.S. District Court for the Central District of California held that by printing their names in the acknowledgment section, they signed that section in their individual capacities. The court held further that the brothers intended their printed names to be signatures because the acknowledgment specifically called for a signature, and it was reasonable to infer that a person who writes his name underneath a statement calling for a signature, even if printed, intends to sign the contract. Because the acknowledgment stated that by signing it, "the Principals consent to the execution of this Agreement by Franchisee, and agree to be bound by those terms of the Agreement that relate to their duties and obligations as Principals," the brothers had consented to the personal guaranty provision contained in the franchise agreement.

***Derma Pen, LLC v. 4EverYoung Ltd.*, Bus. Franchise Guide (CCH) ¶ 15,334, No. 2:13-CV-00729-DN-EJF, 2014 WL 3817133 (D. Utah Aug. 4, 2014)**

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

***Johnson v. Dunkin' Donuts Franchising L.L.C.*, Bus. Franchise Guide ¶ 15,323, No. 11-1117, 2014 WL 2931379 (W.D. Pa. June 30, 2014)**

Plaintiffs Derrick Johnson, his entity F&J Holdings, Inc. and Charles Thomson, as well as Intervenor Pittsburgh Baker's Dozen (PBD), brought promissory estoppel claims against Dunkin' Donuts Franchising L.L.C. (Dunkin') arising from failed investments in renovating two buildings for the purpose of starting a donut commissary. Dunkin' brought a motion for summary judgment, which the Western District of Pennsylvania granted.

The court found that a claim for promissory estoppel must arise in a promisee/promisor relationship. However, in the case at bar, Dunkin' had agreed to do business via an agent. The court found the evidence overwhelmingly pointed to a relationship as between PBD and Dunkin' whereby PBD would build a commissary from which Dunkin' would direct its franchisees to purchase fresh donuts and other baked items once completed. The arrangement was communicated to PBD via its agents, who were plaintiffs in the action.

The evidence contained neither a direct relationship nor any direct promises between Dunkin' and plaintiffs. The court accordingly found that any purported promise plaintiffs assumed would constitute, at most, implied promises based on their own judgments, which was insufficient to ground a claim for promissory estoppel.

***Kumon N. Am., Inc. v. Timban*, Bus. Franchise Guide (CCH) ¶ 15,328, No. 13-4809 (RBK/KMW), 2014 WL 2812122 (D.N.J. June 23, 2014)**

Plaintiff Kumon North America, Inc. (Kumon) moved to dismiss franchisee Demetrio Timban's (Timban) counterclaims in a matter regarding Timban's alleged continued operation of the franchise after termination of the franchise agreement. The U.S. District Court for the District of New Jersey granted Kumon's motion and dismissed Timban's counterclaims.

Timban entered into a franchise agreement with Kumon to operate a Kumon Math and Reading Centre in Medford, New Jersey. Kumon issued a notice of default for Timban's failure to pay royalties. Timban was afforded an opportunity to cure, but was not able to do so. Kumon advised Timban that his franchise agreement would be terminated, but termination would be delayed to allow Timban the opportunity to transfer the franchise, subject to Kumon's approval. Timban was not able to find purchasers satisfactory to Kumon. As a result, Kumon terminated the franchise agreement. Kumon commenced an action against Timban for continuing to operate the franchise post-termination. Timban counterclaimed against Kumon for: (1) violation of the New Jersey Franchise Practices Act (NJFPA); (2) breach of contract; (3) breach of the implied duty of good faith and fair dealing; (4) tortious interference; (5) unjust enrichment; and (6) violation of the New Jersey Consumer Fraud Act (NJCFA).

The court dismissed Timban's claims for violation of the NJFPA, breach of contract, breach of the implied duty of good faith and fair dealing, tortious interference and unjust enrichment because the franchise agreement specifically afforded Kumon the right to have final approval of prospective transferees. Once Timban failed to pay royalties to Kumon, he lost any right to continued operation or transfer for value. Regarding Timban's claim for unjust enrichment, the court found that unjust enrichment is an equitable remedy resorted to only when there is no express contract providing for remuneration. Since the contract expressly afforded Kumon the right to reject prospective transferees, unjust enrichment could not apply. Regarding the claim that Kumon violated the NJCFA, the court followed the Third Circuit decision in *J&R Ice Cream Corp. v. California Smoothie Licensing Corp.*, 31 F.3d 1259, 1273 (3d Cir. 1994), which held that the NJCFA does not apply to franchises.

***LaFontaine Saline, Inc. v. Chrysler Grp., LLC*, Bus. Franchise Guide (CCH) ¶ 15,330, 852 N.W.2d 78 (Mich. 2014)**

In a dispute between Chrysler Group LLC (Chrysler) and its dealer LaFontaine, the Supreme Court of Michigan ruled that a 2010 amendment of the Motor Vehicle Dealer Act (MVDA), which expanded the relevant market area from a six-mile radius to a nine-mile radius, did not apply retroactively. The six-mile radius in effect under the Act's market area provisions when Chrysler and IHS Automotive Group, LLC (IHS), another Dodge automobile dealer, entered into a "Letter of Intent to Add Vehicle Line" was expanded to nine miles in 2010. LaFontaine then filed a complaint for declaratory relief, challenging the proposed dealership under the MVDA.

The court held that the relevant market area was the area where automobile manufacturers were obligated to notify an existing dealership of the manufacturer's intent to set up a dealership selling the same line of automobiles as the existing dealer. The 2010 amendment of the MVDA did not contain language suggesting retroactivity, so the parties' existing contract rights would be altered if the amendment were applied as such. Since there was no contrary language and since the 2010 amendment did not apply retroactively, the court vacated the appellate court's judgment.

***Martin v. Bimbo Foods Bakeries Distrib., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,343, No. 5:14-CV-17-BR, 2014 WL 3487618 (E.D.N.C. July 11, 2014)**

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

***Newpaper, LLC v. Party City Corp.*, Bus. Franchise Guide (CCH) ¶ 15,319, No. 13-1735 ADM/LIB, 2014 WL 2986653 (D. Minn. July 1, 2014)**

Plaintiff Newpaper LLC (Newpaper) alleged thirty-one theories of liability, including breach of contract, good faith and fair dealing claims, various Minnesota Franchise Act (MFA) claims and promissory estoppel claims against its franchisor Party City Corporation (PCC) and the franchisor's suppliers Amscan Holdings, Inc. Newpaper and its affiliates owned and operated twenty-six Party City franchise stores primarily in the Midwest. PCC owned or franchised more than 800 party supply stores nationwide. The franchise agreement granted Newpaper the exclusive right to operate Party City stores within a number of states primarily in the Midwest. PCC stores already in operation were excluded (the Excluded Stores).

The U.S. District Court for the District of Minnesota dismissed all of Newpaper's allegations, which were made in express contradiction to the clear wording of the franchise agreement and its addendum. The court found that all but one of Newpaper's claims failed to state a claim upon which relief can be granted.

The court found it was premature to dismiss Newpaper's claim relating to discrimination under the MFA. Newpaper alleged that PCC's preferential treatment of the Excluded Stores violated the MFA. PCC argued that since it terminated the Excluded Stores' franchise agreements and replaced them with supply agreements, they were not subject to the MFA. The court held that regardless of what an agreement is called, it may establish a franchise relationship provided that it meets the statutory requirements. The court found Newpaper plausibly alleged the supply agreement had allowed the Excluded Stores to continue a franchise relationship with defendants by another name and that the Excluded Stores received more favorable treatment.

***Ramsey v. Bimbo Foods Bakeries Distrib., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,310, No. 5:14-CV-26-BR, 2014 WL 3408585 (E.D.N.C. July 10, 2014)**

Ramsey, a terminated distributor of Bimbo Foods Bakeries Distribution, Inc. (Bimbo), filed a complaint asserting claims for breach of contract, violation of North Carolina's Unfair and Deceptive Trade Practices Act (UDTPA), and fraud. Ramsey also moved for preliminary injunction. Bimbo filed a motion to dismiss all claims pursuant to Federal Rule of

Civil Procedure 12(b)(6). In this opinion, the court held that Ramsey adequately alleged claims for breach of contract and violation of UDTPA sufficient to survive Bimbo's motion to dismiss, but not for fraud. In addition, the court denied Ramsey's motion for preliminary injunction.

Ramsey entered into a distribution agreement with Bimbo and purchased a distribution route which granted the exclusive right to purchase bakery products and sell those products at grocery store chains and independent grocers in a designated area. In June 2013, Bimbo informed Ramsey and other local independent operators that it was reducing the margins they would be paid. Ramsey and the other operators resisted and formed a committee of which Ramsey was one of the more outspoken members. According to Ramsey, Bimbo refused to negotiate.

Meanwhile, a significant conflict arose between Ramsey and Harris Teeter, one of the stores he serviced on his route. Harris Teeter reported to Bimbo that Ramsey was no longer permitted to service its store with Bimbo products due to Ramsey's continuous failure to provide proper and satisfactory service. As a result, Bimbo issued Ramsey a notice of termination and eventually terminated the distribution agreement. This suit followed.

In its motion to dismiss, Bimbo argued that Ramsey did not allege improper termination sufficient to support a breach of contract claim. The court noted that according to the relevant terms of the distribution agreement Bimbo was allowed to terminate if Ramsey did not cure a breach. Bimbo argued that because Ramsey was banned from entering the Harris Teeter store, he was unable to service all of the stores on his distribution route and thus was in breach of the agreement, making termination proper. Ramsey countered that any breach was not material. The court could not decide on a motion to dismiss whether the inability to service one retail store on the distributor's route constituted a material breach of the distribution agreement justifying termination. However, Ramsey did adequately allege that Bimbo unjustifiably terminated the agreement as a pretext to punish Ramsey's efforts to overturn the reduced margins and to profit financially from the resale of his distribution route. For these reasons, the court refused to dismiss Ramsey's breach of contract claim.

Likewise, the court denied Bimbo's motion to dismiss the UDTPA claim because of Ramsey's allegations that Bimbo acted unfairly and deceptively by pretextually terminating the distribution agreement. The court held that pretextual termination may constitute a substantial "aggravating circumstance" attendant to the breach of contract claim sufficient to establish a violation of UDTPA.

However, the court dismissed Ramsey's fraud claim. Ramsey contended that Bimbo committed fraud by intentionally and fraudulently making false and untrue allegations in the notice of termination for the purpose of attempting to create a claim that would justify termination of Ramsey's agreement. The court found that there was no merit to Ramsey's fraud claim for two reasons. First, the court found that Ramsey was seeking to transform a separate breach of contract claim into a fraud claim based on a failure to perform in accordance with the contract's terms and that this theory of liability was not viable as a matter of law. Second, the court noted that there was no evidence Ramsey was deceived by Bimbo's purportedly false statements in the notice of termination and, therefore, Ramsey failed to state a claim for fraud. For these reasons, Bimbo's motion to dismiss Ramsey's fraud claim was granted.

Finally, the court denied Ramsey's motion for preliminary injunction regarding the breach of contract claim. Ramsey's motion asked the court to enjoin Bimbo from interfering with the operation of his bakery products distribution route and from forcing the sale of the route. Ramsey did not show either likelihood of success on the merits or irreparable harm. Specifically, the court held that because Ramsey was operating the distribution route for five years prior to the termination, there was sufficient historical data to calculate monetary damages. In addition, the court found that a monetary value could be placed on any loss of goodwill as there was an active market for the sale of rights to distribute Bimbo products in North Carolina and fair market value of the distributorship was based on a formula using weekly average of net product sales revenue.

***Trouard v. Dickey's Barbecue Rest., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,348, No. PWG-14-1703, No. GLR-14-1650, 2014 WL 3845785 (D. Md. Aug. 1, 2014)**

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

***Valvoline Instant Oil Change Franchising, Inc. v. RFG Oil, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,297, No. 12-cv-2079-GPC-KSC12CV2079 (S.D. Cal. June 4, 2014)**

Plaintiff franchisor Valvoline Instant Oil Change Franchising, Inc. (VIOCF) entered into forty-four renewal license agreements with RFG Oil, Inc. (RFG), as franchisee, under which RFG operated forty-four oil change facilities using Valvoline trademarks. In December 2010, RFG fell behind in payments owed to VIOCF for products purchased from VIOCF. In January 2011, VIOCF issued a notice of default, which provided RFG an opportunity to cure. VIOCF issued a notice of termination in November 2011 based on RFG's failure to cure the default, which terminated each of the forty-four renewal license agreements and sought damages under the contract totaling over $14,610,680.10.

VIOCF was willing to settle its claims if RFG would enter into "We Feature" agreements for each of the oil change facilities. Under the agreements, RFG would no longer operate under the Valvoline trademarks or be required to pay royalties, but would sell Valvoline branded products under the terms and conditions of the We Feature agreements.

During this same time period, VIOCF was also in talks with a third party that intended to purchase seventy-two oil change facilities which it would convert into Valvoline branded oil change facilities. Some of those seventy-two facilities were located within RFG's protected territory under the renewal license agreements. Once RFG discovered that VIOCF intended to allow a third party to operate oil change facilities within its protected territory, it disputed the termination of the renewal license agreements and the validity of the "We Feature agreements." This lawsuit followed and at issue was whether VIOCF is entitled to declaratory judgment that the renewal license agreements and the We Feature agreements were all terminated.

As to the declaratory judgment that the renewal license agreements were terminated, the court found that a genuine issue of material fact existed and could not grant declaratory judgment. Although RFG made weekly payments to VIOCF following the notice of default, the sum of which would amount to payment in full of the amounts owed to VIOCF, at issue was whether the amounts RFG paid to VIOCF were toward the amounts owed on credit or for the purchase of future products. The renewal license agreements included a provision stating that if VIOCF extended credit to RFG, payments made would be applied to the oldest portion of the account first. However, around the time of the default, the arrangement between the parties changed such that products would no longer be purchased on credit and instead paid for in advance of delivery. Neither the renewal license agreements, nor any other agreement between the parties, provided for how to handle application of payments from RFG to VIOCF in a situation such as this where RFG went from having a credit account to paying before delivery. VIOCF applied the payments received from RFG to the purchase of products to be delivered. RFG contends that the payments should have been applied to the credit account first. Had the amounts paid been applied to the oldest portion of the credit account first, RFG would have cured the default and VIOCF could not have terminated the renewal license agreements for non-payment. Therefore, the court could not find the absence of a genuine issue of material fact.

The court also denied the plaintiff's motion for summary judgment on whether the We Feature agreements were properly terminated because there was a genuine issue of material fact as to whether the agreements were ever validly executed. Although both parties signed the agreement, there was no meeting of the minds as to a material term of the agreements because the parties continued to negotiate the term of the agreements as they exchanged signature pages. Therefore, the court found it was improper to grant a motion for summary judgment declaring the We Feature agreements terminated.

***Yumilicious Franchise, L.L.C. v. Barrie*, Bus. Franchise Guide (CCH) ¶ 15,362, No. 3:13-CV-4841-L, 2014 WL 4055475 (N.D. Tex. Aug. 14, 2014)**

The Northern District of Texas struck in part pleadings for alleged breaches of two franchise agreements on the basis that the counterclaiming franchisees had not adequately pled how breaches of the franchise agreement caused them harm.

The franchisor Yumilicious Franchise, L.L.C. (Yumilicious) brought an action against franchisee defendants for alleged breaches of two franchise agreements for yogurt shops, alleging the franchisees breached the agreements by closing the stores without prior authorization and failing to pay for ordered products and royalties. The franchisees maintained that the shops were doomed because they were unable to obtain proprietary and contractually mandated yogurt products at a reasonable price in the state where the franchises were located. The franchisees asserted counterclaims for breach of contract, fraud, negligent misrepresentation and violations of the Texas Deceptive Trade Practices Act. Yumilicious moved to strike and dismiss the counterclaim.

The court concluded the franchisees adequately pled that Yumilicious made false statements regarding franchise costs and products supplied to induce the franchisees into entering into the franchise agreements, and the franchisees relied on those statements in entering into the agreements.

However, the court rejected the franchisees' pleadings for breach of the franchise agreement for failure to conduct on-site evaluations and inspections because it was unclear from the pleadings, described as "sparse," why the franchisees believed they suffered damages as a result of those breaches.

DAMAGES

***Derma Pen, LLC v. 4EverYoung Ltd.*, Bus. Franchise Guide (CCH) ¶ 15,334, No. 2:13-CV-00729-DN-EJF, 2014 WL 3817133 (D. Utah Aug. 4, 2014)**

Derma Pen, LLC, which owns the micro needling product known as Derma Pen, sought rescission of its distribution agreement with distributor 4EverYoung Limited. 4EverYoung moved for summary judgment, which the District of Utah granted in part.

Derma Pen sought rescission after discovering misrepresentations allegedly made by the distributor. However, the distribution agreement was a two-year agreement and had already expired. Therefore, the court held that Derma Pen failed to timely assert or pursue rescission. There was no purpose in rescinding a contract that was already ended by termination and no ground for rescission if the contract was already completely performed. Moreover, Derma Pen's continued performance under the contract for its term was inconsistent with the remedy of rescission. Therefore, the court granted 4EverYoung's partial motion for summary judgment on Derma Pen's claim for rescission. Derma Pen became aware of misrepresentations prior to the expiration of its agreement, but stayed in the contractual relationship up through early termination that it initiated and at no time prior to the notice of termination did it say anything about rescission. Allowing Derma Pen to rescind after the agreement terminated would lead to an inequitable result which could permit it to avoid post-termination provisions even though it obtained the benefits of full performance.

DISCRIMINATION

CMS Volkswagen Holdings, LLC v. Volkswagen Grp. of Am., Inc., Bus. Franchise Guide (CCH) ¶ 15,329, No. 13-cv-03929 (NSR), 2014 WL 2580999 (S.D.N.Y. June 6, 2014)

Dealer plaintiffs Hudson Valley Volkswagon, LLC (Hudson Valley) and CMS Volkswagen Holdings LLC (CMS) sued franchisor Volkswagen Group of America (Volkswagen) for violations of the New York Franchised Motor Vehicle Dealer Act (Dealer Act). Plaintiffs, both Volkswagen dealerships in New York, asserted causes of action seeking injunctive relief, declaratory relief, and damages on the basis that the Dealer Sales Index (DSI) and Variable Bonus Program (VBP) included in their dealer agreements violated the Dealer Act for pricing and bonus discrimination. In addition, plaintiffs sought declarative and permanent injunctive relief on the basis that Volkswagen unreasonably withheld its consent to the transfer of ownership interests and made unreasonable modifications to the dealer agreements in violation of the Act.

Volkswagen moved to dismiss each of the claims and plaintiffs sought a motion to amend their complaints. The court granted the motion to dismiss and denied the motion to amend claims, alleging it was impossible for plaintiffs to meet the standards for the VBP due to consumer preferences because the VBP was not applied disproportionately. The court refused to dismiss the claim that the DSI violated the Act by using an unreasonable, arbitrary, or unfair sales or performance standard. The court allowed plaintiffs to amend a claim that Volkswagen unreasonably withheld consent to transfer an ownership interest on the basis that they had adequately alleged a violation of the Act and dismissed the claim that Volkswagen had illegally modified the dealership agreement since the language of the Act only prohibited unilateral amendment without notice.

Mathew Enter., Inc. v. Chrysler Grp. LLC, Bus. Franchise Guide (CCH) ¶ 15,311, No. 13-cv-04236-BLF, 2014 WL 3418545 (N.D. Cal. July 11, 2014)

This case is discussed under the topic heading “Good Faith and Fair Dealing.”

ENCROACHMENT

Mathew Enter., Inc. v. Chrysler Grp. LLC, Bus. Franchise Guide (CCH) ¶ 15,311, No. 13-cv-04236-BLF, 2014 WL 3418545 (N.D. Cal. July 11, 2014)

This case is discussed under the topic heading “Good Faith and Fair Dealing.”

***Yamaha Motor Corp., U.S.A. v. Ariz. Dep't of Transp.*, Bus. Franchise Guide (CCH) ¶ 15,315, No. 1 CA-CV 13-0242, 2014 WL 2999029 (Ariz. Ct. App. July 3, 2014)**

YSA Motorsports, LLC (YSA) objected to Yamaha Corporation, U.S.A.'s (Yamaha) proposal to open a new dealership in North Scottsdale. Under Arizona Revised Statutes § 28-4452(B), Yamaha was prohibited from establishing a dealership in a community if an existing franchise with standing objected, unless Yamaha established that "there is good cause . . . and unless it is in the public interest." In the case of a dispute, an Administrative Law Judge (ALJ) was to determine whether the franchisor had established good cause by considering the "existing circumstances" and five factors outlined in the applicable statute (ARIZ. REV. STAT. § 28-4457(E)).

A hearing was held before an ALJ, who decided in favor of YSA. The superior court upheld that decision on review. Yamaha sought to overturn that decision on appeal to the Arizona Court of Appeals, which affirmed the ALJ's conclusion that the appellant franchisor had not established "good cause" necessary to permit it to open a new franchise.

Yamaha's arguments on appeal were focused on the ALJ's consideration of the economic impact on existing franchisees, one of the five factors outlined in the applicable statute. First, Yamaha argued that since the ALJ stated neither side had conclusively proved its case regarding the economic impact of the proposed dealership, she should have ruled in favor of Yamaha. The court rejected this argument because, based on the evidence before her, the ALJ concluded that an added competitor would be "more likely" to have a negative rather than a positive impact on the existing franchisees. Secondly, Yamaha argued the ALJ should have rejected YSA's evidence as speculative and unreliable as it came from individuals who had a stake in the existing franchises. However, the court concluded that the witnesses were qualified to testify before the ALJ because of their experience in the business. Also, Yamaha had the opportunity to raise any issues with the witnesses on cross-examination. Thirdly, Yamaha argued the ALJ should have ruled against YSA because of its failure to quantify the alleged economic harm the existing dealers would suffer if the proposed new dealership was allowed. The court stated that YSA was not required to quantify the alleged harm under the applicable statute and, at most, the lack of quantification would impact the weight given to YSA's evidence. On this issue, the court also rejected Yamaha's claim that expert evidence should always be preferred to lay evidence, and YSA's failure to present any expert evidence should have resulted in a ruling in favor of Yamaha. Finally, Yamaha also argued the ALJ had placed an undue amount of emphasis on the factor of the economic impact of the proposed dealership. The court rejected this argument as well both because the ALJ was not required to give equal weight to every factor and because it had given roughly equal consideration to the five factors outlined in its decision.

FINANCIAL PERFORMANCE REPRESENTATION

***Governara v. 7-Eleven, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,368, No. 13-CV-6094 (LAP), 2014 WL 4476534 (S.D.N.Y. Aug. 20, 2014)**
A convenience store franchisor attempted to dismiss a franchisee's claim under the New York Franchise Act (NYFA) for damages and rescission arising from the failure to make required disclosures. The franchisee alleged that 7-Eleven provided financial performance representations outside of the franchise disclosure document (FDD). 7-Eleven argued that the NYFA claim should be dismissed because the information contained in the alleged earnings claims was included in the FDD. The franchisee, however, argued that the FDD contained no reference to the New York market where the purchased franchise was located. The alleged representations related to statements that stores in Manhattan and Long Island were more expensive due to higher sales volumes and because they were more profitable, but it was not clear as to which locations the representative was comparing the Manhattan and Long Island stores. Moreover, 7-Eleven's representative purportedly stated that the franchisee's location should do between \$2 million and \$3 million, but that \$1.7 million to \$1.8 million was consistent with 7-Eleven's estimates and should be used for preparing a business plan. Nothing in the FDD, however, indicated where the franchisee's particular store could be expected to fall and or described the methods and computations used in arriving at those estimates as required by § 683 of the NYFA. 7-Eleven also argued that the franchisee could not show reliance on the representative's statements, but the Southern District of New York held that reliance was not a required element under § 683 because it only enumerates information required to be disclosed when selling franchises.

The franchisee also asserted a claim for damages and rescission under § 687, which prohibits franchisors from employing any device, scheme, or artifice to defraud. However, the court dismissed this claim because the contractual disclaimer of reliance in the FDD was given effect. The franchisee argued that the representative's oral statements were fraudulent misrepresentations, but the franchisee disclaimed reliance upon any representations outside of the agreement or FDD when it signed the agreement. The court did hold that projections of financial performance could serve as the basis for actionable fraud claims because even though statements of prediction are generally not actionable as fraud, 7-Eleven had superior knowledge of performance and the projections could have been construed as representations of existing fact. Under New York law, however, a party cannot disclaim reliance and then claim fraud. While the NYFA's anti-waiver provision has been interpreted to provide an exception to this common law rule for claims, the court chose to diverge from a New York Appellate Division decision (*Emfore Corp. v. Blimpie Associates, Ltd.*, Bus. Franchise Guide (CCH) ¶ 13,889 (N.Y. App. Div. May 6, 2008)) that held disclaimers did not preclude fraud claims under the NYFA on the grounds that the decision was not binding on the federal district court, the NYFA does not give a franchisee the right to purchase a franchise while relying on oral representations outside of the written agreement, and refusing to enforce the non-reliance disclaimer would violate the "sanctity of contracts."

The franchisee's claims for breach of the covenant of good faith and fair dealing regarding the franchisor's obligation to provide merchandising advice and operational systems designed to meet customers' needs, survived a motion to dismiss because the complaint alleged that the franchisor canceled more than twenty meetings during a one-year period concerning the franchisee's store's performance, operations, and merchandising. The court held that this was enough to state a claim for relief because persistent cancellations could constitute the withholding of the benefits of the contract. Claims for violation of the covenant of good faith and fair dealing related to a lack of ongoing training were dismissed because the agreement provided that 7-Eleven may offer additional training, but was not obligated to do so.

***Legacy Academy v. Mamilove, LLC*, Bus. Franchise Guide (CCH) ¶ 15,336, 761 S.E.2d 880 (Ga. Ct. App. 2014)**

A former franchisee of a day care franchise and its owners (Mamilove) recovered a $1.1 million judgment against the franchisor Legacy Academy, Inc. and its officers for violations of the Georgia Racketeer Influenced and Corrupt Organizations Act based on Legacy Academy's alleged violations of the FTC Franchise Rule, fraud, and rescission. The trial court ruled in favor of the franchisee, and the franchisor appealed.

Legacy Academy argued that Mamilove: (1) did not seek rescission of the franchise agreement in a timely manner; (2) affirmed the agreement by pleading a contract-based defense; and (3) knowingly agreed to the provisions of the franchise agreement which disclaimed the making of any financial performance representation, the subject of Mamilove's claim for fraud. The Georgia Court of Appeals disagreed. Legacy Academy provided Mamilove with earnings projections stating that it would earn approximately $260,000 in net income after the first year and $440,000 in net income for the second and third years. These projections failed to come to fruition and Mamilove sued for rescission. The court held that sufficient evidence was presented at trial to support the jury's finding that Mamilove timely asserted its rescission claim. Legacy Academy also argued that Mamilove affirmed the franchise agreement when it asserted a contract-based defense to Legacy Academy's breach of contract counterclaim, thereby, waiving its right to rescission. The court disagreed and held that Mamilove could pursue its tort claim for rescission while asserting a contract-based defense to the counterclaim because a defense is fundamentally distinct from a claim. Legacy Academy also argued that Mamilove could not prove that it entered into the agreement based on fraudulent representations because the agreement expressly stated that Mamilove did not receive any representations of potential income or earnings capabilities prior to signing. The court, however, held that sufficient evidence showed that Legacy Academy had intentionally prevented Mamilove from reading the franchise disclosure document or franchise agreement prior to signing by pressuring Mamilove to sign as soon as possible in order to avoid losing territory and so Legacy Academy could conceal the false financial performance representation contained in the agreement.

Mamilove also argued that its claim under the Georgia statute based on the franchisor's violations of the FTC Rule failed because the Georgia statute provided for a private right of action only where no other cause of action was available and the FTC Franchise Rule permitted Mamilove to complain to the FTC to file a cause of action on its behalf. The court disagreed, holding that the FTC's ability to pursue an action against the franchisor was not a cause of action for purposes of the Georgia statute, which provides that

> when the law requires a person to perform an act for the benefit of another or to refrain from doing an act which may injured another, although no cause of action is given in express terms, the injured party may recover for the breach of such legal duty if he suffers damage thereby.

***Rogers Hosp., LLC v. Choice Hotels Int'l, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,245, Am. Arbitration Ass'n, Case No. 655 114 Y 00212 11, B248627 (Dec. 23, 2013)**

A three-arbitrator panel found a franchisor liable for making oral financial performance representations to a then-prospective franchisee in violation of "applicable Franchise Disclosure laws." The franchisee brought claims against the franchisor before the American Arbitration Association, asserting that the franchisor made financial performance representations in violation of the disclosure provisions of both the Minnesota Franchise Act and the North Dakota Franchise Act. Although the panel did not specify which act applied, it held that the franchisee established that, at a 2008 investor conference, the franchisor's director endorsed the financial projections for a potential hotel in Rogers, Minnesota. The projections had been adopted into a pro-forma for the hotel and included the hotel's average daily rates. At the conference, the director endorsed the numbers in the pro forma as being "attainable," "conservative," and/or "spot-on." The panel held that such statements were unlawful financial performance representations made outside of Item 19 of the Franchise Disclosure Document provided to the franchisee.

The panel also found that the director's statements were false. In the franchisor's last full year of operation before the conference, only 2.3 percent of all hotels had ever achieved such performance. The director failed to disclose that figure, which the panel held was material as a historical achievement number and should have been disclosed.

Because the franchisee established that it had reasonably relied on the director's statements, the panel did not address whether reasonable reliance was a required element for a claim under either act. The franchisee also asserted claims of common law fraud, negligent misrepresentation, breach of contract, and other violations of franchise disclosure laws, all of which were rejected by the panel.

FRAUD

***Alsa Corp. v. PPG Indus., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,294, No. 13-11403-JGD, 2014 WL 1921152 (D. Mass. May 13, 2014)**
This case is discussed under the topic heading "Contract Issues."

***Martin v. Bimbo Foods Bakeries Distrib., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,343, No. 5:14-CV-17-BR, 2014 WL 3487618 (E.D.N.C. July 11, 2014)**
Plaintiff was an independent distributor that had exclusive rights to purchase bakery products from defendant manufacturer and sell those products to grocery store chains and independent grocers in a designated area. The manufacturer sent the distributor a notice of termination, stating it recently discovered that the distributor had engaged in the practice of "flushing" product by creating false sales and buy-back invoices for which plaintiff received approximately $2,500 to which he was not entitled.

Plaintiff distributor filed a lawsuit asserting claims for breach of contract, fraud, and unfair and deceptive trade practices. Defendant manufacturer moved to dismiss the distributor's fraud and unfair and deceptive trade practices claims related to the termination. Plaintiff's fraud claim was based on the manufacturer's purported fraud by intentionally and fraudulently making false and untrue allegations in the notice of termination for the purpose of attempting to create a claim that would justify termination.

According to plaintiff, he did not engage in "flushing" as set forth in the notice of termination and the statements in the notice of termination were false pretext for terminating him. Plaintiff argued that the manufacturer's real reason for terminating the distribution agreement was to punish him for taking an active role in attempting to negotiate higher margins and to profit from the resale of the distribution business. Under North Carolina law, the elements of fraud are: (1) a false representation or concealment of a material fact; (2) reasonably calculated to deceive; (3) made with the intent to deceive; (4) which does in fact deceive; and (5) resulting in damage to the injured party. Here, because plaintiff was not in fact deceived by the purportedly false statements in the notice of termination, he failed to state a claim for fraud.

In order to state a claim under North Carolina's Unfair and Deceptive Trade Practices Act, a plaintiff must show: "(1) defendant committed an unfair deceptive act or practice; (2) the action in question was in or effecting commerce; and (3) the act proximately caused injury to the plaintiff." Because plaintiff claimed defendant terminated the agreement not only contrary to its terms but also that defendant acted unfairly and deceptively by pretextually terminating the agreement, this pretextual termination could constitute a substantial aggravating circumstance attendant to the breach of contract and could support a claim for violation of the Act. Therefore, there may be a violation of the Act where a breach of contract is accompanied by aggravating factors. Thus, the Eastern District of North Carolina denied defendant's motion to dismiss this claim.

***Ramsey v. Bimbo Foods Bakeries Distrib., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,310, No. 5:14-CV-26-BR, 2014 WL 3408585 (E.D.N.C. July 10, 2014)**
This case is discussed under the topic heading "Contract Issues."

***Yogo Factory Franchising, Inc. v. Ying*, Bus. Franchise Guide (CCH) ¶ 15,291, No. 13-630 (JAP) (TJB), 2014 WL 1783146 (D.N.J. May 5, 2014)**
Yogo Factory Franchising, Inc. (YFF) is the franchisor of the Yogo Factory franchise system. Between August 2011 and June 2012, YFF sold two new franchises and one company-owned store to a third-party franchisee (Ying). Ying struggled to make the franchised units profitable. YFF brought suit in the federal court of the District of New Jersey against Ying on multiple grounds. Ying counterclaimed that YFF fraudulently induced him to purchase the franchises and brought claims of fraud, negligent misrepresentations, and violations of the New Jersey Consumer Fraud Act.

With respect to one franchise agreement, the court dismissed all claims and ordered the parties to submit those claims to arbitration in accordance with the arbitration provision in the franchise agreement. The arbitration provision stated it would apply to any disputes "arising from" the franchise agreement. Ying argued that his tort and statutory claims fell outside the scope of the arbitration clause because they were not contract claims. However, the court disagreed, electing to interpret the language of the arbitration provision broadly.

With respect to the two other franchise agreements, the court dismissed Ying's fraud claims on two grounds. First, the court held that Ying failed to plead the claim with sufficient particularity. Ying alleged one broad claim of fraud as to all YFF parties and did not specify which representatives of YFF made what alleged representation and when. Second, the court stated that even if the claim was pled with particularity, it would still fail because Ying was not able to show that he reasonably relied on any alleged misrepresentations made by YFF. In reaching this conclusion, the court pointed out that the franchise agreements contained integration clauses that specifically excluded all outside agreements and outside representations made by either party. Ying also signed a representations statement under which he specifically represented that he did not rely on any representations made by any YFF parties and that no YFF parties made any promises concerning profitability of the franchises. Lastly, the FDDs provided to Ying indicated that Item 7 numbers were "estimates" and contained disclaimers in Item 19 stating that individual results may vary and that YFF provided no assurances or representations that any franchisee would earn the disclosed amounts. Based on these documents, the court found that any reliance on other representations made by any YFF parties was unreasonable.

The court also rejected Ying's claim under the New Jersey Consumer Fraud Act (NJCA), citing existing precedent that the NJCA did not apply to franchise sales because franchises were not commercial "goods or services."

FTC FRANCHISING RULE

***Legacy Academy v. Mamilove, LLC*, Bus. Franchise Guide (CCH) ¶ 15,336, 761 S.E.2d 880 (Ga. Ct. App. 2014)**
This case is discussed under the topic heading "Financial Performance Representation."

GOOD FAITH AND FAIR DEALING

***Bennett v. Itochu Int'l, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,313, 572 F. App'x 80 (3d Cir. 2014)**
This case is discussed under the topic heading "Alternatives to Franchising."

***Copans Motors, Inc. v. Porsche Cars N. Am., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,307, No. 14-60413-CV, 2014 WL 2612308 (S.D. Fla. June 11, 2014)**
This case is discussed under the topic heading "Unfair Competition/Unfair and Deceptive Practices."

***Governara v. 7-Eleven, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,368, No. 13-CV-6094 (LAP), 2014 WL 4476534 (S.D.N.Y. Aug. 20, 2014)**
This case is discussed under the topic heading "Financial Performance Representation."

***Kumon N. Am., Inc. v. Timban*, Bus. Franchise Guide (CCH) ¶ 15,328, No. 13-4809 (RBK/KMW), 2014 WL 2812122 (D.N.J. June 23, 2014)**
This case is discussed under the topic heading "Contract Issues."

***Mathew Enter., Inc. v. Chrysler Grp. LLC*, Bus. Franchise Guide (CCH) ¶ 15,311, No. 13-cv-04236-BLF, 2014 WL 3418545 (N.D. Cal. July 11, 2014)**
Chrysler Group LLC moved to dismiss a claim by dealer Mathew Enterprise, Inc. after Chrysler established two additional dealers in Mathew's geographic area. Due to the increased competition, Mathew's sales declined and it failed to qualify for payments under Chrysler's "volume growth" sales incentive program. Mathew also complained about rent subsidies that

Chrysler provided to its competitors and the mix of vehicles that Chrysler supplied.

The U.S. District Court for the Northern District of California denied Chrysler's motion with regard to the allegation that its "volume growth" program amounted to prohibited price discrimination. Section 2(a) of the Robinson-Patman Act prohibits a seller from discriminating in price between two customers if there is a reasonable possibility that doing so will adversely affect competition. Mathew pleaded sufficient facts to show that payments under the volume growth program were "functionally unavailable" to it and that the impact was significant enough to affect competition.

The court allowed the motion and dismissed, with leave to amend, Mathew's claim that rent subsidies provided to its competitors amounted to prohibited price discrimination on the basis that a rental agreement could not be considered a commodity subject to the Robinson-Patman Act. Further, although Mathew argued that the rental subsidies amounted to a "disguised price discount," it did not plead any facts showing a connection between the rental subsidies and the volume of cars sold by its competitors.

The court also dismissed, with leave to amend, Mathew's claim based on California Vehicle Code § 11713.3(a). That section makes it unlawful for a dealer to fail to deliver, "in reasonable quantities and within a reasonable time after receipt of an order," vehicles that are covered under the franchise agreement and which have been "publicly advertised as being available for delivery or [were] actually being delivered." The court noted that Mathew's allegations only suggested dissatisfaction with the vehicle mix offered by Chrysler. Mathew did not plead any facts that established any of the elements necessary for the claim, namely that Mathew placed an order, the order was for a reasonable quantity, or that Chrysler failed to deliver a placed order.

Finally, the court dismissed with prejudice Mathew's claim alleging a violation of the implied covenant of good faith and fair dealing. Under the Michigan law governing the contract, there could not be any implied duty of good faith and fair dealing with regards to a particular matter where a contract granted a party absolute and unfettered authority with respect to that matter. Since the parties' contract granted Chrysler expressed authority to set sales targets as it saw fit, there was no implied duty.

***Naik v. 7-Eleven, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,332, No. 13-4578 RMB/JS, 2014 WL 3844792 (D.N.J. Aug. 5, 2014)**

This case is discussed under the topic heading "Labor and Employment."

INJUNCTIVE RELIEF

***Acceleration Prods., Inc. v. Arikota, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,346, No. 2:14-CV-00252, 2014 WL 3900875 (D. Utah Aug. 7, 2014)**

This case is discussed under the topic heading "Non-Compete Agreements."

***ACG Pizza Partners, LLC v. Mykull Enter., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,355, No. 5:14-CV-174 (MTT), 2014 WL 4267495 (M.D. Ga. Aug. 28, 2014)**

In this case, a Georgia federal district court found that the franchisor of Stevi B's all-you-can-eat pizza restaurants properly terminated its franchisee and granted a preliminary injunction enjoining the defendant from using the franchisor's trademarks. The franchisor, ACG Pizza Partners, terminated the franchise agreement for several reasons. First, ACG Pizza Partners demonstrated that defendant defaulted multiple times during the past year by not adhering to the trade dress standards (non-conforming chairs) and three months later for serving unauthorized menu items like soup and submarine sandwiches. Second, ACG Pizza Partners discovered that defendant was using an offline point-of-sale system to underreport net sales and avoid royalties. Third, ACG Pizza Partners proved that defendant was insolvent after it stopped making payments for its leased soft-serve ice cream machine and defaulted on its small business loan. Both the lessor and the bank secured consent judgments against the defendant totaling more than $700,000.

After the termination, defendant continued to operate a restaurant at the formerly franchised location using the Stevi B's Pizza trademarks. The evidence established that defendant fell behind in its payments to its dough and sauce supplier, which stopped deliveries as a result, causing the franchisee to sell a different and inferior product after the termination. Defendant admitted that it had non-conforming chairs and food. Defendant contended that the additional cash register was a "back up," but the court found that testimony not credible. Defendant raised an "unrelated issue" in its defense: another Stevi B's Pizza had opened a few miles away. The court found that the franchise agreement granted no territorial protection and dismissed the argument.

The court found ACG Pizza Partners met its burden of showing that it would suffer irreparable harm to its reputation and loss of customers due to the trademark infringement. The court acknowledged that defendant serving different food threatened the brand's consistency and also noted that the defendant's inability to pay for pest control created a potential health hazard that could be attributed to the brand. The court further found that the balance of harms favored an injunction because the harm to defendant—although "unfortunate"—was self-inflicted and outweighed by the harm to ACG Pizza Partners for continuing infringement of its trademarks. The injunction served the public interest because it prevented customer confusion. The court therefore enjoined the franchisee from (1) using the Stevi B's Pizza trademarks and (2) causing any likelihood of confusion as to the source or sponsor of the business or as to defendant's affiliation with the franchisor. The court set the bond amount at $100,000.

***Am. Dairy Queen Corp. v. YS&J Enter., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,364, No. 5:14-CV-151-BR, 2014 WL 4055550 (E.D.N.C. Aug. 14, 2014)**

The U.S. District Court for the Eastern District of North Carolina held that franchisor Dairy Queen was entitled to treble damages, attorney fees, and an injunction based on its former franchisee's trademark infringement. Dairy Queen initially sought a preliminary injunction, which the court granted when defendants did not oppose the motion.

Dairy Queen then sought a default judgment because defendants did not respond to plaintiff's complaint. The court granted the motion, awarding treble damages pursuant to 16 U.S.C. § 1117(a) and attorney fees, and converted the preliminary injunction to a permanent injunction.

***Dunkin' Donuts Franchising LLC v. Claudia III, LLC*, Bus. Franchise Guide (CCH) ¶ 15,347, No. 14-2293, 2014 WL 3900569 (E.D. Pa. Aug. 11, 2014)**

Plaintiffs, Dunkin' Donuts and Baskin Robbins, moved for a preliminary injunction to enjoin a former franchisee's continued operation under their trademarks. Defendant, the franchisee, was required to remodel its store but several unforeseen obstacles caused delays in 2013, including the lack of necessary approvals from the health department and an issue with the drinking water well that was still not resolved by August 2014. As a result of the delayed renovations, plaintiffs issued a notice of termination. Defendant argued that plaintiffs continued to accept fees after the purported termination and that defendant continued to operate as a franchisee. Nonetheless, plaintiffs sought a preliminary injunction against the continued use of their intellectual property.

In analyzing whether to issue a preliminary injunction, a court must consider the likelihood that the moving party would succeed on the merits of its claim, the extent to which the moving party would be irreparably harmed without an injunction, the extent to which the non-moving party would suffer irreparable harm if the injunction was issued, and the public interest. The U.S. District Court for the Eastern District of Pennsylvania held that it was reasonably likely that plaintiffs would succeed on the merits because the renovations were not finished and plaintiffs provided multiple notices of default with an opportunity to cure. Thus, even though the remodel defaults were not necessarily in defendant's control, the fact that the remodel was incomplete was not in question.

Nonetheless, the court refused to grant an injunction because it was not persuaded that plaintiffs would suffer irreparable harm. While the Third Circuit applied a presumption of irreparable harm from the trademark infringement, the court noted that a growing number of courts recognized that *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), appeared to prohibit courts from applying an automatic presumption of irreparable harm in cases of intellectual property infringement. Taking a cue from *eBay*, the court held that it could not presume irreparable harm and instead independently evaluated whether plaintiffs established they would suffer irreparable harm absent a preliminary injunction.

Here, because defendants continued to operate their stores according to Dunkin' Donuts rules and procedures, there was no indication that sales suffered in any way or that goodwill was harmed. The only deviation by defendant was the failure to remodel, but the premises were clean and not in disrepair. The most that could be said is that the franchisors' customers were "not experiencing the next generation of Dunkin' Donuts décor." Thus, because defendant was operating in conformity with the rules other than the delayed remodel, the court found that any damages plaintiffs may be suffering were compensable with monetary damages and plaintiffs failed to show irreparable harm.

Moreover, the court held that defendant would suffer substantial harm if enjoined from operating because an injunction would be the death of defendant's business, deprive it of any income, and leave it with the costs of maintaining the store. The court also held that the reason for termination was not necessarily defendant's wrongful conduct but due to delays outside of its control. Therefore, the court held that defendant's harm if an injunction was issued far outweighed any harm to plaintiffs stemming from defendant's continued operation of the existing store.

Grout Doctor Global Franchise Corp. v. Groutman, Inc., Bus. Franchise Guide (CCH) ¶ 15,295, No. 7:14-CV-105-BO, 2014 WL 2566261 (E.D.N.C. June 6, 2014)

In this case, the court granted a preliminary injunction against the former franchisee of a grout-cleaning and repair franchise from continuing to use the franchisor's trademarks and holding itself out as a franchisee. The former franchisee operated a business offering grout cleaning and repair under a renewal franchise agreement with plaintiff. Shortly after the franchise agreement was renewed, the franchisor terminated it after receiving complaints that the franchisee performed faulty work and "engaged in conduct which caused customers . . . to fear for their safety." In addition, the former franchisee failed to pay a renewal fee and to submit gross sales reports.

After termination, the former franchisee started a so-called vendetta campaign against plaintiff by leaving threatening voicemails for plaintiff's executives and the web developer responsible for plaintiff's website. The former franchisee also attempted to register plaintiff's trademarks for itself with the U.S. Patent and Trademark Office and published e-books for sale on Amazon.com using plaintiff's marks and logos.

Applying these facts, the court found that plaintiff met each of the four elements for granting a preliminary injunction: (1) it was likely to succeed on the merits; (2) it was likely to suffer irreparable harm in the absence of preliminary injunctive relief; (3) the balance of equities tipped in its favor; and

(4) an injunction was in the public interest. The court determined that plaintiff had at least showed that it would prevail on its trademark infringement claims and that the former franchisee's continued use of the trademarks would cause irreparable harm. Particularly concerning to the court were the threatening voicemails left by the former franchisee, which called into question his mental and emotional stability. Thus, the court preliminarily enjoined the former franchisee from continuing to infringe on plaintiff's trademarks, holding itself out as plaintiff's franchisee, breaching post-termination covenants in the franchise agreement, harassing and threatening plaintiff and its employees, and making false claims to federal and state agencies.

***Ledo Pizza Sys., Inc. v. Singh*, Bus. Franchise Guide (CCH) ¶ 15,335, No. WDQ-13-2365, 2014 WL 3810524 (D. Md. July 31, 2014)**
This case is discussed under the topic heading "Breakaway Franchisees."

***Martin v. Bimbo Foods Bakeries Distrib., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,301, No. 5:14-CV-17-BR, 2014 WL 2439954 (E.D.N.C. May 30, 2014)**
Plaintiff, a baked goods distributor of Bimbo Foods Bakeries Distribution, Inc., was not entitled to a preliminary injunction enjoining termination of its distribution agreement for allegedly flushing product within its territory because it failed to clearly demonstrate both the likelihood of success on the merits of its breach of contract claim and the likelihood of suffering irreparably harm without an injunction. Plaintiff and Bimbo had entered into a distribution agreement in 2006, under which plaintiff purchased exclusive rights to sell and distribute Bimbo bakery goods to grocery stores in specified territorial areas; it was to be paid a percentage of sales or a margin on the sale of product. In June 2013, after Bimbo informed plaintiff and other distributors that it was reducing the margins, they formed a six-member committee to negotiate the reduced margins with the company. According to plaintiff, who was an active member of the committee, Bimbo refused to negotiate with the committee. On December 21, 2013, Bimbo delivered a notice terminating his distribution agreement effective immediately for a non-curable breach of the distribution agreement. The notice stated as grounds for the termination that Bimbo recently discovered plaintiff's practice of flushing product by creating false sales and buyback invoices, for which plaintiff received approximately $2,500 to which it was not entitled.

According to the parties' distribution agreement, a non-curable breach that entitled Bimbo to terminate immediately, upon written notice and with no opportunity to cure, included where the distributor's breach involved criminal activity or fraud, threatened public health or safety, or threatened significant harm to the company. Plaintiff claimed that Bimbo's stated reasons for termination were pretext for retaliating against him for his role in opposing the reduced margins paid to distributors and requested a hearing with Bimbo to produce evidence regarding the termination. When

Bimbo refused the request, plaintiff filed suit in state court, bringing claims of unfair and deceptive trade practices under North Carolina law, breach of contract, and fraud, and moved for a temporary restraining order. When Bimbo removed the action to the Eastern District of North Carolina, plaintiff filed this motion to preliminarily enjoin Bimbo from in any way interfering with its operation of its bakery products distribution route and from taking any action or invoking any timeline to force the sale of their distribution agreement.

In denying plaintiff's motion for preliminary injunction, the court held that because there were factual disputes regarding whether Bimbo properly terminated the distribution agreement, plaintiff failed to clearly show it would likely succeed on the merits of its breach of contract claim. Although Bimbo argued it instituted and distributed a specific written policy against flushing of product in 2009, plaintiff argued (with supporting affidavits from other distributors) that it never received any training or notice of the anti-flushing policy.

Moreover, even if plaintiff could make such a showing, the court held that it did not clearly show that it would likely be irreparably harmed unless a preliminary injunction was issued. Although plaintiff argued that its damages were incalculable based on the harm to its reputation and goodwill, the court found that goodwill could be valued in monetary terms and damages calculated because plaintiff operated its route for more than seven years when Bimbo terminated it. Because plaintiff's distribution route was well established at the time of termination, there was more than sufficient historical data from which to calculate monetary damages. Additionally, any goodwill plaintiff built in the distribution route was included in the valuation of the route, as evidenced by plaintiff's own testimony that it created equity in the route and its value increased from $108,000 to $140,000. Because plaintiff's breach of contract damages was calculable, it was therefore unable to clearly show it was likely to be irreparably harmed absent injunctive relief. Without that showing, the court found the balance of the equities did not tip in favor of plaintiff. Because the propriety of the termination of the distribution agreement was factually disputed, the court found that the public interest in enforcement of contractual obligations was served no matter whether the court granted or denied preliminary injunctive relief. Plaintiff was unable to make the requisite showing to justify a preliminary injunction; thus, the court denied its motion.

***Meineke Car Care Ctrs., LLC v. ASAR Inc.*, Bus. Franchise Guide (CCH) ¶ 15,366, No. 3:14-cv-129-RJC, 2014 WL 3952491 (W.D.N.C. Aug. 13, 2014)**

Meineke, a muffler shop franchisor, was entitled to a permanent injunction, enjoining its former franchisee from post-termination use of the franchisor's marks and the operation of a competing car care center in the same location. Upon termination of the franchise, defendant continued to operate under

Meineke's marks. Meineke filed a complaint against defendant and then moved for a default judgment when defendant failed to answer.

The U.S. District Court for the Western District of North Carolina held that Meineke showed it owned the trademark and defendant was infringing on its trademark rights. Thus, it showed a likelihood of success on the merits. The court held Meineke also showed irreparable harm because Meineke suffered damage to goodwill and reputation, as well as lost sales. Moreover, monetary damages were inadequate because the denial of an injunction would force the plaintiff to suffer continued infringement and bring successive suits for monetary damages indefinitely. Finally, granting the injunction would serve the public interest to avoid consumer confusion that would otherwise result from defendants' unauthorized use of the trademark.

The court also agreed to enjoin defendants from competing in violation of the franchise agreement's non-compete. It held that the non-compete, prohibiting competition for one year within a six-mile radius of the franchised location and any other Meineke Center in operation, was reasonable in duration and geographic scope. The court, however, denied Meineke's request for attorney fees, even though the agreement provided for an award of attorney fees to the prevailing party. The provision of attorney fees in North Carolina is at the court's discretion; considering all relevant facts and circumstances, the court denied Meineke's request for attorney fees.

***Mister Softee, Inc. v. Tsirkos*, Bus. Franchise Guide (CCH) ¶ 15,296, No. 14 Civ. 1975 (LTS)(RLE), 2014 WL 2535114 (S.D.N.Y. June 5, 2014)**
The court partially granted plaintiffs' motion for a preliminary injunction preventing a former franchisee from using the franchisor's registered trademarks and from competing against the franchisor's other franchisees by operating an ice cream truck franchise.

Defendant was a former franchisee who operated Mister Softee franchised ice cream trucks for nearly thirty years. The franchise agreements were terminated after defendant ceased making royalty payments and parking his trucks at the required depot (necessary to clean and store the trucks). However, defendant continued operating the ice cream trucks in his former franchise territories using names such as "Master Softee" and "Soft King." Defendant's renamed trucks also contained similar lettering and paint schemes as the franchisor's trucks; truck design was a federal registered trademark. Finally, defendant's trucks featured an "anthropomorphized waffle cone character," wearing a blue jacket and red bow tie, which was also a federally trademarked feature of Mister Softee trucks. However, defendant did not use Mister Softee's trademarked jingle.

Because of these similarities, the court granted plaintiffs' motion for preliminary injunction with respect to defendant's use of the registered trademarks because of the likelihood of confusion with the Mister Softee brand.

Plaintiffs also sought to enforce a non-compete agreement that prohibited defendant from competing in the ice cream business—both retail and wholesale and mobile and fixed—for two years anywhere in defendant's former franchise territory as well as any territory of any other Mister Softee franchisee. The court took judicial notice that the protection being sought by plaintiffs would be well over 100 miles in length and included four boroughs of New York City (excluding Staten Island) and all of Long Island. The court agreed to enforce the non-compete within defendant's former territories and within the territories of other franchisees that are within a five-mile radius of defendant's former territory, for both retail and wholesale operations. In rejecting the non-compete for other areas, the court held that the plaintiffs failed to make a clear showing why their legitimate business interests required restraint in those areas. The court deemed the two-year restriction reasonable.

Defendant argued he was entitled to rescission because the plaintiffs failed to comply with the prospectus delivery requirements of the New York General Business Law. The New York statute provides that a franchise may not be sold without first "providing" a prospectus to the franchisee. A person who sells a franchise without compliance is liable for rescission if the violation was "willful and material." Plaintiffs filed an affidavit in which they declared that an officer offered defendant a prospectus, but he refused to review it because he told the officer he had been a franchisee for nearly thirty years and already knew everything about the system. The court declared that the common English usage of "provide" means to "supply or make available." Because defendant did not rebut plaintiffs' affidavit that they offered the prospectus, this was enough in the court's opinion to satisfy the requirement that the franchisor "made available" the prospectus. Moreover, even if the failure to follow through and physically deliver the prospectus was a violation of the New York statute, nothing in the evidence suggested the failure was "willful," so rescission would not be an appropriate remedy.

***Pla-Fit Franchise, LLC v. Patricko, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,306, No. 13-CV-489-PB, 2014 WL 2106555 (D.N.H. May 20, 2014)**
This case is discussed under the topic heading "Arbitration."

***RE/MAX of New England, Inc. v. Prestige Real Estate, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,314, No. 14-12121-GAO, 2014 WL 3058295 (D. Mass. July 7, 2014)**
Plaintiff RE/MAX of New England sought a preliminary injunction to restrain its former franchisees from competing with its real estate brand. RE/MAX sought to restrain the former franchisees from continuing to use its trademarks, competing with it, and continuing to use certain phone numbers and domain names post-termination.

Defendants Prestige Real Estate, Inc., Stacey Alcorn, and Andrew Armata (collectively Prestige) operated real estate offices under a franchise agreement with RE/MAX. In April 2014, Prestige sent RE/MAX a letter terminating the relationship and alleging unfair business practices. Defendants began operating their real estate offices as LAER Realty Partners.

The U.S. District Court for the District of Massachusetts denied RE/MAX's requested injunction in full. The court found Prestige did not wish to continue using RE/MAX's trademarks and held that undated photographs submitted by RE/MAX were unreliable evidence that Prestige continued to use the RE/MAX name and marks. The court further found RE/MAX did not establish Prestige violated any of its in-term and post-termination non-compete obligations. Regarding the in-term non-competes RE/MAX argued applied to ten franchises with unexpired agreements, the court found they limited ordering competition. The court held there were there no trade secrets and there was reason to wonder whether any goodwill generated by Prestige office was due to RE/MAX branding and method or the work and personal relationships of agents. The court held the record did not convincingly support the former possibility. As for the post-termination non-competes, the court held the clause was meant to prevent a former franchisee from joining another real estate franchise, organization or network, not to prevent it from conducting its own real estate business. As for the phone numbers, the court held that an injunction was not warranted in light of its findings regarding the alleged trademark infringement.

***Sandhu v. 7-Eleven, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,300, No. 14-565-SLR, 2014 WL 2503760 (D. Del. June 2, 2014)**
This case is discussed under the topic heading "Statutory Claims."

***SmallBizPros, Inc. v. Terris*, Bus. Franchise Guide (CCH) ¶ 15,308, No. 3:14-CV-34 (CDL) (M.D. Ga. June 10, 2014)**
This case is discussed under the topic heading "Non-Compete Agreements."

JURISIDICTION

***Century 21 Real Estate LCC v. Ed/Var Inc.*, Bus. Franchise Guide (CCH) ¶ 15,312, No. 5:13-cv-00887 EJD, 2014 WL 3378278 (N.D. Cal. July 10, 2014)**
This case is discussed under the topic heading "Contract Issue."

***Scooter's Chicken Int'l, LLC v. Sunday Dinner, LLC*, Bus. Franchise Guide (CCH) ¶ 15,338, No. 13-6766, 2014 WL 3687314 (E.D. La. July 23, 2014)**
A franchisor sued a terminated franchisee that allegedly continued to operate its restaurant under a different name. The franchisee moved to dismiss on the grounds that the U.S. District Court for the Eastern District of Louisiana lacked subject matter jurisdiction because the amount in controversy requirement of $75,000 was not met. The franchisee argued it stopped

operating any restaurant at all seven months after termination because it was not profitable, and while the franchisor showed lost fees and royalties for that period to be roughly $17,000, this was well below the jurisdictional threshold.

The franchisor also argued that because the franchise agreement was for twenty years, the amount in controversy should reflect monthly fees for those twenty years. The court declined to indulge the franchisor's conclusions, holding that royalties are calculated as a percentage of gross sales, and here, the franchisee ceased operating not long after termination. Moreover, while the franchisor argued the franchisee stole proprietary information, there was no reasonable basis to believe that any damages arising from this would raise the amount in controversy to over $75,000. Thus, the court granted the franchisee's motion to dismiss because it lacked subject matter jurisdiction.

LABOR AND EMPLOYMENT

Naik v. 7-Eleven, Inc., Bus. Franchise Guide (CCH) ¶ 15,332, No. 13-4578 RMB/JS, 2014 WL 3844792 (D.N.J. Aug. 5, 2014)

7-Eleven franchisees filed a claim against the franchisor alleging it violated the Federal Fair Labor Standards Act (FLSA) and the New Jersey Wage and Hour Law (NJWHL). Plaintiffs alleged a variety of factors that entitled them to protections under the FLSA and NJWHL, including: (1) the franchisor's tight level of control over the regulation of vendors and supply, pricing, advertising, and promotional items; (2) the franchisor processed payroll through its internal payroll system; (3) plaintiffs were required to wear the franchisor's uniforms in the store and at off-site events and were subject to "intense daily oversight" by the franchisor's managers; (4) plaintiffs could not control the volume of their televisions or the air conditioning and heat in their stores and that the franchisor controlled these from its corporate headquarters; (5) plaintiffs were restricted from having interests in other business entities; (6) bookkeeping and accounting were all done by the franchisor, and plaintiffs could not withdraw money without the franchisor's approval; and (7) the franchisor would be unable to operate in the manner it does without the plaintiffs.

Claims under the NJWHL were for unpaid wages and unpaid overtime. The U.S. District Court for the District of New Jersey held the New Jersey Supreme Court recently accepted certification of a case that would address the appropriate test for whether an individual is deemed to be an independent contractor or an employee. Claims under the NJWHL are only available to employees. Therefore, the court refused to dismiss plaintiffs' claims under the NJWHL on the franchisor's motion to dismiss because it was an unsettled issue as to how courts determine whether a party is an independent contractor or an employee and would remain so until the New Jersey Supreme Court resolved the issue.

The court then turned to the FLSA claims and held that the Third Circuit set forth a six factor test in determining whether an individual is an employee under the FLSA: (1) the degree of the alleged employer's right to control the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task or his employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; and (6) whether the service rendered is an integral part of the alleged employer's business. Moreover, the court held that it must consider whether as a matter of economic reality the individuals were dependent upon the business to which they render service. The court held that plaintiffs pled a claim for relief sufficient to withstand the franchisor's motion to dismiss because they asserted sufficient facts to allege employee status under the FLSA. For example, plaintiffs alleged that the franchisor regulated vendors and supply, product pricing, advertising, and promotional items; controlled all bookkeeping and accounting; and required plaintiffs to obtain approval before withdrawing money. The court also held that plaintiffs' opportunity for profit or loss was partially dependent upon their ability to manage the store and hire employees, but the franchisor's conduct undercut those opportunities through pervasive control. The court also held that plaintiffs were integral to the franchisor's business, which weighed in favor of classifying plaintiffs as employees. The court noted that it was unclear how the franchisor could run its business at all without its franchisees. Moreover, because the franchisor's control significantly limited the franchisees' discretion to run their franchises, the franchisees alleged an economic reality of dependence on the franchisor.

Plaintiffs asserted claims for violation of the covenant of good faith and fair dealing due to the franchisor's purported failure to properly maintain the franchised stores and respond to plaintiffs' request for service, unfairly burdening plaintiffs through their actions in negotiating vendor contracts, refusing to properly train plaintiffs on equipment, demanding maintenance of minimum credit balances despite audit irregularities perpetuated by defendants, and refusing to pay plaintiffs' promotional incentives and earn "bill backs." The franchisor argued that plaintiffs failed to support this claim because they did not identify the terms of the contract out of which the implied covenant arose. The court, however, found that plaintiffs adequately set forth allegations of a violation of the covenant of good faith and fair dealing by alleging that the franchisor's actions have the effect of destroying or injuring the rights of the franchisees to receive the fruits of the contract. *See Sons of Thunder, Inc. v. Borden, Inc.*, 690 A.2d 575, 587 (N.J. 1997). Plaintiffs also asserted the requisite bad motive by contending that the franchisor's alleged breach of the duty of good faith and fair dealing was an attempt to create a hostile environment for plaintiffs and intimidate them into surrendering their franchises.

Plaintiffs asserted claims under the New Jersey Franchise Practices Act (NJFPA) for constructive termination, but the court dismissed plaintiff's NJFPA claim, holding that there could be no NJFPA claim for constructive termination where the franchise is still in operation. Plaintiffs also alleged claims under the NJFPA for imposing unreasonable standards of performance. Plaintiffs contended that their maintenance contracts with the franchisor constituted unreasonable standards because they required that franchisees assume all responsibility for maintenance of their franchises; the plaintiffs were required to purchase maintenance contracts from the franchisor, leaving them at the mercy of the franchisor when repairs are needed as the maintenance calls go unanswered. As a result, plaintiffs alleged they lost profits due to spoiled product. Plaintiffs also alleged that the franchisor had an unreasonable policy against replacing equipment in stores that grossed below a certain amount annually. Thus, the court held that the NJFPA claim based on the imposition of unreasonable standards of performance survived the franchisor's motion to dismiss.

***Olvera v. Bareburger Grp. LLC*, Bus. Franchise Guide (CCH) ¶ 15,345, No. 14 Civ. 1372 (PAE), 2014 WL 3388649 (S.D.N.Y. July 10, 2014)**
A class of employees, who worked as porters, dish washers, food preparers, and cooks, brought an action against franchisees operating under the name Bare Burger. Franchisee defendants operated the restaurants pursuant to contracts with Bare Burger Group LLC and Bare Burger Inc. Plaintiffs also sued the franchisor and individual defendants who served as executives of the franchisor, alleging that defendants failed to "pay minimum wage, overtime, and spread-of-hours compensation" and maintain accurate records of hours worked. Thus, plaintiffs brought actions under the Fair Labor Standards Act (FLSA) and New York Labor Law (NYLL).

The franchisor and the individual defendants filed a motion to dismiss. The relevant sections of the FLSA and NYLL apply only to employers; thus, the motion to dismiss turned on the single question of whether plaintiffs pled facts sufficient to allege a plausible claim that defendants were their employers.

The FLSA defines employer as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). Moreover, an individual may simultaneously have multiple employers for purposes of the FLSA in which case all joint employers are responsible both individually and jointly for compliance with the applicable provisions of the FLSA. Whether an employer-employee relationship exists for purposes of the FLSA is grounded in an economic reality test. The Second Circuit articulated two tests for determining whether an employment relationship exists for purposes of the FLSA, one relating to formal control and the other to functional control. The formal control test asks whether the alleged employer: (1) had the power to hire and fire the employees; (2) supervised and controlled the employee work schedules or conditions of employment;

(3) determined the rate and method of payment; and (4) maintained employment records. Formal control may not be exercised continuously and may be exercised only occasionally. The functional control test looks at a variety of factors, including but not limited to: (1) whether the alleged employers' premises and equipment were used for plaintiffs' works; (2) whether the alleged employee had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which the alleged employee preformed a discrete line-job that was integral to the alleged employers' process of production; (4) whether responsibility under the contracts can pass from one employee to another without material changes; (5) the degree to which the alleged employers or their agents supervised the alleged employee's work; and (6) whether the alleged employee worked exclusively or predominately for the alleged employers. The statutory standard for employer status under the NYLL is nearly identical to that of the FLSA.

Plaintiffs alleged that franchisor defendants were employers of plaintiffs because they (1) guided franchisees on how to hire and train employees; (2) set and enforced requirements for the operation of their franchises; (3) monitored employee performance; (4) specified the methods and procedures used by those employees to prepare customer orders; (5) exercised control over the work of employees; (6) required franchises to employ record keeping for their operations, including systems for tracking hours and wages and for retaining payroll records; and (7) exercised control over their franchisees' time keeping and payroll practices. Moreover, plaintiffs alleged that defendants had the right to inspect the facilities and operations of the franchisees, audit any franchisees' financial records, and terminate the franchise agreement and the operations of any restaurant that violated the FLSA or NYLL. As to individual defendants, plaintiffs alleged that they determined the wages and compensation of plaintiffs, established the schedules of employees, maintained employee records, and had the authority to hire and fire employees. The U.S. District Court for the Southern District of New York held that these allegations were sufficient at the motion to dismiss stage to state a claim for relief under the FLSA and NYLL.

Orozco v. Plackis, Bus. Franchise Guide (CCH) ¶ 15,316, 757 F.3d 445 (5th Cir. 2014)

Benjamin Orozco, a former employee of a Craig O's Pizza and Pasteria franchise, alleged multiple violations of the Fair Labor Standards Act (FLSA) against his employers, alleging he was not paid overtime or minimum wage as entitled under the Act. After settling with the franchisee owners, Orozco added Craig Plackis, the founder of the franchisor Craig O's Pizza and Pasteria, as a defendant. At the district court, a jury found Plackis was an "employer" for the purposes of the FLSA.

On appeal, the Fifth Circuit reversed the district court's finding. The court relied on the economic reality test, whereby a party's status as an employer is evaluated with reference to whether the alleged employer: (1) possessed the power to hire and fire employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records.

With respect to Orozco's argument that Plackis was responsible for hiring and firing, the court held there was no evidence Plackis directed the franchisee to hire or fire employees. Any input from Plackis was characterized as advice "on improving profitability" in order to assist a struggling franchisee. The ultimate authority to hire and fire rested with the franchisee. With respect to Orozco's argument that Plackis supervised and controlled employee work schedules or conditions of employment, the court held that it was insufficient to infer control from the effect that a franchisor's advice might have on the actions of a franchisee. Plackis merely provided advice to the franchisee and could not be said to "control" any aspect of work schedules or conditions of employment. The evidence that Plackis reviewed schedules and trained employees was insufficient to establish control.

The court left open the possibility that, in certain circumstances, a franchisor may qualify as the FLSA employer of the franchisee's employees, where sufficient evidence is produced to satisfy the economic reality test.

***Patterson v. Domino's Pizza, LLC*, Bus. Franchise Guide (CCH) ¶ 15,357, 333 P.3d 723 (Cal. 2014)**
This case is discussed under the topic heading "Vicarious Liability."

NONCOMPETE AGREEMENTS

***Acceleration Prods., Inc. v. Arikota, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,346, No. 2:14-CV-00252, 2014 WL 3900875 (D. Utah Aug. 7, 2014)**
A franchisor of sports training gyms moved for a preliminary injunction, requesting that the court enjoin defendant from operating sports training gyms allegedly in violation of post-termination covenants not to compete. The U.S. District Court for the District of Utah granted the franchisor's motion with respect to one location in Scottsdale, Arizona, because the former franchisee's current location was within the territory set forth in the post-termination noncompete agreement. The court held that allowing defendants to ignore the noncompete would result in irreparable harm by harming the franchisor's goodwill, customer relationships, and relationships with other franchisees. The court, however, refused to grant plaintiff's requested injunction for the franchisee's location in Tempe, Arizona, because that location was outside the boundaries of the protected territory in the noncompete.

***Meineke Car Care Ctrs., LLC v. ASAR Inc.*, Bus. Franchise Guide (CCH) ¶ 15,366, No. 3:14-cv-129-RJC, 2014 WL 3952491 (W.D.N.C. Aug. 13, 2014)**
This case is discussed under the topic heading "Injunctive Relief."

***Mister Softee, Inc. v. Tsirkos*, Bus. Franchise Guide (CCH) ¶ 15,296, No. 14 Civ. 1975 (LTS)(RLE), 2014 WL 2535114 (S.D.N.Y. June 5, 2014)**
This case is discussed under the topic heading "Injunctive Relief."

***RE/MAX of New England, Inc. v. Prestige Real Estate, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,314, No. 14-12121-GAO, 2014 WL 3058295 (D. Mass. July 7, 2014)**
This case is discussed under the topic heading "Injunctive Relief."

***SmallBizPros, Inc. v. Terris*, Bus. Franchise Guide (CCH) ¶ 15,308, No. 3:14-CV-34 (CDL) (M.D. Ga. June 10, 2014)**
The court granted SmallBizPros, Inc. d/b/a Padgett Business Services' motion for preliminary injunction against a former franchisee who failed to comply with the post-termination noncompetition obligations of his franchise agreement.

Padgett is the franchisor of bookkeeping, tax preparation, and business services companies. John A. Terris, Sr. was a franchisee of Padgett for twenty years. His franchise agreement expired when he chose not to renew, allegedly because he planned to retire. The agreement's post-termination obligations included: (1) a duty not to compete in the same county for a one-year period; (2) a duty not to divert clients to a competing business; and (3) an obligation to cooperate in the transition of clients to Padgett or its designee. Padgett sued and moved for a preliminary injunction after learning that Terris allegedly violated all three post-termination obligations.

At the evidentiary hearing, Terris testified that he had completely retired and that he had no involvement in any bookkeeping, tax preparation, or business services company. Terris further testified that after his franchise agreement expired, his wife established a new limited liability company doing business as Premiere Business Services, which provided the same services as Padgett. Terris contended that he had no present involvement in Premiere's operations, Premiere was wholly owned by his wife, and he had nothing to do with it other than occasionally visiting the office for lunch.

However, Padgett submitted evidence that directly contradicted Terris's testimony and led to the inescapable conclusion that he violated his post-termination obligations. In particular, Padgett presented a photocopy of Premiere's website, which included a photograph of Terris with his professional biography describing him as a valued member of the Premiere team, thereby giving the impression that he was actively involved in the operation. More troubling, as of the date of the hearing, the website listed Terris as "John Alvin" as opposed to his full name (the court surmised that "Alvin" was Terris's middle name), but continued to state his same biography. The court found this to be an egregiously deceptive and dishonest attempt to avoid his contractual obligations. Moreover, lying to the court about his involvement at the evidentiary hearing was sanctionable. Padgett also submitted a video and audio recording of a private investigator who posed as a potential client of Premiere. The evidence depicted Terris as working for Premiere in a managerial role and inducing a prospective client to bring his accounting and tax business to Premiere. Consequently, there was a substantial likelihood that Padgett would prevail on its claim that Terris breached the post-termination obligations of his franchise agreement.

The court granted Padgett's motion for preliminary injunction and enjoined Terris from: (1) working at a competing business as a manager or owner for one year; (2) working at Premiere or otherwise being associated with that business for one year; (3) diverting or attempting to divert any customers to Premiere; (4) employing or attempting to employ any former employee of his franchise; and (5) disclosing any information or knowledge regarding Padgett customers, methods, promotion, advertising, or other methods of operation. The court also ordered Terris to cooperate in the transfer of clients that were served by his Padgett franchise; work with Padgett in transferring any telephone numbers that were used by the franchise; and return all files, signs, and materials to Padgett.

ORAL AGREEMENTS

***Bennett v. Itochu Int'l, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,313, 572 F. App'x 80 (3d Cir. 2014)**

This case is discussed under the topic heading "Alternatives to Franchising."

STATE DISCLOSURE/REGISTRATION LAWS

***Rogers Hosp., LLC v. Choice Hotels Int'l, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,245, Am. Arbitration Ass'n, No. 655 114 Y 00212 11, B248627 (Dec. 23, 2013)**

This case is discussed under the topic heading "Financial Performance Representation."

***Yamaha Motor Corp., U.S.A. v. Ariz. Dep't of Transp.*, Bus. Franchise Guide (CCH) ¶ 15,315, No. 1 CA-CV 13-0242, 2014 WL 2999029 (Ariz. Ct. App. July 3, 2014)**

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

STATUTE OF LIMITATIONS

***Dunlap v. Cottman Transmissions Sys., LLC*, Bus. Franchise Guide (CCH) ¶ 15,325, 539 F. App'x 69 (4th Cir. 2013)**

This case is discussed under the topic heading "Tortious Interference."

STATUTORY CLAIMS

***B&S Transp., Inc. v. Bridgestone Am. Tire Operations, LLC*, Bus. Franchise Guide (CCH) ¶ 15,350, No. 5:13-cv-2793, 2014 WL 3687777 (N.D. Ohio July 24, 2014)**

Plaintiff tire dealer filed a motion to amend a complaint, asserting claims that the manufacturer terminated the dealer in violation of the Ohio Farm Machinery Dealer Law (the Act) and engaged in unlawful restraint of trade. The U.S. District Court for the Northern District of Ohio held that the dealer could not set forth a claim under the Act because it made no allegation that it was a farm machinery or construction equipment dealer. Plaintiff failed to allege that it was engaged in the retail sale of farm machinery or construction equipment, which is necessary to state a claim under the Act. Moreover, even if it had successfully alleged that this law did apply, it sought a remedy not provided for in the statute—the only remedy provided for in that statute is the repurchase of inventory, and plaintiff made no request that the manufacturer repurchase its inventory. Moreover, the dealer failed to state a cause of action for restraint of trade and could not do so because it provided little detail and failed to allege an agreement in restraint of trade, allege the restraint of trade was unreasonable, and demonstrate or allege any anti-competitive effects within a relevant market.

The dealer also moved to amend the complaint to reflect additional facts adduced in discovery, and the defendants did not oppose this portion of the motion. Therefore, the court granted plaintiff's motion to amend the complaint to add facts adduced in discovery, but denied the motion to amend the complaint to add a claim under the Ohio Farm Machinery Dealer Law and to add a claim for violation of the Ohio Antitrust Law.

***Copans Motors, Inc. v. Porsche Cars N. Am., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,307, No. 14-60413-CV, 2014 WL 2612308 (S.D. Fla. June 11, 2014)**

This case is discussed under the topic heading "Unfair Competition/Unfair and Deceptive Practices."

***Ferreira v. Chrysler Grp. LLC*, Bus. Franchise Guide (CCH) ¶ 15,321, 13 N.E.3d 561 (Mass. 2014)**

The Supreme Judicial Court of Massachusetts affirmed that a manufacturer is not obligated under Massachusetts General Laws ch. 93B § 8(a) to defend a negligence claim on behalf of a motor vehicle franchisee where plaintiff's allegations are against both the manufacturer and the dealer.

Matthew Ferreira purchased from Somerset Auto Group, a Jeep Wrangler manufactured by a predecessor Chrysler Group LLC. Ferreira filed a claim against both defendants. The claim against Chrysler alleged breach of warranty and unfair and deceptive trade practices. The claim against Somerset alleged misrepresentations regarding the warranty and unfair and deceptive trade practices. The trial judge dismissed the claim against Chrysler.

Somerset filed a cross-claim alleging Chrysler was obligated to defend the action against Somerset under § 8(a). Both the Superior Court and the Massachusetts Appeals Court dismissed the cross-claim. Somerset further appealed that decision.

Chrysler argued it was not obligated to defend the claim against Somerset until Somerset was found liable. The court rejected this argument and stated that the duty will be triggered by a claim before any determination of liability. The court also rejected the trial judge's conclusion that there was no duty to defend unless the claim specifically alleged negligent design or manufacture. It held that the duty would be triggered so long as the claim was predicated upon negligent design or manufacture of a motor vehicle.

The court held that the duty to defend under § 8(a) is triggered in cases where a complainant makes allegations solely against the manufacturer and where the claim does not allege any fault or neglect on the part of the dealer. Specifically, the court held that the purpose of this provision is to protect an essentially innocent dealer which would be found liable or would have to bear the expense of mounting a defense without any fault alleged against it. In this case, Ferreira alleged fault on the part of both the manufacturer and dealer. Therefore, Chrysler was not obligated to take on the defense of the claim against Somerset.

***Governara v. 7-Eleven, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,368, No. 13–CV–6094 (LAP), 2014 WL 4476534 (S.D.N.Y. Aug. 20, 2014)**
This case is discussed under the topic heading "Financial Performance Representation."

***Interstate Equip. Co. v. ESCO Corp.*, Bus. Franchise Guide (CCH) ¶ 15,340, No. 5:11CV51-RLV, 2014 WL 3547348 (W.D.N.C. July 17, 2014)**
Plaintiff dealer sued the supplier under the North Carolina Farm Machinery Franchise Act as a result of a dispute following termination and the supplier's obligations to repurchase inventory. Following a bench trial, the U.S. District Court for the Western District of North Carolina held that the encumbrance on the inventory at the time of termination did not excuse the supplier's repurchase obligation. Upon termination of the agreement, a dispute arose as to the extent to which the supplier was obligated to repurchase inventory from the dealer given that the inventory was encumbered by a lien. In this case, the lien was held by the dealer's president and sole shareholder, whose representative told the court that the encumbrance would be cancelled and extinguished at the close of the repurchased transaction. Therefore, while the property to be repurchased was encumbered, which would excuse the supplier from having to meet its statutory repurchase obligations under the Farm

Machinery Franchise Act, the court held that the proper focus should be that the inventory is free of liens at the time of closing of the repurchase transaction, not at the time of termination. Therefore, the supplier's statutory obligation to repurchase inventory remained but was conditioned on proof of the extinguishment of the president's lien at the closing of the repurchased transaction.

***Ledo Pizza Sys., Inc. v. Singh*, Bus. Franchise Guide (CCH) ¶ 15,335, No. WDQ-13-2365, 2014 WL 3810524 (D. Md. July 31, 2014)**
This case is discussed under the topic heading "Breakaway Franchisees."

***Legacy Academy v. Mamilove, LLC*, Bus. Franchise Guide (CCH) ¶ 15,336, 761 S.E.2d 880 (Ga. Ct. App. 2014)**
This case is discussed under the topic heading "Financial Performance Representation."

***Mathew Enter., Inc. v. Chrysler Grp. LLC*, Bus. Franchise Guide (CCH) ¶ 15,311, No. 13-cv-04236-BLF, 2014 WL 3418545 (N.D. Cal. July 11, 2014)**
This case is discussed under the topic heading "Good Faith and Fair Dealing."

***Micro Man Distribs., Inc. v. Louis Glunz Beer, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,331, No. 8:13-cv-00639-T-27MAP, 2014 WL 3887497 (M. D. Fla. Aug. 7, 2014)**
A beer importer and beer distributor were engaged in a lawsuit concerning the importer's termination of the distributor's franchise to distribute the importer's beer in Florida. The distributor initiated litigation concerning the termination and the importer asserted counterclaims. Both sides moved for summary judgment.

The distributor alleged that the importer did not have good cause for termination because the deficiencies cited as the reasons for termination were not provisions of the franchise agreement because there was no written agreement. The importer argued that even in the absence of a written distributor agreement, the distributor was required under Florida beer distribution law to use due diligence and reasonable efforts and resources to promote the product and expand the market within its exclusive territory. The distributor purportedly failed to fulfill that obligation and the importer argued that this constituted good cause for termination. Specifically, the importer argued that the distributor lacked an adequate sales presence in the Florida panhandle region and the Florida Keys, and it refused to sell through the Publix supermarket chain. The distributor argued that these were not provisions of an agreement and therefore could not be used as good cause for termination.

The U.S. District Court for the Middle District of Florida held that the issue was how to read the good cause provision of § 563.022(7)(a) of the

Florida Beer Distribution Law in harmony with the reasonable efforts and resources provision of § 563.022(12) when there is no written agreement. The court held that where there is no written agreement, the reasonable efforts and resources provision of § 563.022(12) must be read as a provision of the agreement under the good cause provision of § 563.022(7)(a). Section 563.022(7)(a) defines "good cause" as a failure by a distributor to comply with a provision of the agreement that is both reasonable and of material significance to the business relationship between the distributor and the manufacturer. Section 563.022(12), however, requires a distributor to devote such efforts and resources as required in the agreement as long as the requirements are reasonable and in the absence of a written agreement, the distributor should devote reasonable efforts and resources to distribution and sales. The reasonableness of the distributor's distribution and sales efforts was an issue of material fact and therefore, whether the importer had good cause to terminate the distribution agreement was also an issue of fact, so the court refused to grant summary judgment for either party.

***Naik v. 7-Eleven, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,332, No. 13-4578 RMB/JS, 2014 WL 3844792 (D.N.J. Aug. 5, 2014)**
This case is discussed under the topic heading "Labor and Employment."

***Newpaper, LLC v. Party City Corp.*, Bus. Franchise Guide (CCH) ¶ 15,319, No. 13-1735 ADM/LIB, 2014 WL 2986653 (D. Minn. July 1, 2014)**
This case is discussed under the topic heading "Contract Issues."

***Olvera v. Bareburger Grp. LLC*, Bus. Franchise Guide (CCH) ¶ 15,345, No. 14 Civ. 1372 (PAE), 2014 WL 3388649 (S.D.N.Y. July 10, 2014)**
This case is discussed under the topic heading "Labor and Employment."

***Sandhu v. 7-Eleven, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,300, No. 14-565-SLR, 2014 WL 2503760 (D. Del. June 2, 2014)**
Plaintiffs, owners of a 7-Eleven franchise, alleging constructive termination following their failure of an unannounced audit by 7-Eleven, were not entitled to a preliminary injunction enjoining termination of their franchise under the Delaware Franchise Security Law (DFSL).

Pursuant to the parties' June 3, 2013, franchise agreement, 7-Eleven agreed to establish and maintain financing for plaintiffs, provided that 7-Eleven would conduct quarterly audits of the store. 7-Eleven expressly preserved in the franchise agreement the right to enter the store and conduct an audit at any time and without notice and to discontinue financing if plaintiffs materially breached the franchise agreement.

Plaintiffs commenced operations in August 2013. On March 31, 2014, 7-Eleven conducted an unannounced audit at plaintiffs' store and found an inventory shortage exceeding $30,000. According to 7-Eleven, with this shortage plaintiffs' equity investment in the store fell significantly below the minimum required under the franchise agreement. Plaintiffs disputed the propriety of the audit, claiming the auditor failed to include large sections of merchandise and that the audit was done to constructively terminate the franchise agreement; they requested a second audit. 7-Eleven served two notices of material breach (which were subsequently withdrawn), removed the store's money order equipment, and discontinued financing. Plaintiffs instituted this action and filed their motion for injunctive relief on May 7, 2014, claiming that 7-Eleven constructively terminated the franchise agreement by removing the equipment and discontinuing financing. On May 12, 2014, 7-Eleven served a curable notice of material breach to plaintiffs for their store's failure to maintain the required minimum net worth as of April 30, 2014, with a termination date ninety days from receipt of the notice. 7-Eleven also attempted to conduct a regularly scheduled audit of the store on May 19, 2014, but plaintiffs refused access.

In their motion for injunctive relief, plaintiffs argued that the DFSL, instead of the usual standard for injunctive relief, applied. The court agreed that the DFSL permits a cause of action for constructive termination and requires that, in order to maintain the status quo pending a full hearing, a franchisee must show "some probability" that the franchisor was attempting to terminate the relationship in bad faith or without just cause. Plaintiffs were therefore not required to show for the first prong of the injunctive relief standard a likelihood of eventual success on the merits, but rather they needed only demonstrate by a preponderance of the evidence that it was "more likely than not" that 7-Eleven was constructively terminating the franchise in bad faith.

The court concluded that plaintiffs failed to carry their burden of proof and declined to issue injunctive relief. It found plaintiffs' supporting declarations merely repeated and provided no additional evidentiary support for their claims. Based on this record, the court also could not conclude that 7-Eleven's unannounced audit was either inaccurate or conducted outside the scope of the franchise agreement. If anything, the court noted the fact that plaintiffs refused to permit 7-Eleven to conduct a scheduled audit or failed to arrange their own independent audit counterbalanced the alleged impropriety of the unannounced audit. As to the remaining prongs of the preliminary injunction standard, the court found that discontinuation of financing by 7-Eleven was a substantial hardship to plaintiffs, but as a secured creditor, 7-Eleven had contractual rights under the franchise agreement that would be harmed if forced to resume financing; and the public interest lied somewhere in between these two positions. Because none of the prongs weighed "so heavily" in favor of plaintiffs, the court denied their motion for injunctive relief.

***Tri County Wholesale Distribs., Inc. v. Labatt USA Operating Co., LLC*, Bus. Franchise Guide (CCH) ¶ 15,363, No. 2:13-CV-317, 2014 WL 4076041 (S.D. Ohio Aug. 14, 2014)**

Beer distributors won an injunction challenging their supplier's termination of their franchises. The supplier, however, moved to vacate the preliminary injunction. The U.S. District Court for the Southern District of Ohio granted the motion due to the franchisees' reduced likelihood of success on the merits, based on an intervening ruling by the Ohio Supreme Court that permitted terminations by a successor manufacturer without cause upon due notice under the Ohio Alcoholic Beverage Franchise Act.

The distributors had franchise relationships with Labatt USA Operating Co., LLC, which was indirectly owned by North American Breweries Holdings and underwent a change of ownership. After the change in ownership, Labatt USA notified the distributors that their distribution agreements were being terminated under the successor manufacturer provision of the Ohio Alcoholic Beverage Franchise Act. The provision permits a successor manufacturer to terminate a distribution relationship without cause. The distributors obtained a preliminary injunction barring termination, which was granted, but there was an open question as to whether that provision applied to distribution relationships governed by written agreements.

The Ohio Supreme Court then issued a decision holding the relevant statute applied to written franchise agreements. *Esber Beverages Co. v. Labatt United States Operating Co., L.L.C.*, 3 N.E.3d 1173 (Ohio 2013). Therefore, the distributors no longer had a likelihood of success on the merits because the relevant provision of the Ohio Alcoholic Beverage Franchise Act was now held to apply to written franchise agreements.

***Trouard v. Dickey's Barbecue Rest., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,348, No. PWG-14-1703, No. GLR-14-1650, 2014 WL 3845785 (D. Md. Aug. 1, 2014)**

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

TERMINATION AND NONRENEWAL

***Casco, Inc. v. John Deere Constr. Co. & Forestry Co.*, Bus. Franchise Guide (CCH) ¶ 15,356, No. 13-1325 (GAG), 2014 WL 4233241 (D.P.R. Aug. 26, 2014)**

A former John Deere dealer brought claims against John Deere in the U.S. District Court for the District of Puerto Rico under the Puerto Rico Dealers Act, P.R. Laws Ann. tit. 10 §§ 278 et seq., which is commonly referred to as Law 75. Both the dealer and John Deere moved for summary judgment, and the court denied both motions.

The court began by explaining the history of and purpose behind Law 75. Although the Act initially regulated only the termination of suppliers' relationships with dealers, its protections were eventually extended to include conduct that is sufficiently "detrimental to the established relationship, even where the contract was not terminated." *See Caribe Industrial System, Inc. v. National Starch & Chemical Co.*, 212 F.3d 26, 29 (1st Cir. 2000). Certain actions by suppliers—including failing to adequately fill orders—create a rebuttable "presumption of impairment" to the established relationship. If the dealer demonstrates that any of these actions occurred, the burden shifts to the supplier to show just cause existed for such actions.

> Just cause is defined as the: nonperformance of any of the essential obligations of the dealer's contract, on the part of the dealer, or any action or omission on [the dealer's] part that adversely and substantially affects the interests of the [supplier] in promoting the marketing or distribution of the merchandise or service.

The court emphasized that determining whether just cause exists is typically a question of fact. It also noted that the "established relationship between dealer and [supplier] is bounded by the distribution agreement and therefore the act only protects against detriments to contractually acquired rights."

The dealer alleged that John Deere violated Law 75 as follows: (1) in December 2012, John Deere unilaterally canceled a purchase order for an excavator that the dealer would have sold for a substantial price; and (2) in March 2013, John Deere terminated the distribution agreement because of the dealer's alleged indebtedness. The dealer argued that John Deere's failure to provide the excavator impaired the dealer's cash flow such that it constituted a constructive termination of the agreement and that consequently the dealer was unable to pay John Deere on its debt, which ultimately resulted in John Deere formally terminating the agreement. John Deere countered that it was justified in canceling the excavator order because the dealer had not completed new model qualification (NMQ) training, which according to John Deere was an "essential obligation" under the agreement. John Deere also argued that in addition to failure to maintain NMQ compliance, the dealer violated a host of other essential obligations under the agreement, which independently warranted termination.

First, the court noted that it was unclear whether the Puerto Rico legislature and courts allowed for a constructive termination claim as a separate cause of action under Law 75, and it chose instead to read the dealer's constructive termination claim as "an effort to emphasize the impairment endured" by the dealer. Second, the court rejected John Deere's argument that the presumption of impairment applies only when there are multiple cancellations of orders, as opposed to the single cancellation at issue here. Third, the court was unpersuaded that John Deere was entitled to summary judgment as to whether just cause existed for termination simply because it presented evidence that the dealer violated nearly all of the obligations set forth in the "Essential Obligations" section of the agreement. The court identified a common theme in all of the ostensible reasons for termination given by John Deere: "resolving whether a breach occurred requires assessing the adequacy or reasonableness of [the dealer's] performances and course of conduct, an investigation which turns entirely on fact." Consequently, summary judgment was improper.

For example, although the dealer admitted that its employees were not yet fully trained in NMQ compliance at the time of the order, the dealer argued that they were in the process of training and John Deere's policy had always been to allow dealers a ninety-day grace period after the sale to complete such training. The court held that given the competing evidence in the record on this key issue—whether NMQ compliance was an essential obligation and prerequisite for filling any purchase orders—it could not resolve the matter at the summary judgment stage.

The court similarly held that the issue of whether John Deere was liable for breach of good faith and fair dealing was "attached" to the Law 75 claim and required resolution of the factual issues surrounding the Law 75 claim first. Lastly, the court rejected John Deere's argument that the dealer could not prove damages even if it was ultimately determined that NMQ compliance was not an essential obligation. The court noted that clearly the dealer might be able to show damages if John Deere withheld products without just cause the dealer wished to sell. Such a refusal also could have prevented the dealer from timely paying its debts. Ultimately, the damages issue was for the factfinder.

***Copans Motors, Inc. v. Porsche Cars N. Am., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,307, No. 14-60413-CV, 2014 WL 2612308 (S.D. Fla. June 11, 2014)**

This case is discussed under the topic heading "Unfair Competition/Unfair and Deceptive Practices."

***Dunkin' Donuts Franchising LLC v. Claudia III, LLC*, Bus. Franchise Guide (CCH) ¶ 15,347, No. 14-2293, 2014 WL 3900569 (E.D. Pa. Aug. 11, 2014)**

This case is discussed under the topic heading "Injunctive Relief."

***Giuffre Hyundai, Ltd. v. Hyundai Motor Am.*, Bus. Franchise Guide (CCH) ¶ 15,326, 756 F.3d 204 (2d Cir. 2014)**

The Second Circuit ruled that § 463 of the New York Vehicle and Traffic Law, which provides protections to motor vehicle franchisees in their dealings with automobile manufacturers, did not abrogate the common law right to immediately terminate the contract for incurable breaches.

Plaintiff Giuffre Hyundai was a Hyundai dealer pursuant to a contract with defendant, Hyundai's domestic affiliate. A state court concluded Giuffre engaged in fraudulent, illegal, and deceptive business practices in clear violation of the contract terms. Giuffre sought to prevent termination of the contract on the grounds that it was entitled to cure the breach and alleged § 463 required Hyundai to provide an opportunity to cure the breach occasioned by the state court's ruling. The court affirmed the district court's finding that the breach was incurable and that Hyundai was entitled to terminate the contract immediately.

***Martin v. Bimbo Foods Bakeries Distrib., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,301, No. 5:14-CV-17-BR, 2014 WL 2439954 (E.D.N.C. May 30, 2014)**
This case is discussed under the topic heading "Injunctive Relief."

***Sandhu v. 7-Eleven, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,300, No. 14-565-SLR, 2014 WL 2503760 (D. Del. June 2, 2014)**
This case is discussed under the topic heading "Statutory Claims."

TORTIOUS INTERFERENCE

***Copans Motors, Inc. v. Porsche Cars N. Am., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,307, No. 14-60413-CV, 2014 WL 2612308 (S.D. Fla. June 11, 2014)**
This case is discussed under the topic heading "Unfair Competition/Unfair and Deceptive Practices."

***Dunlap v. Cottman Transmissions Sys., LLC*, Bus. Franchise Guide (CCH) ¶ 15,325, 539 F. App'x 69 (4th Cir. 2013)**
Plaintiff James M. Dunlap operated two AAMCO franchises and alleged that defendants Cottman Transmissions Systems and Todd Leff, the president of AAMCO, conspired to force him out of business with local competitors. Dunlap named Cottman and Leff in an action claiming violation of Virginia's business conspiracy statute (VA. CODE §§ 18.2-499, 18.2-500), tortious interference with a contract, and tortious interference with business expediency. At issue were three questions: (1) whether defendants' actions could form the required acts to proceed on a business conspiracy claim; (2) what limitation period applied; and (3) whether the intracorporate immunity doctrine shielded defendants in this case.

While the U.S. District Court for the Eastern District of Virginia dismissed Dunlap's suit, the Supreme Court of Virginia answered those questions otherwise on a certification request. The Fourth Circuit accordingly vacated the district court's judgment.

On the first question, the court, overruling the district court's judgment, ruled that tortious interference with a contract and tortious interference with business expediency could form the required acts to proceed on a business conspiracy claim under the Virginia statute. On the second question, the court ruled that this sort of action was not personal injury and thus was not subject to a two-year limitation period. Since the action was directed at the contract it was therefore subject to the five-year limitation period for personal property. On the final question, the court rejected defendant's invocation of the intracorporate immunity doctrine, which provides related parties with immunity from conspiracy allegations. However, while some of the named parties did have the necessary relationship, other parties did not; thus, the doctrine did not apply here.

***Kumon N. Am., Inc. v. Timban*, Bus. Franchise Guide (CCH) ¶ 15,328, No. 13-4809 (RBK/KMW), 2014 WL 2812122 (D.N.J. June 23, 2014)**
This case is discussed under the topic heading "Contract Issues."

***Priority Auto Grp., Inc. v. Ford Motor Co.*, Bus. Franchise Guide (CCH) ¶ 15,324, 757 F.3d 137 (4th Cir. 2014)**
Priority Auto Group, Inc. failed to show that Ford Motor Company improperly exercised a right of first refusal when preventing Priority from purchasing one of its franchises. Priority entered into an agreement with the owners of Kimnach Ford, Inc. to purchase the Kimnach dealership. The franchise agreement between Kimnach and Ford gave Ford a right of first refusal, and the agreement between Kimnach and Priority was conditional upon receiving Ford's approval for the sale. Ford declined to approve the sale and assigned its right of first refusal to a third party. That third party purchased Kimnach, dispersed its assets, and closed the dealership. Priority filed suit against Ford.

The District Court for the Eastern District of Virginia dismissed the claim pursuant to a motion by Ford under Federal Rule of Civil Procedure 12(c). Priority appealed that decision to the Fourth Circuit.

Priority advanced two alternate claims. Its first claim was that Ford violated Virginia Code § 46.2-1569(3a), which governs the imposition of conditions on the transfer or sale of motor vehicle franchises. Although § 46.2-1569(3a) stated that the exercise of a right of first refusal could not be considered a condition prohibited by that section, Priority argued Ford could not rely on this clause because it failed to fulfill the requirement under § 46.2-1569.1—that its exercise of the right of first refusal resulted in the dealership receiving the same or greater consideration than what it would have received under a proposed sales agreement. The court rejected this argument because the requirement was enacted to protect the interests of dealers, and therefore, Priority, as a prospective purchaser, could not rely on it.

Priority also argued Ford's actions constituted tortious interference with Priority's contract and business expectancy. Under Virginia common law, a claimant alleging tortious interference must show that defendant employed improper means. The court held that since Ford was authorized to exercise a right of first refusal by both contract and statute, its actions preventing Priority from purchasing the Kimnach dealership could not constitute improper means.

TRADEMARK INFRINGEMENT

***Century 21 Real Estate LCC v. Ed/Var Inc.*, Bus. Franchise Guide (CCH) ¶ 15,312, No. 5:13-cv-00887 EJD, 2014 WL 3378278 (N.D. Cal. July 10, 2014)**
This case is discussed under the topic heading "Contract Issues."

***Dunkin' Donuts Franchising LLC v. Claudia III, LLC*, Bus. Franchise Guide (CCH) ¶ 15,347, No. 14-2293, 2014 WL 3900569 (E.D. Pa. Aug. 11, 2014)**
This case is discussed under the topic heading "Injunctive Relief."

***Grout Doctor Global Franchise Corp. v. Groutman, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,295, No. 7:14-CV-105-BO, 2014 WL 2566261 (E.D.N.C. June 6, 2014)**
This case is discussed under the topic heading "Injunctive Relief."

***Ledo Pizza Sys., Inc. v. Singh*, Bus. Franchise Guide (CCH) ¶ 15,335, No. WDQ-13-2365, 2014 WL 3810524 (D. Md. July 31, 2014)**
This case is discussed under the topic heading "Breakaway Franchisees."

***Mister Softee, Inc. v. Tsirkos*, Bus. Franchise Guide (CCH) ¶ 15,296, No. 14 Civ. 1975 (LTS)(RLE), 2014 WL 2535114 (S.D.N.Y. June 5, 2014)**
This case is discussed under the topic heading "Injunctive Relief."

***Pla-Fit Franchise, LLC v. Patricko, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,306, No. 13-CV-489-PB, 2014 WL 2106555 (D.N.H. May 20, 2014)**
This case is discussed under the topic heading "Arbitration."

TRANSFERS

***Priority Auto Grp., Inc. v. Ford Motor Co.*, Bus. Franchise Guide (CCH) ¶ 15,324, 757 F.3d 137 (4th Cir. 2014)**
This case is discussed under the topic heading "Tortious Interference."

UNFAIR COMPETITION/UNFAIR AND DECEPTIVE PRACTICES

***Copans Motors, Inc. v. Porsche Cars N. Am., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,307, No. 14-60413-CV, 2014 WL 2612308 (S.D. Fla. June 11, 2014)**
A terminated Porsche dealer in Broward County, Florida, which sold more Porsches than any other dealer in the United States since 1998, filed a lawsuit against the Porsche distributor in Florida state court, asserting claims, among others, for (1) violation of § 320.64(18) of the Florida Automobile Dealers Act (FADA), (2) tortious interference with business relationship,

(3) violation of the Florida Deceptive Unfair Trade Practices Act (FDUTA), (4) breach of contract, and (5) breach of the implied covenant of good faith and fair dealing. Porsche removed the lawsuit to the U.S. District Court for the Southern District of Florida and moved to dismiss the previously mentioned claims. The court granted the motion in part, but allowed certain alleged violations of the FDUTA to proceed.

The parties' dispute stems from the following facts. The dealer wanted to sell even more cars, but Porsche repeatedly denied the dealer's requests for more inventory. Then, during a regional dealer's meeting, one of the dealer's employees took photos of a presentation with confidential pictures of new Porsche models, and those photos were subsequently leaked to a third-party website. In response, Porsche filed a lawsuit for misappropriation against the dealer in Georgia state court and one day later notified the dealer that it would terminate the dealer's franchise. A month later, Porsche filed administrative notice with the Florida Department of Highway Safety and Motor Vehicles, as required under the FADA, to add a new dealership to Broward County. The dealer did not object during the administrative process, and the department approved the new dealership. A day later, the dealer filed the lawsuit at issue.

The dealer claimed that by modifying its system of distribution to add an additional Porsche dealer in Broward County, Porsche violated FADA § 320.64(18), which prohibits distributors from "establish[ing]" or "implement[ing]" a "system of motor vehicle allocation or distribution" that is "unfair" or "inequitable."

At the outset, Porsche argued that the dealer's exclusive remedy under the FADA was to object to the department, and by not doing so, the dealer waived any remedy it may have for a potential violation of § 3230.64(18). In rejecting this argument, the court relied heavily on *Barry Cook Ford, Inc. v. Ford Motor Co.*, 616 So. 2d 512 (Fla. Dist. Ct. App. 1993), in which a Florida state court denied the same exclusivity argument for a parallel provision of the FADA. Applying the same analysis of the statutory scheme as the *Barry Cook* court, the court agreed that the legislature did not intend for department procedure to be exclusive. The court reasoned that the FADA provides alternative remedies for the same harm, provides for damages or injunctive relief "notwithstanding the existence of any other" remedies, fails to confer exclusive jurisdiction on the department, and allows the dealer to seek damages, which the department's procedure cannot provide. For those reasons, the dealer did not waive its right to assert claims under the FADA by failing to protest at the administrative level.

Nonetheless, the court held that the dealer failed to state a claim that Porsche violated FADA § 320.64(18). The dealer claimed that by Porsche rejecting the dealer's requests for increased inventory and establishing a new dealership—which would take vehicles or customers from the dealer—Porsche established or implemented a system of distribution in violation of § 320.64(18). The court noted that even if establishing the new dealership constituted establishing a distribution system, which it declined to address, the dealer failed to plead that the system was unfair and distributed a benefit to the new dealership that was not distributed to the dealer. In the absence of any alleged unfairness, the establishment of a new dealership, by itself, was insufficient to support a claim under § 320.64(18).

The court briefly addressed the dealer's claim for tortious interference with a business relationship. Under Florida law, it is well settled that "a plaintiff cannot claim tortious interference with a business relationship when the defendant is a party to the relationship." *See Genet Co. v. Annheuser-Busch, Inc.*, 498 So. 2d 683, 684 (Fla. Dist. Ct. App. 1986). Accordingly, the dealer could not assert a claim for tortious interference against Porsche.

The dealer alleged that Porsche violated FDUTPA § 501.204(1), which prohibits unfair or deceptive acts or practices in the conduct of any trade or commerce, in four ways. Its first argument—that Porsche violated the FDUTPA by adding a competitive new dealership—ignored that the FDUTPA exempts any act or practice "specifically permitted by federal and state law." FLA. STAT. § 501.212(1). Because adding a new dealership was permitted by state law, the court dismissed this claim. Second, the dealer claimed that Porsche violated the FDUTPA by filing the Georgia lawsuit as an ulterior motive to terminate the dealer. The court explained that a claim under § 501.204(1) requires that the act or practice itself be in the conduct of trade or commerce. "In Florida, a lawsuit is not an act or practice in the conduct of trade or commerce, regardless if the business that files the lawsuit is in the conduct of trade or commerce." Because Porsche is not in the business of filing lawsuits, the dealer could not claim that Porsche violated the FDUTPA by filing the Georgia lawsuit.

As to its third and fourth claimed violations of FDUTPA, the dealer alleged that Porsche caused it to spend money improving its dealership and denied its requests for additional inventory, all the while intending to add the new dealership. The court reasoned that whether this conduct was "unfair or deceptive," a necessary element for any claim under the FDUTPA—was a question of fact. *See Witt v. LaGorce Country Club, Inc.*, 35 So. 3d 1033, 1040 (Fla. Dist. Ct. App. 2010). Accordingly, the court allowed these claims to proceed.

Lastly, as to the dealer's claims for breach of contract and the implied covenant of good faith and fair dealing, the court noted that the franchise agreement granted the dealer no exclusivity rights and expressly allowed for Porsche to "add, relocate, or replace dealers" in the dealer's primary area of responsibility. The dealer pointed to a provision in the franchise agreement which read: "Porsche and [the dealer] shall refrain from conduct which may be detrimental to or adversely reflect upon the reputation of PORSCHE AG, Porsche, [the dealer] or PORSCHE PRODUCTS in general." The dealer argued that this provision precluded Porsche from engaging in conduct which may be detrimental to the dealer. Porsche argued that the provision only prohibited Porsche from engaging in conduct detrimental to the dealer's reputation. The court conceded that the sentence standing alone was open to two reasonable interpretations and was therefore ambiguous. "However, while this isolated sentence may be ambiguous, the contract is not." Under Florida law, specific provisions in a contract govern its construction over general provisions if the provisions relate to the same subject matter. *See Ibis Lakes Homeowners Ass'n, Inc. v. Ibis Isle Homeowners Ass'n, Inc.*, 102 So. 3d 722, 728 (Fla. Dist. Ct. App. 2012). The court held that even if the general prohibition against detrimental conduct was ambiguous, it was "superseded by the special provision permitting Porsche to add dealerships." The dealer's breach of contract claim was accordingly dismissed.

In the absence of a breach of contract claim, the court dismissed the dealer's claim for breach of the implied covenant of good faith and fair dealing. It is well settled that such a claim requires allegations that the defendant breached an express term of the contract. Because the dealer's breach of contract claims were dismissed, it could not allege that Porsche breached an express provision of the franchise agreement.

***Ledo Pizza Sys., Inc. v. Singh*, Bus. Franchise Guide (CCH) ¶ 15,335, No. WDQ-13-2365, 2014 WL 3810524 (D. Md. July 31, 2014)**
This case is discussed under the topic heading "Breakaway Franchisees."

***Martin v. Bimbo Foods Bakeries Distribution, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,343, No. 5:14-CV-17-BR, 2014 WL 3487618 (E.D.N.C. July 11, 2014)**
This case is discussed under the topic heading "Fraud."

***Ramsey v. Bimbo Foods Bakeries Distribution, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,310, No. 5:14-CV-26-BR, 2014 WL 3408585 (E.D.N.C. July 10, 2014)**
This case is discussed under the topic heading "Contract Issues."

VICARIOUS LIABILITY

***Barrett-O'Neill v. Lalo, LLC*, Bus. Franchise Guide (CCH) ¶ 15,342, No. 2:14-cv-194, 2014 WL 3895679 (S.D. Ohio Aug. 8, 2014)**
Plaintiff was a customer of a franchisee that helped run estate sales as part of the franchised business. Plaintiff sued the franchisee for breach of contract and fraudulent misrepresentations in connection with the sale of antiques and other personal belongings. Plaintiff also sued the franchisor CT Franchising Systems, Inc. (CTFSI) under theories of agency and vicarious liability, arguing that although the franchisor was not the party it contracted with, the franchisor held national meetings with franchisees, provided franchisees with initial training and preapproved advertising and public relations materials, and that the franchisee was the agent of the franchisor.

The franchisor moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). Plaintiff argued that the provision of training and marketing materials showed an agency relationship because the franchisor had a right to control the franchisee. While the U.S. District Court for the Southern District of Ohio held the existence and extent of an agency relationship is a question of fact, plaintiff failed to allege facts sufficient to show an agency relationship and merely alleged legal conclusions. Specifically, the court held that holding meetings and providing marketing materials and training did not suggest that CTFSI had the right to control the means and methods by which the franchisee conducted its business. Under Ohio law, the determinant factor in deciding whether an agency relationship exists between a franchisor and a franchisee is the degree of control a franchisor has over the operations of a franchisee's business and here, there was no allegation of high levels of control.

Plaintiff also argued that she pled the existence of an agency relationship by alleging that CTFSI was aware or should have been aware of the franchisee's misconduct. The court held, however, that mere knowledge of another's actions does not give rise to any agency relationship and therefore, the court granted the franchisor's motion for judgment on the pleadings, holding that it was neither a principal of the franchisee nor vicariously liable for the franchisee's conduct.

***Depianti v. Jan-Pro Franchising Int'l, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,360, No. 08-10663-MLW, 2014 WL 4145411 (D. Mass. Aug. 22, 2014)**

The District Court of Massachusetts allowed summary judgment on a number of counts against defendant master franchisor (Jan-Pro) due to the lack of control exercised over its franchisee and sub-franchisee in a two-tiered system.

Seven franchisee plaintiffs alleged unfair and deceptive business practices, misclassification as independent contractors, related wage-law violations, misrepresentation, quantum meruit and unjust enrichment against Jan-Pro. Jan-Pro sold the right to use its name to regional master franchisees such as plaintiffs, which acquired exclusive rights to sell unit franchises in their respective territories. Jan-Pro exercised a high degree of control over the business.

Regarding the franchisees' classification as a contractor or employee, the court found it was obligated to adopt a previous order in the Georgia Court of Appeal finding that the franchisees were contractors rather than employees. In addition, the court found that the Georgia order was in accordance with Massachusetts law on the basis that the franchisees were free from Jan-Pro's control and discretion, owing both to the master franchisee structure and the low degree of control Jan-Pro exercised over the business.

Regarding the claim for misrepresentation, the court found that Jan-Pro was not vicariously liable for the alleged wrongdoing of the regional master franchisee because no reasonable trier of fact could find Jan-Pro controlled, or had the right to control, the relevant instrumentality of the regional master franchisee's business. However, the court found the record contained sufficient evidence to permit a reasonable trier of fact to conclude Jan-Pro controlled the policies and procedures relevant to allegations of unfair business practices.

The court granted Jan-Pro's motion to dismiss the franchisees' quantum meruit claim on the basis that the franchisees were compensated by the master franchisee rather than by Jan-Pro and therefore did not have any reasonable expectation to be compensated by Jan-Pro for their services. The court left determination of unjust enrichment for a later date.

***Lemmons v. Ace Hardware Corp.*, Bus. Franchise Guide (CCH) ¶ 15,317, No. 12-cv-03936-JST, 2014 WL 3107842 (N.D. Cal. July 3, 2014)**
This case is discussed under the topic heading "Americans With Disabilities Act."

***Orozco v. Plackis*, Bus. Franchise Guide (CCH) ¶ 15,316, 757 F.3d 445 (5th Cir. 2014)**
This case is discussed under the topic heading "Labor and Employment."

***Patterson v. Domino's Pizza, LLC*, Bus. Franchise Guide (CCH) ¶ 15,357, 333 P.3d 723 (Cal. 2014)**
The Supreme Court of California rejected a claim for vicarious liability by Domino's Pizza, LLC following harassment in the workplace at one of its franchises on the basis that Domino's did not exercise the requisite control over the franchisee with regard to employment and disciplinary matters.

Plaintiff Patterson, an employee of the franchisee, sued both the franchisee and Domino's following sexual harassment committed by another employee. Patterson claimed that because Domino's was the "employer" of persons working for the franchisee, and because the franchisee was the "agent" of Domino's, as franchisor Domino's could be held vicariously liable.

The court rejected Patterson's submission that the degree of control exercised by franchisors like Domino's made each franchisee the agent of the franchisor for all business purposes and rendered each employee of the franchisee an employee of the franchisor. It stated that the "means and manner" test generally used could not stand for the proposition that an operating system alone constituted the necessary control.

The court noted that Domino's prescribed standards involving pizza making, delivery, general store operations and brand image, but that the franchisee made day-to-day decisions involving the hiring, supervising, and disciplining of employees. The franchisee suspended the harassing employee, and all relevant training on sexual harassment was by the franchisee.

The court accordingly held that training employees on workplace conduct, monitoring and reporting of sexual harassment and disciplinary measures in the case at hand were undertaken by the franchisee, and Domino's lacked the general control of an employer or principal over the relevant day-to-day aspects of the business.