Franchising (& Distribution) Currents

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ANTITRUST

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***Mathew Enter., Inc. v. Chrysler Grp. LLC*, Bus. Franchise Guide (CCH) ¶ 15,643, No. 13-cv-04236-BLF, 2015 WL 7779912 (N.D. Cal. Oct. 27, 2015)**

An automobile dealer's price discrimination claims against Chrysler Group LLC were dismissed for a third time, but with prejudice.

Plaintiff Mathew Enterprise, Inc., a long-time franchise dealership of Chrysler in San Jose, California, filed suit after Chrysler established a second dealership, San Leandro Chrysler Jeep Dodge and Ram, in the same geographic area. Although San Leandro was owned by another entity, Ytransport, LLC, it was located on land owned by Chrysler. The San Leandro agreement contained terms for the sale of vehicles by Chrysler to San Leandro and lease provisions, including rental incentives. According to the plaintiff, the rental incentive payments, which Chrysler made to San Leandro but not to the plaintiff, constituted disguised price reductions in violation of Section 2(a) of the Robinson-Patman Act (RPA). In other words, the "dominant nature" of the payments was to reduce the price San Leandro paid Chrysler for vehicles, not rent.

The court dismissed the plaintiff's price discrimination claim in July 2014 and again with prejudice in January 2015. In dismissing with prejudice, the court was persuaded by Chrysler's representation that, due to the high cost of establishing new dealers and the risks involved, Chrysler needed to condition certain incentives for dealers operating on land leased by Chrysler Realty to ensure that the realty was only being offered to viable

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dealers. The court also considered the terms of the San Leandro agreement, which showed that "the sales-based incentives were not provided on a per-vehicle basis." Based on the defendant's representation, the court therefore found that the dominant nature of the payments related to the lease, not the vehicles. Because the RPA cannot apply to a leasehold, the court dismissed the plaintiff's § 2(a) claim with prejudice. However, the court modified its dismissal to be without prejudice after the plaintiff discovered in a related state action that, contrary to Chrysler's representation to the court, the defendant provided payments to a dealership in Valencia, California, that did not lease Chrysler-owned realty. Accordingly, the plaintiff filed its second amended complaint on June 12, 2015, adding new allegations related to the Valencia dealership, bookkeeping practices suggesting that neither Chrysler nor San Leandro considered the payments to San Leandro rent-related, and the lack of restrictions by Chrysler on how San Leandro could use the payments. Chrysler once more moved to dismiss the § 2(a) claim.

Section 2(a) of the RPA makes it "unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality." The RPA covers only transactions involving commodities: sales of goods, wares, or merchandise, not rent. Where a party alleges a transaction that involves both commodities and a service, courts in the Ninth Circuit employ a "dominant nature" test to determine if the transaction is for a sale of services or goods. Given the plaintiff's new allegations, the plaintiff was required only to allege facts that made it plausible that the "dominant purpose" of the alleged agreement was to discount vehicles (a good) rather than rent (a service). Although the court previously found the plaintiff's characterization of the payments implausible, it did so based on Chrysler's representation that the payments were provided only to dealerships located on land leased from Chrysler Realty and the plain language of the agreement. However, the Valencia allegations now cast doubt upon Chrysler's new explanation that the payments related to rent, whether or not the dealership was located on land owned by Chrysler Realty, and also conflicted with the plain language of the San Leandro agreement. As a result, the court found that further development of the factual record would be necessary to determine the dominant nature of the payments and dismissal based on the dominant nature of the payments was inappropriate. Nonetheless, the court granted dismissal with prejudice based on the contemporaneous customer requirement of § 2(a). Under that requirement, the plaintiff had to allege that it and San Leandro were contemporaneous customers of Chrysler but failed to do so. Instead of alleging that the two dealerships commenced business at the same time in order to meet § 2(a)'s requirement, the plaintiff alleged only that the two dealerships were in business at reasonably contemporaneous times. Because that was insufficient as a matter of law, the court dismissed the plaintiff's price discrimination claim with prejudice.

***MM Steel, L.P. v. JSW Steel (USA) Inc.*, Bus. Franchise Guide (CCH) ¶ 15,653, No. 14-20267, 2015 WL 9261785 (5th Cir. Nov. 25, 2015)**
In 2011, steel distributor MM Steel, L.P. was formed and its founders began contacting steel manufacturers in an attempt to serve the Gulf Coast region. In 2011, MM signed a supply agreement with manufacturer JSW Steel (USA), Inc. The founders of MM were former salesmen for steel manufacturers American Alloy (AmAlloy) and Chapel. Representatives of AmAlloy and Chapel allegedly were not pleased that the founders were now competing against them and were determined to threaten steel manufacturers that if they did business with MM, AmAlloy and Chapel would no longer do business with them. The manufacturers contacted by AmAlloy and Chapel included Nucor Corporation and JSW. In April 2012, MM filed a lawsuit against, among others, AmAlloy, Chapel, Nucor, and JSW, alleging violation of § 1 of the Sherman Act as to all defendants and breach of contract as to JSW.

In a six-week jury trial, the jury heard evidence suggesting that the defendants entered into a "horizontal group boycott" in violation of the Sherman Act by seeking to drive MM out of business through cutting off its access to steel manufacturers. The jury found in favor of MM on both the Sherman Act claim and the breach of contract claim. Nucor and JSW appealed to the Fifth Circuit. On appeal, the court analyzed whether there was substantial evidence supporting the jury's finding. To establish a claim under the Sherman Act, the evidence was required to show not only a conspiracy to boycott MM, but that the particular defendant knowingly joined the conspiracy. An independent refusal to deal with a particular party is not sufficient.

The court first analyzed Nucor's assertion that it did not knowingly join the conspiracy, but rather refused to deal with MM as part of its "incumbency practice" to do business only with long-standing distributors. The court held that MM had failed to put on evidence supporting its argument that when Nucor first refused to do business with MM, Nucor was aware of an agreement among distributors to keep MM out of the market. Moreover, the court held that Nucor's conduct was otherwise as consistent with permissible competition as it was with illegal conspiracy, and therefore the conduct did not support an inference of anti-competitive behavior. The court therefore reversed the judgment as to Nucor.

The court then turned to JSW. The court applied the "rule of reason" to determine whether the evidence supported a finding that there was an unreasonable restraint on trade. If the evidence showed a group boycott, that would lead to a per se finding of an unreasonable restraint. The court also noted that the group boycott at issue was horizontal because it was among distributors that normally competed against each other. Vertical agreements to refuse to deal with parties (i.e., between manufacturers and customers) are not per se unreasonable. The court concluded that MM had provided sufficient evidence to support the judgment that JSW violated the Sherman Act and also breached its contract with MM.

***Rochester Drug Co-Operative, Inc. v. Biogen Idec U.S. Corp.*, Bus. Franchise Guide (CCH) ¶ 15,626, No. 6:15-cv-6388 EAW, 2015 WL 6036301 (W.D.N.Y. Sept. 18, 2015)**

Rochester Drug Co-Operative, Inc. and Biogen Idec U.S. Corp. were parties to a distribution agreement under which Rochester distributed pharmaceuticals manufactured by Biogen, including a drug for the treatment of multiple sclerosis called Avonex. Rochester distributed Avonex in four states pursuant to the distribution agreement for more than six years. In contrast to regional distributors such as Rochester, the pharmaceutical market is dominated by three national drug wholesalers known in the industry as the Big Three. In March 2015, Biogen informed Rochester that it was terminating the distribution agreement and that, going forward, Biogen would make Avonex available for purchase only from the Big Three.

Rochester thereafter filed suit against Biogen in the U.S. District Court for the Western District of New York, alleging that Biogen's termination of the distribution agreement violated the New York antitrust statute (the Donnelly Act), seeking injunctive relief, and also alleging breach of contract and breach of the covenant of good faith and fair dealing. Biogen moved to dismiss the suit under Federal Rule of Civil Procedure 12(b) for failure to state a claim. The court analyzed whether Rochester had pled facts sufficient to state a claim under the Donnelly Act. The court determined that stating such a claim would require a showing of a "contract, arrangement, or combination" between Biogen and the Big Three to restrain trade or commerce. Put another way, Rochester was required to show that there was a "reciprocal relationship or commitment" between Biogen and the Big Three. The court held that Rochester had failed to plead facts sufficient to state such a claim. The court noted that a "unilateral exertion of power" as expressed in Biogen terminating the distribution agreement was not a violation of the Donnelly Act. The court further noted that, although the Big Three were tangentially involved in that Biogen was choosing to do business with them going forward, there were no facts pled supporting an actual agreement or understanding. The court also refused to consider hypothetical schemes put forth by Rochester suggesting that such an agreement "must have" been in place because no facts supported the hypotheticals. The court therefore dismissed the suit for Rochester's failure to state a claim under either the Donnelly Act or its other claims.

***Two Bros. Distrib. Inc. v. Valero Mktg. & Supply Co., LLC*, Bus. Franchise Guide (CCH) ¶ 15,651, No. CV-15-01509-PHX-DGC, 2015 WL 9261784 (D. Ariz. Nov. 25, 2015)**

This case is discussed under the topic heading "Statute of Limitations."

ARBITRATION

Bldg. Werks Holdings, LLC, v. Paul Davis Restoration Inc., Bus. Franchise Guide (CCH) ¶ 15,609, Appeal No. 14AP1849, 2015 WL 6036182 (Wis. Ct. App. Sept. 29, 2015)

The Wisconsin Court of Appeals declined to overturn a lower court judgment compelling arbitration following termination of three franchises. The plaintiffs' owner, Matthew Everett, had been owner of three franchises (Building Werks). Following termination of one franchise by franchisor Paul Davis, Everett transferred ownership of the terminated franchise to his wife, who continued operating it outside the Paul Davis banner. Paul Davis then terminated the other two franchises on the basis of Everett's continued involvement in the previously terminated and now-competing franchise.

Building Werks brought claims in respect of all three franchises, alleging violations of Wisconsin's Fair Dealership Law, intentional misrepresentation and fraud, and violations of the Wisconsin Franchise Investment Law. Paul Davis sought to enforce arbitration provisions in each of the franchise agreements, and the court granted its motion compelling arbitration.

On appeal, Building Werks sought to challenge the enforceability of the arbitration clauses, arguing the arbitration system (in which the panel was composed of fellow franchisees) was biased in favor of Paul Davis, that the arbitration provisions were inoperative because the franchise agreements were invalid because they were induced by fraud, and that the arbitration provisions were unconscionable.

The court held that it was not in a position to rule on the composition of the panel prior to the arbitration hearing and that Building Werks could seek relief following the arbitration if it still felt the award must be vacated under law. Regarding Building Werks' arguments that the contract was invalid, the court found that, unless the challenge was to the arbitration clause itself, the issue of the contract's validity should be considered by the arbitrator. Because Building Werks had challenged the validity of the contract as a whole, it would be appropriate for the issue to be considered by the arbitrator as opposed to the court.

Regarding Building Werks' unconscionability claim, the court rejected its arguments as speculative because they were based on predictions about the composition, conduct, and decision of the arbitration panel. The court found Building Werks had not established procedural unconscionability because Everett was an experienced businessperson, and in any case, disparity in bargaining power alone would generally be insufficient to make out procedural unconscionability. The court also held Building Werks had not established substantive unconscionability, which turns on the terms of the contract rather than their implementation, because Building Werks had not argued the arbitration provisions on their face were commercially unreasonable.

The court concluded by rejecting Building Werks' request to reverse the circuit court's ruling so that it could have additional opportunities for discovery to demonstrate the alleged unfairness inherent in the Paul Davis arbitration system. Again, the court held that Building Werks' arguments were too speculative and that, because arbitration had not yet begun, the desired discovery would, at best, indicate a risk that Building Werks would be treated unfairly.

***LeafGuard of Kentuckiana, Inc., v. LeafGuard of Kentucky, LLC*, Bus. Franchise Guide (CCH) ¶ 15,638, No. 5: 15-237-DCR, 2015 WL 7779904 (E.D. Ky. Oct. 9, 2015)**

The U.S. District Court for the Eastern District of Kentucky allowed a franchisor's motion to compel arbitration, rejecting arguments from the franchisee that the arbitration provision was unconscionable. The plaintiff, franchisee LeafGuard of Kentuckiana, Inc. (LeafGuard K), was entitled to manufacture, sell, and install defendant's LeafGuard of Kentucky, LLC (LeafGuard) gutter system pursuant to a distributor agreement. Following poor sales by the franchisee, the parties entered into a purchase agreement pursuant to which the franchisor was to buy the franchisee's territory and assets. The defendant franchisor subsequently decided it did not want to go forward with the transaction and, when the plaintiff refused to return an escrow deposit held by its attorney, terminated the distributor agreement on the basis of the franchisee's failure to meet its annual sales targets and pay royalties. The franchisee sued for breach of contract and sought injunctive relief enforcing the terms of the two agreements. The franchisor moved to compel arbitration, pursuant to an arbitration provision in the distributor agreement.

The plaintiff sought to rely on Kentucky law; the defendant argued the distributor agreement stipulated that New Jersey law would apply to questions regarding contract formation. Based on New Jersey having a substantial relationship to the parties, where the defendant was headquartered and incorporated, and after deciding the results of proceeding in either New Jersey or Kentucky would be the same, the court chose to apply New Jersey law.

Noting that Section 4 of the Federal Arbitration Act requires courts, not arbitrators, to address any challenge to the arbitration clause itself, the court found the plaintiff had been careful to attribute unconscionability to the arbitration clause itself, rather than to the whole agreement. Because the plaintiff had opposed enforcement of only the arbitration clause and not the contract as a whole, the court undertook to apply state law to determine whether the arbitration agreement was valid and binding.

The plaintiff contended that the arbitration provision was unconscionable because the agreement was obtained through economic duress under the threat that the defendant would revoke its license and distributor rights. The plaintiff also asserted that the distributor agreement was substantively unconscionable because it required the plaintiff to forfeit its right to seek punitive damages, exemplary damages, and injunctive relief.

The court held that in order to prove unconscionability, the plaintiff needed to show some obligation imposed as a result of a bargaining disparity between the parties or such patent unfairness that no person not acting under duress would accept the terms of the contract. It noted that the plaintiff was a sophisticated businessman and had failed to submit any evidence that any personal characteristics prohibited or impaired his ability to make wise business decisions. The arbitration clause was not hidden in the contract, nor was it difficult to understand. The court held that the enticement of continuing to operate a distributorship did not constitute economic duress.

The court also held that substantive unconscionability existed only where the exchange of obligations was so one-sided that it would shock the court's conscience. It found that waiver of punitive and exemplary damages was neither one-sided nor shocking to the conscience and disagreed that the distributor agreement would bar the plaintiff from seeking injunctive relief.

***Meadows v. Dickey's Barbecue Rests. Inc.*, Bus. Franchise Guide (CCH) ¶ 15,665, No. 15-cv-02139-JST, 2015 WL 9261797 (N.D. Cal. Nov. 12, 2015)**

Claims brought by various Dickey's Barbecue Restaurants, Inc. franchisees against the franchisor alleging fraud and violations of California's Franchise Investment Law (CFIL) and Unfair Competition Law (UCL) were required to be arbitrated, held the U.S. District Court for the Northern District of California.

The plaintiffs, all California residents, sought to represent a class of current and former owners of Dickey's Barbeque Pit franchises in California. They all purchased a Dickey's franchise after receiving Dickey's franchise disclosure document (FDD) and signing a franchise agreement. The franchise agreements, which were approximately sixty pages long and printed in small type, contained: (1) a dispute resolution provision; (2) terms permitting Dickey's, but not its franchisees, to bring certain claims in court without participating in mediation or arbitration; (3) a Texas choice-of-law provision; and (4) a venue clause. The dispute resolution provisions, however, were different in the franchise agreements signed by the plaintiffs. For one set of plaintiffs (the Toff plaintiffs), the provision required that disputes first be resolved through non-binding mediation in Collin County, Texas, and, if mediation failed, through binding arbitration at the American Arbitration Association (AAA) office nearest to Dickey's corporate headquarters in Plano, Texas. The provision defined "disputes" as "all disputes, controversies, claims, causes of actions and/or alleged breaches or failures to perform arising out of or relating to this Agreement (and attachments) or the relationship created by this Agreement." For the other set of plaintiffs (the Meadows plaintiffs), however, the provision defined "disputes" to include all disputes "arising from, or with respect to (1) any provision of this Agreement or any other agreement related to this Agreement between the parties; (2) the relationship of the parties; and (3) the validity of this Agreement or any other agreement between the parties, or any provisions thereof." Like the Toff plaintiffs' provision, the Meadows plaintiffs' provision also required non-binding mediation first, but in Dallas. Both provisions provided that the proceedings "shall be conducted in accordance with the then current commercial arbitration rules."

In their suit, the plaintiffs alleged that the FDDs contained several misrepresentations and that Dickey's employees made additional misrepresentations outside of the FDDs. They also sought a declaration that the dispute resolution provision requiring that all disputes be resolved through arbitration was unenforceable. In response, Dickey's filed a motion to compel arbitration of all of the plaintiffs' claims, stay the litigation pending completion of the arbitrations, and strike the plaintiffs' class allegations. The plaintiffs argued that the arbitration provision was unconscionable as a whole. Dickey replied that the court lacked jurisdiction to consider the plaintiffs' unconscionability argument because the plaintiffs were required to arbitrate whether the arbitration provision itself was enforceable.

The court first addressed whether the court or an arbitrator should decide the question of arbitrability. It noted that arbitrability "is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." The court then applied federal arbitrability law because the franchise agreements' choice-of-law provision did not expressly state that Texas law governed the question of arbitrability. As to the Meadows plaintiffs, the court agreed with Dickey's that because the arbitration provision required that disputes regarding the validity of any provision in the agreement must be sent to arbitration, there was "clear and unmistakable language indicating that the threshold issue of arbitrability is delegated to an arbitrator." The only question, then, for the court to consider was whether the delegation clause was itself unconscionable as to not be enforced under the Federal Arbitration Act (FAA). The court held that because the Meadows plaintiffs challenged the entire arbitration provision, not the specific delegation clause, as unconscionable, the unconscionability challenge was for the arbitrator to decide.

The conclusion was different, however, for the Toff plaintiffs. Their arbitration provision did not contain the same language delegating decisions about the validity of the franchise agreement or any of its provisions. Although the language that disputes "arising out of or relating" to the franchise agreement was so broad that it could theoretically encompass the threshold issue of arbitrability, the court found that such language did not "rise to the level of clear and unmistakable evidence of delegation required to defeat the presumption that the court, not the arbitrator, will decide the issue of arbitrability." Nor did incorporation of the AAA rules in the arbitration provisions supply such clear and unmistakable evidence. Although Rule 7(a) of the AAA Commercial Rules delegates all jurisdictional questions, including arbitrability, to the arbitrator, under Ninth Circuit law, incorporating the AAA rules into an agreement can evince a "clear and unmistakable" intent to delegate only when all the parties to the arbitration agreement are sophisticated. Here, the plaintiffs were "far less sophisticated than Dickey's[];" therefore, as to the Toff plaintiffs, it was up to the court to decide the question of arbitrability.

Next, the court analyzed the Toff plaintiffs' defense that the arbitration provision was unenforceable. It first decided whether to enforce the Texas choice of law chosen by the parties based on California's conflict of law rules. Under California's choice of law framework, which followed the Second Restatement of Conflict of Laws, the court had to determine whether (1) Texas had a substantial relationship to the parties or their transaction, or (2) there was any other reasonable basis for the parties' choice of law. If neither test was met, the court need not enforce the parties' choice of law. But if either test was met, the court had to then determine whether Texas law was contrary to a fundamental policy of California. Applying this framework, the court enforced the parties' Texas choice of law. In so doing, it discarded the plaintiffs' argument that there was no meeting of the minds because the FDD they received before signing their franchise agreements stated that the choice of law clause "may not be enforceable." Although the FDD contained that statement, it also included other statements making clear that Dickey's would insist on the application of Texas law, including a statement on the cover page of the FDD in all caps and bold lettering that "[t]he Franchise Agreement states that Texas law governs the Franchise Agreement, and this law may not provide the same protections and benefits as your local law. You may want to compare these laws." Moreover, there was a substantial relationship between Texas and the parties because Dickey's headquarters were in Plano, and payments under the franchise agreements were due to Dickey's in Texas. Finally, the court determined that applying Texas unconscionability law was not contrary to a fundamental public policy of California. The court was not convinced by the plaintiffs' argument that the arbitration provision violated the CFIL because it limited punitive damages, which the CFIL expressly allowed. According to the court, Dickey's arbitration provision did not "contract around that policy" because, although it did state that punitive damages were waived, such waiver was only "to the fullest extent permitted by law." In addition, another section of the franchise agreement specified that when a state's controlling law is inconsistent with the franchise agreement, state law governed. In sum, because the arbitration provision did not eliminate the ability to recover punitive damages under CFIL, the Toff plaintiffs failed to identify an actual conflict with California policy and Texas law applied.

Last, applying Texas law, the court held that the arbitration provision in the Toff plaintiffs' franchise agreements was neither procedurally nor substantively unconscionable. As to procedural unconscionability, although there was a disparity in bargaining power between plaintiffs and Dickey's and Dickey's did offer the contracts on a take-it-or-leave-it basis, an "imbalance in the relative sophistication of the parties" was not sufficient to render the agreement to arbitrate unconscionable under Texas law. Nor did the argument that the arbitration provision was buried near the back of a sixty-page agreement save the plaintiffs because the provision was not hidden and plaintiffs were presumed to have read the contracts they signed. The arbitration provision also was not substantively unconscionable because it did not waive the plaintiffs' ability to obtain punitive damages under CFIL. In sum, the Toff plaintiffs' arbitration provision was enforceable and their claims were subject to arbitration.

Based on the foregoing, the court granted Dickey's motion to compel arbitration and stay the litigation. As to the Meadows plaintiffs, the court stayed the litigation to permit arbitration of the "gateway" issues and then, if permissible, to arbitrate the substantive claims. The Toff plaintiffs, however, were to arbitrate their substantive claims.

BANKRUPTCY

Colonial Chevrolet Co. v. United States, Bus. Franchise Guide (CCH) ¶ 15,613, Nos. 10-647C, 11-100C, 12-900C, 2015 WL 6036279 (Ct. Cl. Sept. 9, 2015)

In 2009, General Motors and Chrysler were able to avoid liquidating in their bankruptcy cases due in large part to $38 billion in financing provided by the federal government as part of the Automotive Industry Financing Program (AIFP). The funding was conditioned on GM and Chrysler agreeing to cancel a large number of their franchise agreements, resulting in more than 2,000 dealership closures. Several GM and Chrysler former franchisees filed suit against the federal government in the U.S. Court of Federal Claims, arguing that the forced cancellation of their franchise agreements constituted a taking without just compensation in violation of the Fifth Amendment.

The court initially denied the government's motion to dismiss the plaintiffs' claims. The government filed an interlocutory appeal to the Federal Circuit, which held that the plaintiffs had, in fact, alleged a valid property interest in the franchise agreement and that therefore the case should go forward. However, upon remanding, the Federal Circuit made clear that the plaintiffs were required to amend their complaint to provide specific evidence that they suffered economic loss. The standard for such a showing was that the "franchise agreements would have retained value in a scenario known as the 'but-for world' in which the government did not enter into an agreement with the manufacturers to provide financing, conditioned upon close dealerships, to save the company."

The government took the position that the plaintiffs' franchise agreements would have zero value in the but-for world because the manufacturers would have failed. The plaintiffs challenged this standard, arguing that the correct but-for world would be one where the government provided the AIFP financing, but did not condition the financing on closing dealerships. The court held that based on a prior decision by the U.S. Federal Circuit in *A&D Auto Sales v. United States*, 784 F.3d 1142 (Fed. Cir. 2014), the plaintiffs' but-for world was not the proper standard. Rather, the plaintiffs had to accept the fact that the AIFP funds were contingent on closing dealerships. The plaintiffs could, however, assume that smaller December 2008 bridge financing in the amounts of $17.4 billion would have been made because that bridge financing was not conditioned on closing dealerships. The court ultimately concluded that the plaintiffs would be permitted to put on evidence that their franchise agreements would have retained value under certain scenarios, and therefore the government's motion to dismiss would be denied. Those scenarios were: (1) Chrysler survived without government assistance (GM's survival without government assistance was deemed too speculative); (2) Chrysler merged with either Fiat or Daimler (again, a GM merger was deemed too speculative); and (3) the dealerships would have retained some value in an orderly wind down and liquidation of either Chrysler or GM.

BUSINESS OPPORTUNITY LAWS

Armstrong v. Curves Int'l, Inc., Bus. Franchise Guide (CCH) ¶ 15,634, Case No. 4:15cv1006 TCM, 2015 WL 7779902 (E.D. Mo. Oct. 15, 2015)

Thirty-three groups of franchisees consisting of over one hundred individuals filed suit against Curves International, Inc. in state court on June 1, 2015. The matter was thereafter removed to the U.S. District Court for the Eastern District of Missouri. The plaintiffs' claims included breach of contract, violation of the Texas Business Opportunity Act (TBOA), and violation of the Texas Deceptive Trade Practices Act (DTPA). The allegations underlying the plaintiffs' claims broke down into three separate groups. First, certain plaintiffs (Group A) alleged that Curves knowingly made misrepresentations relevant to the financial prospects of a franchise in the course of inducing the franchisees into purchasing or renewing a franchise. Second, certain plaintiffs (Group B) alleged that Curves made unanticipated demands upon the franchisees regarding additional required payments. Third, certain plaintiffs (Group C) alleged that Curves imposed unanticipated obligations upon franchisees. Curves filed a motion seeking to dismiss the suit because the claims were filed after the applicable four-year statute of limitations. Curves also sought to enforce a forum selection clause requiring such an action to be brought in the U.S. District Court for the Western District of Texas.

The court first addressed the statute of limitations arguments. It held that the franchise agreements were not installment contracts and therefore the statute of limitations began to run upon the opening of a particular franchise as to Group A. As to Group B, the statute of limitations began to run on the particular dates that the alleged misrepresentations were made. The court did not rule with respect to Group C because no time frame relating to the alleged breaches was provided.

The court also addressed Curves's assertions that neither the TBOA nor the DTPA applied in the case. Curves argued that the statutes were designed to protect consumers rather than people who are renewing ongoing, long-time contractual relationships. The court found the argument unavailing and noted that Curves had the burden to show that the statutes did not apply (rather than the plaintiffs being required to show they do apply). The court therefore refused to dismiss on those grounds.

The court lastly addressed the forum selection clause in light of the Supreme Court's decision in *Atlantic Marine Construction Co. v. U.S. District Court for the Western District of Texas*, 134 S. Ct. 568 (2013). The court noted that a forum selection clause would not be enforceable if it was the product of fraud or conversion. Because the plaintiffs had made only general allegations of fraud and had not shown any extraordinary circumstances, the court held that the clause would be enforced. The court therefore dismissed certain claims on statute of limitations grounds and transferred the remaining matters to the U.S. District Court for the Western District of Texas.

CHOICE OF FORUM

Ajax Holdings, LLC v. Cleaners Franchise Grp., LLC, Bus. Franchise Guide (CCH) ¶ 15,639, No. 4:15CV00494 SWW, 2015 WL 7779911 (E.D. Ark. Oct. 9, 2015)

Ajax Holdings, LLC was a franchisee of Comet Cleaners Franchise Group, LLC. Ajax alleged that soon after taking over certain dry cleaning stores, it learned that the stores had serious problems, including allegedly being much less profitable than Comet Cleaners represented. Ajax filed suit in Arkansas state court alleging that Comet Cleaners violated the Arkansas Franchise Practices Act (AFPA) by its alleged misrepresentations, fraudulent acts, and intentional omissions. Comet Cleaners moved to dismiss the case on the grounds that Ajax failed to attach copies of applicable written agreements in violation of Arkansas procedural rules. Comet Cleaners also filed a motion removing the case to the U.S. District Court for the Eastern District of Arkansas based on diversity jurisdiction and a motion to transfer venue to the Northern District of Texas based on a forum selection clause. Ajax sought remand, arguing that Comet Cleaners had waived its right to remove based on taking substantial action in the state court through the filing of the motion to dismiss. Ajax also argued that the state court should address the state issues in the case.

The court held that Comet Cleaners's motion to dismiss was based on a procedural issue and did not rise to the level of participation that would lead to waiving a removal right. The court also held that in cases based on diversity jurisdiction, arguing that state law matters are not an appropriate basis for remand. As to the motion to transfer venue, the court quoted at length the Supreme Court case *Atlantic Marine Construction Co. v. U.S. District*

Court for the Western District of Texas, 134 S. Ct. 568 (2013), for the proposition that forum selection clauses should generally be enforced. The court held that none of the arguments presented by Ajax rose to the level of "the unusual case where the forum-selection clause should not control." The court therefore denied Ajax's motion to remand and transferred the case to the Northern District of Texas.

***B-Jays USA, Inc. v. Red Wing Shoe Co.*, Bus. Franchise Guide (CCH) ¶ 15,641, Civil Action No. 2:15-cv-02182-SDW-SCM, 2015 WL 7779910 (D.N.J. Oct. 6, 2015)**

Red Wing Shoe Company, Inc. is a manufacturer of footwear and holds trademarks associated with products that it licenses to manufacturers and distributors. B-Jays USA, Inc. was party to a contract with Red Wing, which included a trademark license, that authorized B-Jays to manufacture, market, and sell Red Wing's shoes. The contract also included a forum selection clause providing that the parties would submit to the exclusive and personal jurisdiction of the state and federal courts in Ramsey County, Minnesota, for the resolution of any dispute.

In March 2015, B-Jays filed suit against Red Wing in the U.S. District Court for the District of New Jersey, alleging various claims including breach of contract, breach of the implied covenant of good faith and fair dealing, and a violation of the New Jersey Franchise Practices Act (NJFPA). Red Wing sought to transfer venue to Minnesota. Red Wing acknowledged that forum selection clauses are void against public policy under the NJFPA, but argued that the NJFPA did not apply in this case and that the elements for transferring venue otherwise weighed in favor of Red Wing.

The court first analyzed whether the NJFPA applied. NJFPA applies to a franchise:

> (1) the performance of which contemplates or requires the franchisee to establish or maintain a place of business within the state of New Jersey; (2) where gross sales of products or services between the franchisor and the franchisee covered by such franchise shall have exceeded $35,000 for the 12 months preceding the institution of suit pursuant to this act; and (3) where more than 20 percent of the franchisee's gross sales are intended to be or are derived from such franchise.

The court concluded that the NJFPA did not apply because, although B-Jays showed it had annual gross revenue well in excess of $35,000, nothing in the record indicated that there were sales in excess of that amount between B-Jays and Red Wing. The court therefore concluded that the NJFPA prohibition on forum selection clauses did not apply. Nevertheless, the court went on to hold that the matter should be transferred to Minnesota because public interest factors weighed in favor of transfer, including that if B-Jays prevailed it would be easier to obtain a judgment over Red Wing and that the courts in Minnesota could accurately and completely apply Minnesota state law.

***Chadwick-BaRoss, Inc. v. Ecoverse Indus., Ltd.*, Bus. Franchise Guide (CCH) ¶ 15,619, No. 2:15-cv-136-NT, 2015 WL 6036289 (D. Me. Oct. 1, 2015)**

The U.S. District Court for the District of Maine transferred a machinery dealer's Maine dealership law claim to the U.S. District Court for the Northern District of Ohio based on the venue provision of the parties' distributor agreement and dismissed the dealer's contentions that the Maine dealer law's jurisdiction and antiwaiver provisions prohibited such a transfer.

Chadwick-BaRoss, Inc. (C-B), a Maine corporation that sold industrial, construction, commercial, forestry, and business equipment and machinery, entered into a distribution agreement with Doppstadt US LLC to purchase certain Doppstadt products for resale to its customers. Doppstadt later merged with Ecoverse Industries, Ltd., an Ohio limited liability company, resulting in Ecoverse succeeding to all of Doppstadt's rights and liabilities, including the distributor agreement. C-B sued Ecoverse in Cumberland County Superior Court, alleging violations of the Maine's Farm Machinery, Forestry Equipment, Construction Equipment and Industrial Equipment Dealerships Act (Maine Dealerships Act). Ecoverse removed to the U.S. District Court for the District of Maine and then moved to transfer venue to the U.S. District Court for the Northern District of Ohio. C-B opposed.

To decide the venue question, the court analyzed the applicability of the forum selection clause in the distributor agreement and the effect of the Maine Dealerships Act on that clause. Under the applicable law and venue provision of the distributor agreement, venue was in Ohio, but the court stated,

> [i]n the event that a law of the State in which the Distributor has its place of business or in a State of the Territory where Distributor is conducting business [Maine] is deemed to apply and said law conflicts with any provision of this Agreement, this Agreement shall be construed and enforced to be consistent with any such conflicting law, including its venue provisions.

C-B argued that the Maine Dealerships Act conflicted with the venue provision of the distributor agreement because the Act's jurisdiction provision conferred jurisdiction upon the Maine courts. Ecoverse countered that conferring jurisdiction is different than predetermining venue. The court agreed, finding that the Act simply vested jurisdiction in Maine's trial courts but did not explicitly mention or require that all actions under the Act be brought in Maine. Therefore, the parties' selection of an Ohio forum in the distributor agreement did not conflict with the Maine Dealerships Act.

The court then moved on to apply the Supreme Court's analysis in *Atlantic Marine Construction Co. v. U.S. District Court for the Western District of Texas*, 134 S. Ct. 568 (2013), to evaluate whether this was one of the "unusual cases" where the parties' choice of venue should not be honored. Under *Atlantic Marine*, a case falls into this category only if the plaintiff meets that high burden of "show[ing] that public-interest factors overwhelmingly disfavor a transfer." Such factors include "the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; [and] the interest in having the trial of a diversity case in a forum that is at home with the law." C-B argued that the antiwaiver section of the Maine Dealerships Act demonstrated that Maine's public policy was strong enough to defeat the parties' forum selection clause. That section stated that the provisions of the Act are "deemed to be incorporated" into every agreement between a dealer and a supplier, "control all other provisions of the agreement," and cannot be waived or varied. The court was not persuaded, however, because the section did not explain what public interest concerns would be compromised by litigating a suit under the Act in Ohio. Moreover, C-B failed to point to any unusual complications in the Maine Dealership Act that would require analysis by a Maine court and the Act's jurisdiction provision did not establish an overriding interest in having such disputes adjudicated solely in Maine. Finally, the Act did not contain a "dealers' choice" provision, which if combined with an antiwaiver provision could demonstrate a public policy strong enough to defeat the forum selection clause. Accordingly, the court granted Ecoverse's motion to transfer venue to the Northern District of Ohio.

***Jenhanco, Inc. v. Hertz Global Holdings, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,616, No. 2:15-cv-04191-ODW (PJW), 2015 WL 6036273 (C.D. Cal. Sept. 16, 2015)**

The U.S. District Court for the Central District of California held that the forum selection clause in a license agreement that required all actions between the parties to be litigated "in the appropriate district court in the city or county of Los Angeles, California" meant that venue was proper in both state and federal courts in Los Angeles. Therefore, the franchisee's motion to remand its action against the franchisor to a Los Angeles state court from the federal district court was denied.

Plaintiff Jenhanco, Inc. entered into a license agreement with Dollar Rent A Car, which through a series of mergers and acquisitions became a wholly owned subsidiary of Hertz. Under the agreement, the plaintiff paid a certain percentage of its gross revenue in exchange for, among other things, first right over any other entity to expand its rental car operation within the plaintiff's operating locality. When the defendants allegedly denied the plaintiff the opportunity to expand its operation for the benefit of the defendants' other non-franchise subsidiaries, the plaintiff sued in Los Angeles Superior Court for breach of contract, fraud, breach of the covenant of good faith and fair dealing, and tortious interference with prospective economic relations. The defendants removed to the U.S. District Court for the Central District of California based on diversity jurisdiction and the plaintiff moved to remand based on the forum selection clause in the license agreement.

In its motion, the plaintiff argued that the action should be remanded to the Los Angeles Superior Court because the language in the forum selection clause calling for litigation "in the appropriate district court in the city or county of Los Angeles, California" meant that litigation had to be in state courts. The defendants disagreed, arguing that the action was properly removed to the Central District of California because (1) the plain meaning of the phrase "appropriate district court" included both state and federal district courts in Los Angeles, and (2) this interpretation was consistent and harmonized with another provision of the agreement. The court agreed with the defendants. Starting its analysis with the plain language of the forum selection clause, the court was guided by case law finding that although the phrase "courts of" a state refers only to state courts, the phrase "courts in" a state (as here) imposed a geographic limitation and included any court within the physical boundaries of that limitation. Therefore, the forum selection clause here provided venue in both the state and federal courts located within the City or County of Los Angeles. This conclusion was further supported by the cardinal principle of contract interpretation that a document should be read to give effect to all of its provisions and render them consistent with each other. Here, another provision of the parties' agreement expressly provided for service of process "in any state or federal court in the State of California," which, read consistently with the forum selection clause, made clear that both provisions included both state and federal courts in Los Angeles. Accordingly, the court denied the plaintiff's motion to remand to state court.

***Noble Roman's, Inc. v. B&MP, LLC*, Bus. Franchise Guide (CCH) ¶ 15,631, No. 1:14-cv-206-WTL-MJD, 2015 WL 7779901 (S.D. Ind. Oct. 22, 2015)**

Franchisor Noble Roman's, Inc. sued its franchisee, B&MP, LLC and its two owners, Bradley and Leslie Perdriau, for breach of contract and deception, alleging they had continued to operate the franchise following B&MP's dissolution. It argued B&MP had violated several terms of the franchise agreement, including failing to pay royalties, misreporting sales to avoid paying royalties, purchasing Noble Roman's ingredients for non-Noble Roman's products, and violating the noncompetition clause. B&MP and one of its owners sought to transfer venue from the U.S. District Court for the Southern District of Indiana to the Northern District of Illinois; the remaining defendant did not object to the transfer.

The Southern District of Indiana allowed the motion to transfer pursuant to 28 U.S.C. § 1404(a), which provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The court found that, regarding the convenience evaluation, the location of the material events weighed in favor of transferring the case because the franchises were located in and the alleged wrongful acts all took place in the Northern District of Illinois.

The interests of justice factors also weighed in favor of granting the motion to transfer. Those factors included: (1) docket congestion and likely speed to trial in each forum, (2) each court's relative familiarity with the relevant law, (3) the respective desirability of resolving controversies in each locale, and (4) each community's relationship to the controversy. The court found that docket congestion weighed in favor of the Northern District of Illinois because the Southern District of Indiana had more docket congestion and was in a judicial emergency. Regarding the courts' familiarity with the relevant law, the court found that factor neutral because the state law applicable in this case was neither unique nor complex. However, the fact that the controversy arose because of activities conducted in Illinois and the strong interest of the Illinois Franchise Disclosure Act of 1987 in protecting its residents who become franchisees meant that the last two factors weighed in favor of transferring venue. Finding that the defendants' delay was not sufficient reason to deny the motion to transfer, the court allowed the case to be transferred to the Northern District of Illinois.

CHOICE OF LAW

***Meadows v. Dickey's Barbecue Rests. Inc.*, Bus. Franchise Guide (CCH) ¶ 15,665, No. 15-cv-02139-JST, 2015 WL 9261797 (N.D. Cal. Nov. 12, 2015)**

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

CONTRACT ISSUES

***Buffalo Wings & Rings, LLC v. M3 Rest. Grp., LLC*, Bus. Franchise Guide (CCH) ¶ 15,625, No. 14AP-980, 2015 WL 6036308 (Ohio Ct. App. Sept. 22, 2015)**

The Ohio Court of Appeals affirmed summary judgment in favor of a Buffalo Wings & Rings franchisee and its guarantors on the franchisor's claims for breach of contract, breach of guaranty, quantum meruit, and money owed on account because the claims were time barred under the franchise agreement's one-year limitation applicable to such claims.

In March 2008, M3 Restaurant Group, LLC entered into a franchise agreement with Buffalo Wings & Rings, LLC for the operation of a restaurant, which M3's owners guaranteed. In March 2011, the defendants sent a letter to Buffalo Wings outlining their disputes with Buffalo Wings and proposed ending the business relationship. When Buffalo Wings did not reply, the defendants sent a second letter in April 2011, stating that they assumed the failure to reply meant that Buffalo Wings did not object to the termination. On November 1, 2012, Buffalo Wings filed suit against the defendants for breach of contract, breach of guaranty, quantum meruit, and money owed on an account.

In January 2014, both parties filed motions for summary judgment, with each arguing that the other party's claims were barred by the one-year limitations period provided in Section 19.9 of the agreement. That section prohibited either party from bringing a claim more than one year after the party discovered the facts relevant to such claim unless the claim fell within one of three exceptions: (1) claims against the franchisee for underreporting of net sales and corresponding underpayment of royalty and advertising fees; (2) claims against the franchisee relating to third party claims brought against Buffalo Wings as a result of the franchisee's operation of the franchised restaurant; and (3) "claims for injunctive relief to enforce the provisions of this Agreement relating to," among other things, the franchisee's use of the franchisor's trademarks, the franchisee's obligations upon termination or expiration of the agreement, or an assignment of the agreement. Although the parties agreed that exceptions (1) and (2) did not apply, they disagreed as to the third exception. On one hand, Buffalo Wings interpreted the third exception to mean that the phrase "claims for" modified the enumerated list and "injunctive relief" pertained only to claims relating to the use of the franchisor's trademarks. On the other hand, the defendants argued that the phrase "claims for injunctive relief to enforce the provisions of this Agreement relating to" modified the four items that followed; in other words, the third exception applied to four different types of claims for injunctive relief. The defendants argued this was the only logical reading of § 19.9(iii); otherwise the second, third, and fourth subparts of § 19.9(iii) would belong in § 19.9(i) or (ii), which are the exceptions that relate to "claims against franchisee." The trial court agreed, finding the provision unambiguous. Because Buffalo Wings was on notice of the facts giving rise to the defendants' claims as of their April 2011 letter, the November 2012 complaint, which did not include any claim for injunctive relief, was therefore time barred by § 19.9.

On appeal, the court agreed with the trial court's reading of § 19.9(iii). It, too, concluded that the language of § 19.9(iii) was unambiguous and that Buffalo Wings' reading "would result in awkward phrasing, at best, and nonsensical phrasing, at worst." To the contrary, the defendants' reading was grammatically correct in structure and meaning and reflected "the most natural reading of the provision." For these reasons, the appellate court affirmed the trial court's judgment against the franchisor and in favor of the franchisee and its guarantors.

***Burger King Europe GmBh v. Groenke*, Bus. Franchise Guide (CCH) ¶ 15,648, Civil Action No. 3:14-CV-1417-G, 2015 WL 9261780 (N.D. Tex. Nov. 5, 2015)**

Plaintiff Burger King Europe GmBh filed suit in the U.S. District Court for the Northern District of Texas against Christian Groenke to recover on a guaranty agreement executed by the defendant. The court concluded that the plaintiff established that the defendant was liable under the guaranty, that the defendant failed to meet his burden of proof on affirmative defenses, and that the plaintiff had established the amount of its damages.

The plaintiff, through an affiliate, franchised Burger King restaurants throughout Europe. The defendant, through a corporate entity, operated approximately eighteen Burger King franchises in and around Berlin. The defendant signed the guaranty that guarantied the performance and obligations, including payment, of the applicable Burger King restaurants. The plaintiff alleged that the franchise agreements were breached, thus entitling the plaintiff to collect damages under the guaranty from the defendant. The plaintiff sought summary judgment on the issues of breach and the amount of damages.

The defendant raised the following affirmative defenses: (1) failure of consideration, (2) the plaintiff made misrepresentations causing its claims to be barred, (3) the plaintiff's claims were barred because of its contributory negligence, (4) the plaintiff's claims were barred pending resolution of a related insolvency proceeding in Germany, (5) setoff, (6) the plaintiff had written off the debt, and (7) frustration of purpose.

The court addressed each of the defenses. As to failure of consideration, the court held that the Burger King restaurants and the related development agreement were sufficient consideration. As to the alleged misrepresentations and contributory negligence, the court characterized the defenses as a form of setoff and held that the setoff bar in the Guaranty was enforceable. As to the German insolvency proceeding, the court relied upon expert testimony provided by the plaintiff stating that the proceeding did not affect the plaintiff's rights against the defendant. As to writing off the debt, the court held that writing off or depreciating a debt in one's internal records does not constitute a waiver of the principal obligation. As to frustration of purpose, the court considered the defendant's testimony that he would not have signed the guaranty if the plaintiff had not allegedly promised him additional restaurants and development agreements in the future. The plaintiff denied making such a promise. The court did not find the defendant's testimony credible and, even if such verbal promises were made, they were not sufficiently definitive to permit a frustration of purpose defense. The court therefore entered judgment in favor of the plaintiff.

***Colonial Chevrolet Co. v. United States*, Bus. Franchise Guide (CCH) ¶ 15,613, Nos. 10-647C, 11-100C, 12-900C, 2015 WL 6036279 (Ct. Cl. Sept. 9, 2015)**

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

***Elite Int'l Enter., Inc. v. Norwall Grp., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,640, Nos. 14-2272/14-2317, 2015 WL 7779909 (6th. Cir. Oct. 8, 2015)**

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

***Jonibach Mgmt. Tr. v. Wartburg Enters., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,621, Civil Action H-10-600, 2015 WL 6036296 (S.D. Tex. Sept. 30, 2015)**
This case is discussed under the topic heading "Oral Agreements."

***Motor Werks Partners, LP v. Gen. Motors LLC*, Bus. Franchise Guide (CCH) ¶ 15,622, No. 14 CV 119, 2015 WL 6036298 (N.D. Ill. Sept. 29, 2015)**
This case is discussed under the topic hearing "Statutory Claims."

***United Safeguard Distribs. Ass'n, Inc. v. Safeguard Bus. Sys., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,662, No. CV 15-3998 RSWL (AJWx), 2015 WL 9261795 (C.D. Cal. Nov. 17, 2015)**
The defendant Safeguard Business Solutions, Inc. (SBS) provided business management solutions to small businesses, including printing, promotional products, business apparel, and web services. SBS was acquired by Deluxe Corporation, also named as a defendant. Greg and Vicki Schob, and Schob, Inc. were distributors for the defendants and parties to the distribution agreement with the defendants.

In May 2015, the Schobs brought various claims against SBS, Deluxe, and other defendants for breaches of the distribution agreement. The claims included a request for declaratory judgment and claims for breach of contract, breach of the covenant of good faith and fair dealing, tortious interference with contractual relations, intentional interference with prospective economic advantage, intentional misrepresentations, negligent misrepresentation, conversion, and accounting. The defendants subsequently brought a motion to dismiss the plaintiffs' amended complaint pursuant to the Federal Rules of Civil Procedure.

The court granted with prejudice the defendants' motion to dismiss the plaintiffs' claim for declaratory judgment, the defendants' motion to dismiss the Schobs' claim for tortious interference with contractual relations and intentional interference with prospective economic advantage, and the defendants' motion to dismiss the Schobs' claim for conversion. It also denied the defendants' supplemental request for judicial notice, the defendants' motion to dismiss for lack of personal jurisdiction regarding certain defendants, and the defendants' motion to dismiss the Schobs' claim for breach of the implied covenant of good faith and fair dealing, breach of contract, intentional misrepresentation, negligent misrepresentation, and accounting.

In accordance with the governing law provision in the distribution agreement, the contractual dispute was decided under Pennsylvania law. In dismissing the majority of the Schobs' breach of contract claims, the court noted that under Pennsylvania law, a party's conduct does not constitute a breach of contract unless there is a violation of an express duty stated within the contract, as stated in the holding in *Gallo v. PHH Mortgage Corp.*, 916 F. Supp. 2d 537 (D.N.J. 2012). Since the Schobs failed to plausibly allege a breach of an express duty for several of their claims, they were unable to plausibly allege a breach of contract claim. The court found that the Schobs failed to point to any language in the distribution agreement to support the argument that practices, such as SBS having arbitrarily increased shipping and handling costs for its own profits, amounted to a breach of the contract.

Although the court rejected the majority of the plaintiffs' breach of contract claims, it allowed the plaintiffs' breach of contract claims premised on alleged breaches of Schobs' "Customer Protection rights."

Regarding good faith and fair dealing, the court found that Pennsylvania law recognizes a claim for breach of the implied covenant of good faith and fair dealing as an independent cause of action separate from a breach of contract claim. However, it clarified that a prerequisite for a breach of the implied covenant of good faith and fair dealing claim is that the plaintiff has also brought a valid breach of contract claim. The court disagreed with the defendants' argument that *McHale v. NuEnergy Group*, No. 01-4111, 2002 WL 321797 (E.D. Pa. Feb. 27, 2002), stood for the proposition that Pennsylvania law does not "recognize a claim for breach of the implied covenant of good faith and fair dealing as an independent cause of action separate from a breach of contract claim, because the actions forming the basis of the contract claim are essentially the same as the actions forming the basis of the bad faith claim." It found that because the Schobs had properly brought a valid breach of contract claim, their claim for a breach of the implied covenant of good faith and fair dealing was properly advanced.

***Two Bros. Distrib. Inc. v. Valero Mktg. & Supply Co., LLC*, Bus. Franchise Guide (CCH) ¶ 15,651, No. CV-15-01509-PHX-DGC, 2015 WL 9261784 (D. Ariz. Nov. 25, 2015)**

This case is discussed under the topic heading "Statute of Limitations."

DAMAGES

***Days Inns Worldwide, Inc. v. JPM, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,615, Civ. No. 13-3017 (KM), 2015 WL 6036277 (D.N.J. Sept. 15, 2015)**

The U.S. District Court for the District of New Jersey denied a motion to amend an order to include liquidated damages. The plaintiff, Days Inns Worldwide Inc. (DIW), had previously been granted default judgment against the defendants, JPM, Inc. and Jayantilal Shah. The prior order awarded DIW damages for unpaid recurring fees, attorney fees, and costs, but denied DIW an award for liquidated damages. DIW brought this motion to amend the order to include liquidated damages.

DIW entered into a license agreement with Shah for the operation of a guest lodge facility. Pursuant to the agreement, Shah was required to make recurring payments to DIW for royalties, service assessments, taxes, interest, reservation system user fees, and other fees. JPM agreed to pay interest on any delinquent payments under the franchise agreement. Moreover, under the agreement, JPM agreed to pay liquidated damages upon termination in accordance with a formula set out therein. The defendants failed to pay the recurring fees. As a result, DIW terminated the franchise agreement.

DIW filed a complaint seeking to recover liquidated damages, recurring fees, and attorney fees in accordance with the terms of the license agreement and the assignment and assumption agreement whereby JPM Inc. assumed all of Shah's rights and obligations under the license agreement. The defendants failed to answer, and the court entered a default judgment against them on July 26, 2013. The court ordered payment of the recurring fees and attorney fees, but denied the request for liquidated damages on the grounds that DIW had not adequately explained the reasonableness of its liquidated damages claim or its calculation, as required by New Jersey law.

DIW brought a motion to amend the order on November 17, 2014, explaining that it had simply used the wrong date to calculate prejudgment interest. DIW asserted that this flaw in its calculation constituted a "clerical error," and the order should therefore be amended.

The court considered DIW's request in light of timelines imposed by Federal Rule of Civil Procedure 7.1(i), which requires that a motion for reconsideration be filed within fourteen days after the entry of the order or judgment, and Rule 59(e), which requires that a motion to alter or amend a judgment be filed twenty-eight days after the entry of the order or judgment. Because DIW's motion was filed more than three months after the entry of the judgment, neither of these rules permitted the court to amend the order. The court noted that corrections of substantive errors in judgments are subject to these short time limits to ensure finality.

The court then considered a third provision, Rule 60(a). This rule allows the court to correct clerical mistakes that arise from oversight or omissions whenever one is found in a judgment. The court noted that case law has confined the application of Rule 60(a) to the correction of mechanical errors apparent on the record that do not involve an error of substantive judgment. Mistakes that are merely clerical, however, can be corrected pursuant to this rule, without reopening the substantive merits.

DIW sought to correct an error in its own papers, which, if remedied, might have led the court to make a different decision. The court held that the error at issue was DIW's presentation of its liquidated damages. The court held that this was a substantive inadequacy that was more than a clerical error. As such, the court could not review the order under Rule 60(a) and denied the motion.

***Elite Int'l Enter., Inc. v. Norwall Grp., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,640, Nos. 14-2272/14-2317, 2015 WL 7779909 (6th Cir. Oct. 8, 2015)**

Defendant Patton Wallcoverings, Inc., a wallpaper manufacturer, allegedly breached its distributing contract with plaintiff Elite International Enterprise, Inc. by refusing to supply Elite with certain products. Elite and Patton formalized their agreement in March 2011. Under the agreement, Elite was designated as an exclusive sales agent and a distributor of Patton products. Elite sold Patton's products at an average sale price of $15 per wallpaper roll. In August 2011, Patton sent Elite an email explaining that Elite would be limited to selling only existing product lines. Elite sued for breach of contract and obtained a grant of summary judgment as to liability on that claim. The U.S. District Court for the Eastern District of Michigan, however, granted partial summary judgment to Patton on the remainder of Elite's claims, including the claim that Elite had an exclusive distribution agreement that Patton also breached by selling directly and through another distributor in the Middle East market. DID Wallcoverings became a manufacturer and a distributor of Patton products in 2010. Under that agreement, DID was allowed to sell Patton products in Asia and the Middle East but prevented from selling to other Patton distributors, like Elite.

After a bench trial on damages, the district court awarded Elite $222,465.18 in lost profits. The district court based its award on the assumption that if Elite were still operating optimally and able to freely place orders with Patton or DID for products for sale in the Middle East, it would have a two-thirds chance of being the buyer for every sale that DID made in the Middle East and then turning around and successfully reselling the product at the $15 average sales price. Using this method, the district court awarded Elite $222,465.18 in damages, reflecting 74,493 rolls of wallpaper sold by DID in the region at Elite's $15 average sales price, with a 50 percent profit margin and a 66.6667 percent sales probability, minus Elite's average annual fixed costs over the three year term of the contract ($150,000). Both parties, dissatisfied with the award, appealed.

On appeal, Patton assigned three errors to the district court: (1) the district court erroneously awarded Elite lost profits, (2) the district court's calculation of lost profits was improper, and (3) the district court abused its discretion in finding that Elite reasonably mitigated its damages. Elite, for its part, argued that the court erred in granting partial summary judgment to Patton on Elite's additional contract claim and in failing to award greater damages.

The Sixth Circuit first considered Elite's claim that Patton also breached the distribution agreement by selling in the Middle East both directly and through DID. Affirming the district court's grant of partial summary judgment to Patton on this claim, the Sixth Circuit agreed with the lower court that the agreement between Elite and Patton did not name Elite as the exclusive distributor of Patton products in the Middle East. The parties' contract used the word "exclusive" but only in reference to Elite's status as sales agent and not its status as distributor of Patton. Nor did Elite's exclusive agency grant it an exclusive right to sell. Patton, therefore, did not breach the parties' contract by selling products in the Middle East.

Next, the Sixth Circuit considered the parties' challenges to the damages award. Employing the abuse-of-discretion standard of review applicable to damages awards, the court noted that in order to recover prospective profits, a plaintiff must prove lost profits "with a reasonable degree of certainty." Patton first challenged the district court's lost profits award to Elite precisely on the basis that it was based on mere speculation, not reasonable certainty. According to Patton, the district court speculated by: (1) using a profit margin of 50 percent when Elite's tax returns showed a true profit margin of 24 percent, (2) attributing Elite's sales decline to Patton's breach rather than Elite's pre-breach loss of major customers, and (3) finding that Elite was unable to obtain "sales books" following the breach when in fact Elite simply did not wish to pay for additional printings according to Patton's routine policy. Although the court noted that these criticisms had "some merit, they fail to show that the court abused its discretion in choosing to award lost profits at all." Instead, the evidence, including Elite's tax returns, supported the district court's finding that Elite ran a profitable business and that its sales declined following the breach. Therefore, the district court did not abuse its discretion in concluding that Elite suffered some lost profits.

With respect to the district court's calculation of lost profits, the Sixth Circuit agreed with Patton and found that the district court committed error by (1) concluding that DID and Elite were sufficiently similar to allow the court to use DID's sales figures; and (2) treating DID as a supplier rather than a direct competitor of Elite, even though DID was contractually prohibited from selling to Elite. According to the Sixth Circuit, the district court should have used Elite's actual sales data to estimate lost profits. It therefore vacated the district court's award and remanded for recalculation using Elite's own sales data in the first instance. Elite claimed that the district court's award improperly calculated its annual expenses and erred in refusing to award damages for other markets. But given its decision to vacate and remand, the Sixth Circuit declined to reach the merits of Elite's arguments.

Last, the Sixth Circuit rejected Patton's challenge that the district court erred in finding that Elite reasonably mitigated its damages. As the district court correctly found, Elite made attempts to buy product from DID and could not realistically have made up the difference by selling other wallpaper brands because Patton's act of cutting off the new products "predictably resulted in Elite's customers losing interest and taking their business elsewhere[.]" Elite therefore met its minimal burden to mitigate damages.

Based on the foregoing, the Sixth Circuit affirmed the district court's award of partial summary judgment to Patton but vacated the damages award and remanded to the district court for recalculation of damages using Elite's own sales data.

***Super 8 Worldwide, Inc., v. JJC Corp.*, Bus. Franchise Guide (CCH) ¶ 15,644, Civ. No. 14-00961 (WHW)(CLW), 2015 WL 7779914 (D.N.J. Oct. 26, 2015)**

The plaintiff, Super 8 Worldwide, Inc. (SWI), moved under Federal Rule of Civil Procedure 55 for default judgment against the defendants. SWI filed this action alleging that the defendants breached a franchise agreement. The defendants failed to plead or otherwise defend the lawsuit. The court granted the motion for default judgment after considering the factors outlined in *Chamberlain v. Giampapa*, 201 F.3d 154 (3d Cir. 2000).

SWI entered into a franchise agreement with the defendant, JJC Corporation, for the operation of a seventy-four-room Super 8 guest lodging facility. Pursuant to the agreement, the defendant was required to make certain periodic payments to SWI for royalties, system assessment fees, taxes, interest, reservation system user fees, and other fees. The franchise agreement further provided that SWI could terminate the franchise agreement with notice to the defendant upon: (1) failure to pay any amount due under the franchise agreement; (2) failure to remedy any default within thirty days after receipt of written notice from SWI; and (3) receipt of two or more notices of default under the franchise agreement, whether the defaults were cured. In this case, the defendants repeatedly failed to meet their financial obligations under the agreement. As a result, SWI terminated the franchise agreement.

SWI then filed a complaint in the U.S. District Court for the District of New Jersey seeking amounts owing under and damages due to breach of the franchise agreement. The summons and complaint were served on one of the defendants, Rejendra Patel, who had provided SWI with a guarantee of JJC's obligations under the franchise agreement. Patel failed to plead or otherwise defend the action. The clerk of the court entered default against the defendants. SWI therefore brought a motion for default judgment against the defendants.

The court outlined the three factors from *Chamberlain* for evaluating a motion for default judgment under Rule 55: (1) whether there is prejudice to the plaintiff if default is denied, (2) whether the defendant appears to have a litigable defense, and (3) whether defendant's delay is due to culpable conduct.

SWI's action was based on breach of contract, and the elements of the claim were met: (1) there was an agreement and guaranty between the parties, (2) the defendants breached the agreement by failing to meet their financial obligations, (3) damages flowed therefrom, and (4) SWI had performed its own contractual obligations.

The court determined that SWI would suffer prejudice if default was denied because it had already waited over three years for amounts to which it was entitled based on breach of contract. None of the defendants had put forward a defense or presented any facts suggesting that they had a defense. They had also failed to retain counsel in the nearly twenty-month period since the filing of the complaint. In granting the motion for default judgment, the court also noted that the amounts requested by SWI in its submissions accurately represented the amounts owed.

DEFINITION OF FRANCHISE

***Rogovsky Enter., Inc. v. Masterbrand Cabinets, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,660, No. 3:15-cv-00022-RLY-WGH, 2015 WL 9261790 (S.D. Ind. Nov. 30, 2015)**

Masterbrand Cabinets, Inc. is a manufacturer of cabinets. Rogovsky Enterprise, Inc. is a franchisor of kitchen and bath design and home remodeling businesses called Kitchen & Home Interiors (KHI). In December 2011, Masterbrand and Rogovsky entered into a distribution agreement under which Rogovsky agreed to require that all KHI franchisees purchase cabinets exclusively from Masterbrand. The agreement also obligated Rogovsky to, among other things, use its best efforts to actively pursue new KHI franchisees. In addition, Rogovsky was prohibited from distributing or selling any products in a particular territory that Masterbrand reasonably determined were in competition with Masterbrand.

Rogovsky thereafter began selling KHI franchises in Florida. In October 2013, Masterbrand gave Rogovsky written notice stating that, pursuant to the parties' agreement, Rogovsky could not sell any more franchises in Florida because Masterbrand determined that the KHI Florida franchises were competing with Masterbrand dealers. Rogovsky responded by filing a thirteen-count complaint against Masterbrand in the U.S. District Court for the District of Minnesota, including breach of contract, tortious interference with contractual relations, and alleged violations of various state franchise statutes. The district court first determined that the agreement at issue did not constitute a franchise contract under the Minnesota Franchise Act because it did not involve a franchise fee. The court thereafter transferred the matter to the U.S. District Court for the Southern District of Indiana pursuant to a forum selection clause in the agreement for further consideration of the other claims.

The Indiana district court considered a motion to dismiss filed by Masterbrand on the ground that Rogovsky had failed to state a claim. The court first addressed whether the Minnesota court's determination regarding the agreement was considered "law of the case" and thus binding. The court determined that the decision was law of the case because Rogovsky had the opportunity to participate in oral argument on the matter and the decision was otherwise "highly persuasive and well-reasoned."

The court next addressed whether the agreement was an "area franchise" under applicable state statutes. The court concluded it was not because KHI franchises were not sold under the Masterbrand name. The court therefore granted Masterbrand's motion to dismiss on those counts. The court then considered whether the agreement was a franchise agreement under other state laws. The court noted that a franchise agreement must have: (1) a franchise fee; (2) a trademark license; and (3) the right of the franchisor to exert significant control over the franchisee's business. As to the franchise fee, the court held that the $300,000 spent by Rogovsky for remodeling costs of Rogovsky's Florida facility to feature Masterbrand products did not qualify as a franchise fee for several reasons, including the fact that the expenditure was not required under the agreement. The court also refused to consider Rogovsky's promise to exclusively sell Masterbrand products as non-monetary consideration because a franchise fee must be an actual fee or charge. Rogovsky also argued that amounts he spent on training constituted a franchisee fee. Again, the court disagreed on the grounds that the agreement did not actually require Rogovsky to spend those amounts.

The court next addressed whether Rogovsky was granted the use of Masterbrand's trademarks in such a way to meet the second element for a franchise. The court noted that Rogovsky had the right to use Masterbrand's mark to advertise the sale of Masterbrand products. Rogovsky was not granted a license to use Masterbrand's mark to promote KHI franchises. The court therefore concluded that the element was not met. The court also addressed the issue of Mississippi state law, which does not require a franchise to be associated with a trademark. Applicable Mississippi law also does not include an antiwaiver provision. The court therefore held that language in the agreement waiving the right to argue that the agreement was a franchise was binding on the matter.

***Safe Step Walk-In Tub Co. v. CKH Indus., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,629, No. 15-cv-07543 (NSR), WL 77779898 (S.D.N.Y. Oct. 26, 2015)**

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

ENCROACHMENT

***Paso del Norte Motors, LP v. Tri Star Partners, LLC*, Bus. Franchise Guide (CCH) ¶ 15,632, No. EP-15-CV-33-PRM, 2015 WL 7779900 (W.D. Tex. Oct. 20, 2015)**

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

FRAUD

***Abbo et al. v. Wireless Toyz Franchise, LLC*, Bus. Franchise Guide (CCH) ¶ 15,652, Nos. 149536, 304185, 2015 WL 9261786 (Mich. Nov. 25, 2015)**

The franchisee plaintiffs and various associated persons filed suit against the franchisor defendant Wireless Toyz following a breakdown in the relationship. The plaintiffs alleged that Wireless Toyz Franchise, LLC had failed to disclose certain costs and expenses related to operating the franchise, committing "silent fraud" by failing to disclose "chargebacks" and "hits" associated with the business. On May 13, 2014, the Michigan Court of Appeals found that Wireless Toyz had engaged in silent fraud. Wireless Toyz sought leave to appeal. On November 4, 2015, the Michigan Supreme Court, after hearing oral argument on the application for leave to appeal, denied leave to appeal without giving detailed reasons. However, Justice Zahra wrote a dissenting opinion on the basis that the decision of the court below "cu[t] against a fundamental tenet of [the] Court's jurisprudence that requires the enforcement of unambiguous contracts freely executed by the parties."

Justice Zahra asserted that the plaintiffs and defendants entered into unambiguous written agreements containing broad disclaimers. For example, he pointed to a development agent agreement that explicitly acknowledged that Wireless Toyz had not made any "representations or projections of potential earnings, sales, profits, costs, [etc.]. . . ." Additionally, a similar disclaimer was included in the franchise agreement. Both the duty to disclose under Michigan Comprehensive Laws § 445.1505 of the Michigan Franchise Investment Law and the law of silent fraud require a prior representation in order for an omitted material fact to render an otherwise truthful representation misleading. Justice Zahra opined that, as a matter of contract, the parties had agreed that no prior representations had been made and held that the decision by the Michigan Court of Appeals should be reversed.

***Two Bros. Distrib. Inc. v. Valero Mktg. & Supply Co., LLC*, Bus. Franchise Guide (CCH) ¶ 15,651, No. CV-15-01509-PHX-DGC, 2015 WL 9261784 (D. Ariz. Nov. 25, 2015)**

This case is discussed under the topic heading "Statute of Limitations."

GOOD FAITH AND FAIR DEALING

***United Safeguard Distribs. Ass'n, Inc. v. Safeguard Bus. Sys., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,662, No. CV 15-3998 RSWL (AJWx), 2015 WL 9261795 (C.D. Cal. Nov. 17, 2015)**

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

***Wilbern v. Culver Franchising Sys., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,608, No. 13 C 3269, 2015 WL 6036176 (N.D. Ill. Sept. 29, 2015)**

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

INJUNCTIVE RELIEF

***Chaudhry et al. v. Int'l House of Pancakes, LLC*, Bus. Franchise Guide (CCH) ¶ 15,656, No. 15-cv-3504, 2015 WL 9261788 (N.D. Ill. Nov. 18, 2015)**

The U.S. District Court for the Northern District of Illinois denied the plaintiffs' motion to stay the enforcement of a preliminary injunction pending interlocutory review. The court ruled that the plaintiffs had not established that they had a significant probability of success on the merits of the appeal, that they would suffer irreparable harm absent a stay, that a stay would not injure the defendants, or that a stay was in the public interest.

IHOP terminated its franchise agreement with the plaintiff franchisees following a series of failed operational evaluations with respect to their IHOP franchise in Arlington Heights, Illinois. Both parties filed motions for preliminary injunctions. IHOP's motion was granted and Chaudhry's motion was denied. Chaudhry then filed a motion to stay the enforcement of the preliminary injunction.

The court found that the evidence submitted by Chaudhry did not establish a significant probability of success on the merits of the appeal. Chaudhry introduced declarations from various individuals in an effort to undermine the integrity of the restaurant inspection reports and therefore the legality of IHOP's termination of the franchise agreement. However, as the declarations came from individuals who were not actually present for any of the restaurant inspections and they did not provide information to challenge the accuracy of the results, the court held this evidence was not relevant. Additionally, Chaudhry introduced evidence to suggest that the franchise agreement was not lawfully terminated and therefore this constituted a defense to IHOP's allegations. However, the court clarified that improper termination of a franchise agreement is not a defense to a trademark infringement.

The court also clarified that allegations of bad faith are not relevant to a motion for a preliminary injunction to enforce a termination of contract based on a material breach of the franchise agreement. Given this, Chaudhry's evidence of improper termination was irrelevant. As such, Chaudhry had failed to provide evidence to establish a significant probability of success on the merits of the appeal. The court also dismissed Chaudhry's argument that it would be irreparably harmed absent a stay of the preliminary injunction. The court noted that Chaudhry provided no argument in this respect aside from the reference to *In re A&F Enterprises, Inc. II*, 742 F. 3d 763 (7th Cir. 2014), in which the previous order had concluded was inappropriate and unpersuasive.

In addition, the court found Chaudhry had failed to establish that a stay would not injure the opposing party or that it would be in the public interest. The court found that pursuant to the previous order, there was an established potential harm to IHOP as a result of customer confusion and potential injury to IHOP's goodwill and reputation. Further, although the court agreed there was a public interest in protecting Illinois franchisees from abuse and unscrupulous franchisors, Chaudhry had not provided evidence to show that had occurred in this case.

***Choice Hotels Int'l, Inc. v. Zeal, LLC*, Bus. Franchise Guide (CCH) ¶ 15,623, No. 4:13-cv-1961, 2015 WL 6036291 (D.S.C. Sept. 29, 2015)**

Choice Hotels International, Inc. is the owner of various Econo Lodge trademarks. Choice brought suit against Zeal, LLC and related parties for trademark infringement and unfair competition under common law and the Lanham Act, based on Zeal's operation of a hotel in Myrtle Beach. Zeal was never a Choice franchisee, but rather an assignee of the hotel premises by a former Choice franchisee. Following the assignment, Zeal rebranded the hotel from Econo Lodge Inn & Suites to Econo Studios Inn & Suites. Choice argued that, even after the change in name, the new name violated Choice's trademarks and created a likelihood of consumer confusion. The U.S. District Court for the District of South Carolina took the matter up on Choice's motion for an injunction and summary judgment.

The court noted the following elements that Choice was required to meet to show infringement under the Lanham Act: (1) that it owns a valid mark; (2) that Zeal used the mark in commerce without Choice's authorization; (3) that Zeal used the mark (or an imitation of it) in connection with the sale, offering for sale, distribution, or advertising of goods or services; and (4) that Zeal's use of the mark is likely to confuse consumers.

The court focused its analysis on an in-depth review of whether Zeal's use of Econo Lodge Inn & Suites was likely to confuse consumers. The court followed the nine-factor test cited in *Perini Corp. v. Perini Construction, Inc.*, 915 F.2d 121, 127 (4th Cir. 1990): (1) the strength or distinctiveness of the plaintiff's mark as actually used in the marketplace; (2) the similarity of the two marks to consumers; (3) the similarity of the goods or services that the marks identify; (4) the similarity of the facilities used by the mark holders; (5) the similarity of advertising used by the mark holders; (6) the defendant's intent; (7) actual confusion; (8) the quality of the defendant's product; and (9) the sophistication of the consuming public.

The court determined that Choice's marks were commercially strong because, even if the marks could be described as descriptive (as opposed to suggestive, arbitrary, or fanciful), Choice had used the marks for a long period of time in commerce. Moreover, Zeal had failed to meet its burden of establishing genericide, meaning that the public's pervasive use of a mark caused it to lose its trademark significance. The court went on to analyze elements two through five based on the similarity of the applicable hotel names. The court held that Choice was not required show that the names were identical and that all the relevant facts support similarity. As to intent, the court held that there were insufficient facts to establish that Zeal intended to infringe. The court next addressed customer confusion, noting that Choice provided the following examples: (1) Choice being named in a lawsuit by a former guest of Zeal, and (2) a Zeal guest who called Choice's customer service line to complain. Zeal argued that two examples were insufficient to create customer confusion. The court found the examples sufficient, noting that for every customer that either files a lawsuit or calls to complain, there may be "countless" other customers who walk out of the hotel and warn their friends and family not to stay at the chain. Finally, the court found elements 8 and 9 not applicable.

The court thus found that Zeal's hotel name created a likelihood of consumer confusion and that Zeal had infringed on Choice's marks. The court also held that the same elements established Choice's other claims for unfair competition under the Lanham Act and a common law trademark infringement claim. The court moved on to the remedies available to Choice. First, the court determined that Choice was entitled to injunctive relief because it had suffered an irreparable injury (likelihood of confusion and actual confusion), that Choice lacked an adequate remedy at law because Zeal's actions showed that the risk of a lawsuit and monetary damages would not deter it, that the balance of hardships weighed in favor of Choice, and that an injunction would serve the public interest because it would prevent consumer confusion in the marketplace. As to monetary damages, the court noted that the Lanham Act provides that a plaintiff establishing trademark infringement is entitled to: (1) the defendant's profits, (2) damages sustained by the plaintiff, and (3) the costs of the action. Choice demonstrated that Zeal had failed to respond to discovery that would substantiate Choice's damages. The court stated that Zeal's failure to respond and otherwise the way it handled the litigation was "baffling." The court stated that the damages could be up to $3 million, but determined to allow Zeal a final opportunity to explain its actions and seek a lower amount prior to a ruling. Therefore, the court entered summary judgment in Choice's favor, entered an injunction prohibiting Zeal from using Choice's marks and requiring Zeal to remove all Econo Studios Inn & Suites signage and ordered the parties to submit briefing relating to damages.

***Elder Care Providers of Ind., Inc. v. Home Instead, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,617, No. 1:14-cv-01894-SEB-MJD, 2015 WL 6036282 (S.D. Ind. Sept. 14, 2015)**

The U.S. District Court for the Southern District of Indiana granted a non-medical home care franchisor's motion for preliminary injunction enjoining a former franchisee's use of the franchisor's name and licensed marks and requiring it to return all materials relating to the operation of the former franchise to the franchisor, but denied the franchisor's request to enforce the noncompete against the former franchisee and its guarantors.

Defendant Home Instead, Inc. provides non-medical care to senior citizens through independently owned franchises. On October 16, 2006, plaintiff Elder Care Providers of Indiana, Inc. entered into a franchise agreement with Home Instead to operate a Home Instead business in Indianapolis for ten years. Elder Care's sole shareholders, Anthony and Georgette Smith, personally guaranteed the franchise agreement. Elder Care provided non-medical home care to seniors and was not allowed by its franchise agreement and Indiana licensure restrictions to provide any medical care because it was licensed as a personal service agency (PSA) rather than a home health agency (HHA).

In November 2011, the Smiths formed Home Again Senior Care, Inc., a separately licensed HHA corporation through which medical home health care was provided to clients referred by both Elder Care and other area

Home Instead franchises that could not provide medical care. Home Instead first learned of Home Again's operations in March 2013. Concerned about possible confusion resulting from the name Home Again, given its similarity to Home Instead as well as potential competition, Home Instead undertook a twenty-month investigation into Home Again's operations, focusing on whether Elder Care was diverting business to Home Again to the detriment of Home Instead. Concluding that the operation of Home Again was a breach of the franchise agreement's competitive restrictions and infringement on Home Instead's trademark, Home Instead terminated the franchise agreement with Elder Care in November 2014. Elder Care, however, continued to operate its Home Instead franchise until the first week of February 2015. Elder Care claimed that it returned all Home Instead proprietary materials immediately after discontinuing operations. In May 2015, Elder Care transferred all of its patients to a neighboring Home Instead franchisee. In August 2015, Home Again changed its legal business name to Purpose Home Health, Inc.

Elder Care filed suit in the U.S. District Court for the Southern District of Indiana on November 8, 2014, alleging that Home Instead's termination breached the franchise agreement and violated the Indiana Deceptive Franchise Practices Act. Home Instead counterclaimed against Elder Care, Home Again, and the Smiths for breach of contract, civil conspiracy, misappropriation of trade secrets, unfair competition, and trademark infringement. Elder Care filed its motion for preliminary injunction in February 2015, asking the court to order the Smith parties to cease using the Home Instead name; comply with their post-termination covenants, including their nondisclosure and noncompetition covenants; and return to Home Instead all materials relating to the operation of Elder Care's business. After a hearing, the court issued its order granting in part and denying in part Home Instead's motion for preliminary injunction. The court granted the motion as it pertained to the Smith parties' use of Home Instead-related names and return of all Home Instead-related documents used in the operation of the Elder Care franchised business but denied the motion as to enforcement of the noncompete.

As to the former, the court first found that Home Instead had a reasonable likelihood of success on the merits of its claims for trademark infringement and breach of contract related to the failure to return confidential information. Although the parties hotly contested whether termination of the franchise agreement was proper—with Home Instead claiming it had the right to terminate immediately after its twenty-month investigation and the Smith parties contending that Home Instead waived the right to terminate based on its delay and that termination was in bad faith—the court concluded that Home Instead could show "a better than negligible chance of succeeding on its claimed breach of Franchise Agreement that permitted its lawful termination[.]" The evidence demonstrated that the Smith parties had in fact continued to use the name "Home Instead" after termination of the franchise agreement and, without Home Instead's permission, used that name in conjunction with Home Again in an attempt to market the two companies together. The Smith parties even intertwined the operations of the two businesses, rebutting their argument that Home Instead terminated the agreement in bad faith. Moreover, the Smith parties continued to use Home Instead's name and marks after termination in emails, Elder Care's bank account listing "DBA Home Instead Senior Care" after its name, and Home Again's workers' compensation policy listing Mr. Smith's email as 'homeinstead.com." Lastly, the court found that the Smith parties' use of the names "Home Instead" and "Home Again" caused confusion between the marks, as evidenced by a phone call to a neighboring Home Instead franchise asking for an employee of Home Again. Therefore, Home Instead had a reasonable likelihood of succeeding on the merits of its claims. The court also found that Home Instead met its burden of showing that absent a preliminary injunction it would suffer irreparable harm and lacked an adequate remedy at law. Not only is there a well-established presumption that injuries arising from Lanham Act violations are irreparable, but Home Instead also submitted evidence of the strength of its marks; of the significant time, effort, and resources it expended to perfect its business system and establish customer goodwill; and of its efforts to keep its system and confidential information secret from competitors and the public. Lastly, the court determined that the balance of the harms favored issuing an injunction because by ceasing use of the Home Instead name and marks and returning Home Instead's confidential information, the Smith parties were merely ordered to do what they had agreed to do in the franchise agreement and claimed they had already done.

However, the court denied Home Instead's motion with respect to enforcement of the post-termination covenant not to compete because of the near two-year delay by Home Instead in requesting injunctive relief and the fact that the alleged competing business fell outside the scope of the noncompete. The court found that Home Instead's near two-year delay in seeking to halt Home Again's business with a two-year noncompete was inconsistent with a claim of irreparable injury. Nor could Home Instead show a reasonable likelihood of success on the merits of the claim because Home Again's business provided medical-based home health care, which the noncompete did not prohibit. Instead, the noncompete prohibited Elder Care from operating, or having any financial or beneficial interest, in a "nonmedical companionship and domestic care service business" in its former exclusive territory that would be of a character and concept similar to a Home Instead Senior Care. The concepts were simply not similar here. Finally, the balance of the harms weighed strongly against enjoining the operation of Home Again because doing so would deprive 230 patients of continuity of care and 124 employees could potentially be out of work.

***Int'l Franchise Ass'n, Inc. v. City of Seattle*, Bus. Franchise Guide (CCH) ¶ 15,606, 803 F.3d 389 (9th Cir. 2015)**
This case is discussed under the topic heading "Labor and Employment."

***Jackson Hewitt Inc. v. Cline*, Bus. Franchise Guide (CCH) ¶ 15,645, No. 14-6931, 2015 WL 7779908 (D.N.J. Oct. 29, 2015)**
The U.S. District Court for the District of New Jersey granted Jackson Hewitt Inc.'s motion for a preliminary injunction against a former franchisee, enjoining him from operating competing tax preparation businesses in violation of a covenant not to compete and enforcing other post-termination obligations under the parties' franchise agreements.

Plaintiff Jackson Hewitt Inc. entered into four franchise agreements with defendant David Cline for the license and operation of income tax preparation businesses within defined geographic territories in Arizona and California. In a letter dated June 10, 2014, Jackson Hewitt notified Cline that he was in default of the franchise agreements for failure to pay his financial obligations as required under the agreement and that failure to cure by June 20, 2014, could result in termination of the agreement. Cline failed to cure, and in a letter dated August 25, 2014, Jackson Hewitt informed Cline that it was terminating the franchise agreements effective immediately. Notwithstanding termination and in violation of his post-termination obligations under the franchise agreements, Cline continued to operate competing income tax return preparation businesses under the names "Classic Accounting" and "Abacus Accounting" in at least three of his former franchise territories in Arizona and California, in the same exact locations as his former Jackson Hewitt franchised locations, and using the same employees he used as a Jackson Hewitt franchisee. In addition, Cline ran advertising directed at Jackson Hewitt clients promoting his tax preparation services under the "Classic Accounting" name. He also retained and made use of client files and the telephone numbers associated with Cline's former Jackson Hewitt franchised locations.

Jackson Hewitt filed its complaint for various breaches of the franchise agreements in November 2014 and its motion for a preliminary injunction compelling Cline to adhere to his post-termination obligations under the franchise agreements in March 2015. Jackson Hewitt sought an order compelling the defendant to: (1) adhere to the two-year, ten-mile radius noncompete provision of the franchise agreements; (2) return to Jackson Hewitt all client files; (3) return all trade secret, confidential, and proprietary information; and (4) transfer all telephone numbers associated with the franchised Jackson Hewitt businesses to Jackson Hewitt and notify the telephone companies that the defendant no longer had the right to use such telephone numbers. Cline denied any wrongdoing, except to admit that he prepared individual tax returns to earn a living, but claimed that the noncompete was an undue hardship because Arizona is a right to work state. The court was unpersuaded by the defendant's argument and granted the preliminary injunction enforcing defendant's post-termination obligations, including the covenant not to compete.

According to the court, Jackson Hewitt demonstrated a likelihood of success on the merits by showing that Cline breached the franchise agreements by: (1) operating competing tax businesses in violation of the covenants not to compete; (2) failing to comply with his post-termination obligations; and (3) soliciting, or assisting in the soliciting, of customers, or otherwise using client files and telephone numbers associated with Cline's former franchised Jackson Hewitt businesses. The court noted that, although Cline denied certain of Jackson Hewitt's factual allegations, he offered no evidence in support. For example, Cline argued that he did not own or manage tax preparation firms operating in his former locations, but Jackson Hewitt presented evidence from the Arizona Corporation Commission website showing that Classic Accounting remained an active corporation at the same address as one of Cline's former Jackson Hewitt locations. Moreover, Jackson Hewitt need only show a "reasonable probability" of prevailing in the litigation, and it did so here. With respect to irreparable harm, the court found that Jackson Hewitt met its burden based on Cline's possession, use, and/or "inevitable disclosure" of its confidential information (i.e., client files). That such unlawful retention and potential use or "inevitable disclosure" constitutes irreparable harm is not only recognized by New Jersey law, but was expressly recognized by both parties in the franchise agreements. The court also found that the balance of the hardships and the public interest warranted entry of a preliminary injunction. The noncompete agreement's two-year and ten-mile restrictions were reasonable and the hardship to Jackson Hewitt from Cline's improper retention and use of client files was significant. Lastly, the public interest was best served by holding the defendant to the reasonable terms of his post-termination obligations under the franchise agreements. Jackson Hewitt's motion for preliminary injunction was therefore granted.

***MetroPCS Pa., LLC v. Arrak*, Bus. Franchise Guide (CCH) ¶ 15,649, No. C15-0769JLR, 2015 WL 9261782 (W.D. Wash. Nov. 4, 2015)**

The U.S. District Court for the Western District of Washington entered a final injunction enjoining a former dealer and its vice-president from selling competing products and services in violation of the noncompetition and nonsolicitation clauses in the parties' dealer agreement.

Plaintiff MetroPCS Pennsylvania, LLC is a wireless telephone carrier that focuses on offering prepaid plans and relies on its dealers to market and sell its products and provide service to its customers. MetroPCS entered into a dealer agreement with City Wireless, Inc. (CWI) in February 2014. Aimen Arrak, CWI vice president, signed the agreement on behalf of CWI. Pursuant to the agreement, CWI agreed not to solicit or divert MetroPCS customers during the term of the agreement and for six months after its termination. CWI further agreed not to compete with MetroPCS within a two-mile radius of CWI's MetroPCS storefronts during the same period. MetroPCS asserted that those provisions were critical to its business because it invested substantial resources in training and supporting dealers and was vulnerable to having its customers poached while it attempted to reestablish a presence in a particular area after its relationship with a dealer ended.

In late 2014, CWI breached the dealer agreement and MetroPCS terminated the agreement effective February 20, 2015. When, despite termination, CWI continued to operate and sell competing wireless services for Boost Mobile, a competitor of MetroPCS, MetroPCS filed suit seeking permanent injunctive relief. MetroPCS also promptly moved for a preliminary injunction to stop the defendants' unlawful competition and solicitation, which the court granted after finding that MetroPCS satisfied all four elements of the traditional preliminary injunction test. Because 142 days remained in the period of restriction under the noncompete and nonsolicitation provisions at the time MetroPCS discovered defendants' violations, the court granted a preliminary injunction on June 24, 2015, for 142 days or until trial, whichever occurred first. The defendants, however, failed to comply and were held to be in contempt after MetroPCS moved for an order to show cause and they failed to appear. Although MetroPCS also moved to extend the term of the preliminary injunction, the court directed MetroPCS to file a motion for final injunction instead.

In its motion for final injunction, MetroPCS asked the court to enjoin the defendants for an additional 142 days based on their refusal to comply with the agreement and the court's preliminary injunction order. The court held that MetroPCS met each of the elements necessary for a grant of a permanent or final injunction: (1) actual success on the merits; (2) that it suffered an irreparable injury; (3) that the remedies available at law are inadequate; (4) that the balance of hardships justified a remedy in equity; and (5) that the public interest would not be disserved by the injunction. First, MetroPCS succeeded on the merits because the dealer agreement's noncompete and nonsolicitation provisions were enforceable and the defendants were violating them by selling competing products and services. Under Washington law, both provisions were enforceable because they were reasonably necessary to protect MetroPCS's business, particularly in terms of maintaining its customer base and preventing appropriation of and damage to its goodwill. As to the second and third prongs, MetroPCS suffered irreparable harm and remedies at law would be inadequate because the nature of its business made it vulnerable to losing customers after its relationship with a dealer ended and such losses were difficult, if not impossible, to remedy with a monetary award. Fourth, the balance of hardships justified a final injunction because MetroPCS remained at risk of losing customers and sustaining damage to its goodwill absent an injunction, while an injunction threatened defendants only with the inability to compete with MetroPCS within a small area for a few months. Finally, the public interest would not be disserved by a final injunction because of the limited scope of the restrictions at issue. Accordingly, the court granted MetroPCS's motion for final injunction and ordered defendants to comply for 142 days following entry of the order.

***Safe Step Walk-In Tub Co. v. CKH Indus., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,629, No. 15-cv-0743 (NSR), 2015 WL 7779898 (S.D.N.Y. Oct. 26, 2015)**

The U.S. District Court for Southern District of New York denied the defendant's motion for preliminary injunction and temporary restraining order. Three findings were central to the court's ruling: the dealership/licensee agreement was no longer in effect, the agreement was not inadvertently converted into a franchise agreement, and the defendant had not demonstrated irreparable harm.

The defendant argued (1) that the agreement between the parties remained in effect and the plaintiff was breaching the agreement; and (2) the agreement was inadvertently converted into a franchise agreement, which would therefore entitle the defendant to notice before the plaintiff could terminate the agreement.

The court disagreed, holding that the agreement was no longer in effect. The agreement, whose initial term had expired in May 2014, contained a renewal option for two additional five-year terms upon written notice by the defendant, to be provided no less than ninety days prior to the end of the term. The defendant conceded it did not provide written notice within the required time frame, but argued these terms created an automatic renewal of the agreement absent termination. The court found this interpretation to be "wholly inconsistent with a plain reading of the agreement" and concluded the agreement had expired without renewal.

The court also disagreed that the agreement had been inadvertently converted to a franchise agreement, noting that for a franchise relationship to exist (1) the franchisor must exhibit a significant degree of control over the franchisee, and (2) the franchisee must pay a franchise fee. The court ruled that the defendant had not established the plaintiff had exhibited a sufficient degree of control over the defendant's business. Further, the defendant conceded it did not have evidence of payment of a franchise fee.

Finally, the court went on to note that even had the defendant succeeded in proving the earlier arguments, it had not demonstrated irreparable harm. In particular, the defendant attempted to establish irreparable harm solely through "generalized and conclusory statements concerning the termination of employees and the ultimate demise of its business." Citing *AFA Dispensing Group B.V. v. Anheuser-Busch, Inc.*, 740 F. Supp. 2d 465 (S.D.N.Y. 2010), the court found these statements were, as a matter of law, insufficient to demonstrate the harm required for an award of injunctive relief.

JURISDICTION

Baskin-Robbins Franchising, LLC v. Alpenrose Dairy, Inc., Bus. Franchise Guide (CCH) ¶ 15,605, No. 14-13771-GAO, 2015 WL 6036162 (D. Mass. Sept. 25, 2015)

Plaintiff Baskin-Robbins Franchising, LLC brought a declaratory judgment action against defendant Alpenrose Dairy, Inc., seeking a declaration that the territorial franchise agreement (TFA) between Baskin-Robbins and Alpenrose had expired. Alpenrose moved to dismiss the action for lack of personal judgment in Massachusetts or, in the alternative, to transfer venue to the Western District of Washington. The U.S. District Court for the District of Massachusetts determined that Alpenrose did not purposefully avail itself of the privilege of conducting activities in Massachusetts and, accordingly, granted Alpenrose's motion to dismiss the action for lack of personal jurisdiction.

The parties executed the TFA in California in 1965 with Alpenrose as the sub-franchisor to Baskin-Robbins in Oregon and Washington and, subsequently, in Idaho and Montana. In accordance with a provision of the TFA, the agreement was renewed every six years since it was executed until the end of 2013, when Alpenrose gave notice that it would not renew after the term expired in December 2014. Alpenrose's principal place of business was Oregon. Although Baskin-Robbins' principal place of business moved from California to Massachusetts in the late 1990s, Alpenrose continued to send notices of renewal to Baskin-Robbins.

In order for Massachusetts to exercise personal jurisdiction over Alpenrose, Baskin-Robbins needed to show that: (1) its claim "arose out of or is related to Alpenrose's activities in Massachusetts;" (2) that the defendant "purposefully availed itself of the privilege of conducting activities in Massachusetts;" and that (3) the "exercise of jurisdiction in Massachusetts is reasonable" in light of the "Gestalt factors."

The court noted that the fact that a non-resident has entered into a contract with a resident of Massachusetts is not, on its own, sufficient to establish jurisdiction and that the manner in which the parties carried out the agreement must be examined. The TFA's geographical scope did not include Massachusetts nor was it the principal place of business of either of the parties when the TFA was made. Although Baskin-Robbins relocated to Massachusetts, the notices of renewal sent by Alpenrose were for the purpose of ensuring it could continue to do business in the Pacific Northwest. Thus, nothing suggested that Alpenrose "intended to purposefully avail itself of the privilege of conducting business within Massachusetts." Further, the "Gestalt factors" weighed against finding jurisdiction because Massachusetts does not have a strong interest in adjudicating a dispute involving a contract performed in the Pacific Northwest. The court therefore did not exercise jurisdiction and accordingly granted Alpenrose's motion to dismiss the action.

***Hetronic Int'l, Inc. v. Hetronic Germany GmbH*, Bus. Franchise Guide (CCH) ¶ 15,647, No. CIV-14-650-C, 2015 WL 9261779 (W.D. Okla. Nov. 6, 2015)**

The U.S. District Court for the Western District of Oklahoma held that personal jurisdiction existed over a German distributor in Oklahoma in an action alleging Lanham Act trademark infringement and unfair competition claims by an Oklahoma City based manufacturer.

Plaintiff Hetronic International, Inc., a manufacturer of radio remote controls for use in heavy industrial equipment, entered into a distribution agreement with defendants Hetronic Germany GmbH (H-Germany) and Hydronic-Steuersyteme-GmbH (Hydronic), pursuant to which the defendants served as Hetronic's distributor and assembler in Germany and a number of central eastern European countries. This action arose out of the termination of the distribution agreement following the defendants' alleged material breaches. Hetronic alleged that after termination of the agreement, Albert Fuchs, the former CEO of Hydronic, incorporated other entities, including ABI Holding GmbH (ABI), with the Abitron name to wrongly compete with Hetronic. Hetronic filed suit, alleging contract, tort, and Lanham Act claims, in the Western District of Oklahoma against H-Germany, Hydronic, Fuchs, ABI, and other entities. The defendants moved to dismiss based on lack of personal jurisdiction and also moved to dismiss Hetronic's claims for failure to state a claim.

Under Oklahoma's long-arm statute, personal jurisdiction exists where the defendant has sufficient "minimum contacts" with Oklahoma and the exercise of personal jurisdiction over the defendant does not "offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Sufficient "minimum contacts" can be established if the defendant either has continuous or systematic contacts with the forum state or has purposefully directed its activities at residents of the forum and the litigation results from alleged injuries arising out of or relating to those activities. If a foreign defendant does not have sufficient minimum contacts to support personal jurisdiction, then Federal Rule of Civil Procedure 4(k)(2) may apply to act as a federal long-arm statute. When a claim arises under federal law, personal jurisdiction can be established over a defendant if: (1) the plaintiff's claim arises under federal law, (2) the defendant is not subject to jurisdiction in any state court of general jurisdiction, and (3) the exercise of jurisdiction comports with due process.

Applying these principles to this case, the court found that: (1) Hetronic asserted a claim under federal law, i.e., the Lanham Act; (2) the defendants failed to indicate another state in which personal jurisdiction would be proper; and (3) the only issue was whether the exercise of personal jurisdiction in Oklahoma over defendants comported with due process. Because the defendants purposefully directed their activities at the United States and Hetronic's injuries arose out of those activities, the court concluded that personal jurisdiction existed over defendants. Specifically, Fuchs traveled to the United States and engaged a Massachusetts company to obtain certifications from the Federal Communications Commission that were necessary for the Abitron entities to sell products in the United States. Fuchs also traveled to Las Vegas to meet with, and sent over twenty emails to, Hetronic's former president seeking information to compete with Hetronic. Taking all of these allegations as true, Fuchs purposefully directed his activity at competition with the plaintiff in the United States and had sufficient minimum contacts to be haled into court in Oklahoma. In addition, ABI also purposefully availed itself to the United States when it filed a trademark application for the Abitron entities and entered into a consulting agreement, for which it paid $40,000, with a U.S.-based company owned by Hetronic's former president to obtain market research and directly compete with Hetronic. Based on these facts, sufficient minimum contacts existed over ABI as well. And although much of the allegedly fraudulent conduct by Fuchs and ABI occurred outside Oklahoma, the court held that, applying Federal Rule of Civil Procedure 4(k)(2), Oklahoma had personal jurisdiction over both. In an attempt to avoid liability, Fuchs alleged that Oklahoma law, 12 Oklahoma Statutes § 682(B), barred any claims against him as a mere shareholder and/or officer of a potentially liable company. But because plaintiff asserted specific wrongdoings committed by Fuchs, the statute did not bar Hetronic's claims.

Lastly, the court rejected the defendants' argument that Hetronic's contributory trademark infringement claim failed as a matter of law and should be dismissed. Contributory infringement occurs when the defendant either (1) intentionally induces a third party to infringe on the plaintiff's mark; or (2) enables a third party to infringe on the mark while knowing or having reason to know that the third party is infringing, yet failing to take reasonable remedial measures. The defendants argued that they could not be both contributory infringers and infringers under law. Although the court agreed that one cannot be both a direct and contributory infringer, it held that it was too early in the litigation to make factual determinations as to who committed which portion of the infringing. Even so, Hetronic provided sufficient factual allegations to state a contributory trademark infringement claim because it alleged that Fuchs and ABI supplied H-Germany, Hydronic, and Abitron with the means to infringe on Hetronic's trademarks, thus inducing the other defendants to infringe on Hetronic's trademarks. And because alternative pleading is allowed under Rule 8, it was proper for Hetronic to plead claims for direct and contributory trademark infringement in the alternative. Accordingly, the court denied the defendants' motion to dismiss in its entirety.

***Noble Roman's, Inc. v. B&MP, LLC*, Bus. Franchise Guide (CCH) ¶ 15,631, No. 1:14-cv-206-WTL-MJD, 2015 WL 7779901 (S.D. Ind. Oct. 22, 2015)**

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

***Sasso USA, Inc. v. Zein Invs., LLC,* Bus. Franchise Guide (CCH) ¶ 15,650, No. 4:14-CV-1728 JAR, 2015 WL 9261783 (E.D. Mo. Aug. 17, 2015)**

A member of a joint venture lacked standing to sue another member individually and was required instead to sue derivatively on behalf of the joint venture because he failed to plead an injury distinct from that suffered by the joint venture, the U.S. District Court for the Eastern District of Missouri held.

Plaintiff Sasso USA, Inc., an Illinois corporation and subsidiary of Sassomeccanica, S.r.L., a multinational corporation that designs and manufactures stone finishing, cutting, and polishing products, entered into an operating agreement with defendant Zein Investments, LLC. That agreement formed Sasso America, LLC (the Company) as a joint venture for the purpose of selling, distributing, and maintaining the stone manufacturing equipment sold to the Company by Sasso. Sasso and the Company also entered into a distribution and licensing agreement under which the Company was given the exclusive right to sell and market Sassomeccanica products, using the Sassomeccanica trademark, in the United States. Under the distribution agreement, Sasso retained possession of its intellectual property; the Company, along with its owners, directors, officers, and managers, agreed not to compete with Sasso. In January 2013, the parties terminated both the operating and distribution agreements. However, after termination, Zein and its organizer continued to represent themselves as distributors for Sassomeccanica products and to use Sassomeccanica's trademarks, contacts, and customers list to promote a competitor's products.

In March 2015, Sasso brought this lawsuit in the U.S. District Court for the Northern District of Illinois against Zein, its organizer, and the competitor, all based in Missouri, asserting fourteen counts, including (1) breach of the operating agreement by Zein arising out of its misuse of Company property to market rival products; (2) breach by Zein of the distribution agreement by selling the competitor's products; (3) misusing Sasso's trademarks, trademark infringement, and cyberpiracy breach under the Lanham Act; (4) breaches by Zein and its organizer of their duties of care and loyalty to Sasso and the Company in violation of the Missouri Limited Liability Company Act and common law; (5) tortious interference with Sasso's existing and prospective business relationships; and (6) unjust enrichment. The defendants moved to dismiss for lack of personal jurisdiction. The Northern District of Illinois agreed and, finding venue and jurisdiction proper in the Eastern District of Missouri, transferred the case sua sponte. The defendants then moved to dismiss Sasso's amended complaint for lack of standing and failure to state a claim.

The defendants argued that Sasso lacked standing because Missouri law required that, as a member of a Missouri limited liability company, Sasso's claims against other members of the LLC had to be brought as a derivative action on behalf of the LLC. Sasso contended it had standing because it alleged an injury distinct from the injury incurred by the Company. The court noted that, although an individual shareholder generally may not bring an action in his own name to recover for wrongs done to the corporation, an individual rather than a derivative action is allowed where the plaintiff suffered a distinct injury from that suffered by the corporation. The court found that Sasso failed to plead an injury resulting from the defendants' alleged misconduct that was distinct from that incurred by the Company. Instead, the alleged actions necessarily harmed the Company and only indirectly impacted Sasso in its capacity as a member of a LLC. Thus, any action seeking relief had to be brought derivatively on behalf of the Company. The court therefore granted the defendants' motion to dismiss but granted Sasso leave to amend its complaint to allege a derivative action.

LABOR AND EMPLOYMENT

***Int'l Franchise Ass'n, Inc. v. City of Seattle*, Bus. Franchise Guide (CCH) ¶ 15,606, No. 15-35209, 803 F.3d 389 (9th Cir. 2015)**

The Ninth Circuit affirmed a federal district court's denial of the International Franchise Association's (IFA) motion to preliminarily enjoin a Seattle ordinance that would treat franchisees of systems with 500 or more employees as "large" employers subject to an expedited schedule to raise the minimum wage to $15 per hour for all employees.

The Seattle City Council unanimously passed an ordinance in June 2014 raising the minimum wage to $15 per hour in two stages for large and small employers. The ordinance classified franchisees as large employers, meaning a business with 500 or more employees, regardless of the number of employees employed by the particular franchisee in Seattle. When categorized as "large" employers, franchisees are subject to a three-year phase-in schedule under the ordinance, while "small" employers, businesses with fewer than 500 employees, have seven years to phase in the wage increase. The IFA brought this action to enjoin the City of Seattle from treating franchisees as large employers. The IFA argued that the ordinance put franchisees at a competitive disadvantage with their competitors and violated the Equal Protection and dormant Commerce Clauses of the U.S. Constitution, was preempted by the Lanham Act and Employment Retirement Income Security Act (ERISA), and deprived franchisees of their privileges and immunities rights under the Washington state constitution. The district court denied the motion for a preliminary injunction, finding the IFA failed to meet its burden of showing a likelihood of success on the merits, irreparable harm, balance of equities, and public interest factors. The IFA appealed, although it did not raise the ERISA claim on appeal, and the Ninth Circuit affirmed the district court's ruling.

The Ninth Circuit first addressed the IFA's argument that the Seattle ordinance violated the dormant Commerce Clause, which bars state and local governments from erecting taxes, tariffs, or regulations that favor local businesses at the expense of interstate commerce. The court assessed whether the ordinance discriminated against out-of-state businesses on its face and decided it did not because "[a] distinction based on a firm's business model . . . does not constitute facial discrimination against out-of-state entities or interstate commerce." In other words, the IFA did not establish that Seattle franchisees that pay local taxes and have local representation are out-of-state entities. Nor did it establish that franchises have "such unique links to interstate commerce relative to non-franchises that the ordinance facially discriminates against interstate commerce." Next, the court analyzed whether the ordinance had a discriminatory purpose and found that, although the record contained some evidence that Seattle officials and advocates questioned the merits of the franchise model, including some anti-franchise emails, such statements were part of the legislative dialogue and were insufficient to show a discriminatory purpose. The distinction between large and small businesses was also legitimate. The city council viewed franchisees as more akin to large employers than small businesses in their ability to accommodate increased costs. The court found no discriminatory motive in the ordinance's text, context, and structure. Finally, the IFA did not meet its burden of showing that the ordinance would have a discriminatory effect on out-of-state businesses. "The IFA's showing that 96.3 percent of Seattle franchisees are affiliated with out-of-state franchisors and that in-state franchisees will be placed at a competitive disadvantage does not prove that the ordinance will have a discriminatory effect on out-of-state firms," according to the court. If anything, the ordinance's effect was to harm in-state firms, the court noted. The court also found that the IFA had failed to present evidence of the ordinance's effect on out-of-state firms, such as through "diminished franchisor royalties or profitability or show that future franchise development in Seattle will be impaired." "The only thing the affiliation rate shows is that most in-state franchisees have out-of-state relationships and are subject to a disparate minimum wage requirement[,]" but that was not evidence of discriminatory effects on out-of-state firms. In sum, the evidence did "not show that interstate firms will be excluded from the market, earn less revenue or profit, lose customers, or close or reduce stores. Nor does it show that new franchisees will not enter the market or that franchisors will suffer adverse effects." Accordingly, the Ninth Circuit determined that the district court did not err.

Second, the court dismissed the IFA's arguments that the ordinance violated the Equal Protection Clause. The court agreed with the district court that the ordinance must be upheld as long as there is "any reasonably conceivable state of facts that could provide a rational basis for the classification." Here, the district court weighed the affidavits of experts and franchisees explaining "the economic benefits flowing to franchisees" from a franchise system and the ability of franchisees to "handle the faster phase-in schedule." The Ninth Circuit held that the district court did not err in finding a legitimate purpose in the classification and a rational relationship between franchisees and their classification as large employers.

Third, the IFA contended the ordinance discriminated on the basis of protected speech under the First Amendment because two of the three definitional criteria for franchises are based on speech and association: (1) operating under a marketing plan prescribed by a franchisor and (2) associating with a trademark or other commercial symbol. The Ninth Circuit found this construction of the ordinance unpersuasive. As the court noted, the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech. The threshold question is whether conduct with a "significant expressive element drew the legal remedy or the ordinance has the inevitable effect of singling out those engaged in expressive activity." According to the court, "Seattle's minimum wage ordinance is plainly an economic regulation that does not target speech or expressive conduct." Even though franchisees are part of a franchise system associated with a trademark or brand, the ordinance applies to businesses that have adopted a particular business model, not to any message the businesses express. "It is clear that the ordinance was not motivated by a desire to suppress speech, the conduct at issue is not franchisee expression, and the ordinance does not have the effect of targeting expressive activity." Accordingly, the district court did not err in finding that the IFA did not show a likelihood of success on this claim.

Fourth, the IFA argued the Lanham Act preempted the ordinance because it interfered with the use of trademarks. The district court rejected that argument, and the Ninth Circuit affirmed, because the Lanham Act does not expressly preempt state law and the Seattle ordinance, which relates to wages to be paid to employees, falls within the ambit of traditional state regulation. Moreover, the ordinance did not interfere with a franchise's ability to maintain quality, compromise the public's confidence in trademarks, allow misappropriation, or directly interfere with or regulate marks as to be preempted by the Lanham Act.

Fifth, the IFA invoked the privileges and immunities clause of the Washington State Constitution to argue that it guaranteed the IFA's members' fundamental right to carry on business in the state. The court held that the privileges and immunities rights were not implicated "anytime the legislature treats similarly situated businesses differently." Here, all businesses eventually had to pay $15 per hour, and the court repeated that the legislature had reasonable grounds to treat franchise systems with more than 500 employees as large employers for the phase-in schedule.

Despite finding the IFA failed to demonstrate a likelihood of success on the merits on any of its theories, the court went on to address the remaining prongs of a preliminary injunction. It held that the district court erred in evaluating the IFA's evidence of competitive injury and finding no irreparable harm. The IFA had put forth evidence by way of franchisees' declarations indicating that they would face higher labor costs or lose the flexibility to pay workers the wage rate required of non-franchisees as a result of the ordinance. The ordinance's plain text also supported these findings. Therefore, the allegations of competitive injury were neither conclusory nor without factual support, as the district court found. Nonetheless, the IFA did not show that franchisees faced irreparable harm as a result of losing customers or goodwill. The court also concluded that the district court erred in finding that the IFA did not demonstrate that the balance of hardships tipped in its favor. While franchisees would face a higher wage requirement than their competitors if the ordinance went into effect, the city did not make a persuasive showing that it would experience hardships from the issuance of an injunction. The district court, however, correctly concluded that the public interest disfavored an injunction. Not only would many workers receive reduced wages, but Seattle voters would see an ordinance passed as a result of an election enjoined.

Finally, the Ninth Circuit addressed whether it should apply the "serious questions test." Under that test, a plaintiff is entitled to a preliminary injunction by raising "serious questions going to the merits and showing a balance of hardships that tips sharply in the plaintiff's favor, a likelihood of irreparable injury, and that an injunction serves the public interest." The Ninth Circuit deemed it unnecessary to apply this test because the IFA did not raise serious questions going to the merits on any of its claims nor did it show that an injunction was in the public interest. In sum, because the district court correctly denied the IFA's motion for injunctive relief, the Ninth Circuit affirmed.

***Ochoa v. McDonald's Corp.*, Bus. Franchise Guide (CCH) ¶ 15,620, Case No. 14-cv-02098-JD, 2015 WL 6036294 (N.D. Cal. Sept. 24, 2015)**

The U.S. District Court for the Northern District of California dismissed several claims against McDonald's Corp. by employees of its franchisee on the basis that McDonald's was not the plaintiffs' employer, but allowed a claim to proceed that McDonald's was liable as an ostensible agent.

The plaintiffs, past and present employees at a McDonald's franchise, sued both the employer franchisee and McDonald's for violations of the California Labor Code and common law negligence. McDonald's sought summary judgment dismissing the action as against it on the basis that it was not the plaintiffs' employer.

In striking the plaintiffs' Labor Code claim, the court found that, although McDonald's had the ability to exert considerable pressure on its franchisees, the franchisee and its managers had the sole authority to make hiring, firing, wage, and staffing decisions. It found that although McDonald's provided detailed recommendations on crew scheduling and staffing, these were just suggestions, and found other system involvement, such as training franchisees' managers, being the primary leaseholder for the restaurant, requiring franchisees to make purchases through approved vendors, and requiring installation of "bump bars" for employee time tracking were not of the type required to find that McDonald's "exercise[d] control over . . . wages, hours or working conditions." The court similarly found that McDonald's ability to convince an employer to carry out certain acts by threatening economic sanctions did not make it an employer.

The court also found, however, that a jury could reasonably conclude that McDonald's and the franchisee shared an ostensible agency relationship on the basis that the plaintiffs believed McDonald's was their employer because they wore McDonald's uniforms, served McDonald's food in McDonald's packaging, received pay stubs and orientation materials marked with McDonald's name and logo, and applied for the job through McDonald's web site.

The court thus dismissed the plaintiffs' claim for negligence on the basis of California's "new right-exclusive remedy" doctrine because the negligence claims sought to duplicate theories of liability asserted under the California Labor Code.

***Saladworks, LLC v. Workers' Comp. Appeal Board*, Bus. Franchise Guide (CCH) ¶ 15,646, No. 1789 C.D. 2014, 2015 WL 7779915 (Pa. Commw. Ct. Oct. 6, 2015)**

The Commonwealth Court of Pennsylvania agreed with Saladworks, LLC that it was not a statutory employer under Section 302(a) of the Pennsylvania Workers' Compensation Act because its relationship with its franchisee was that of a franchisor and franchisee, not of a contractor and subcontractor.

Guardioso, a former employee of a Saladworks' franchisee, petitioned for benefits against the franchisee employer following a workplace injury. Guardioso then filed a separate claim against the Uninsured Employers Guaranty Fund (UEGF), which filed a joinder petition alleging Saladworks was "an additional employer, agent, statutory employer of the Claimant" and thus jointly and severally liable. Saladworks moved that the joinder petition be dismissed or stricken.

The workers' compensation judge (WCJ) granted the motion to strike on the basis that Saladworks did not know who the employees of any individual franchisee were; had no contact or control over individual franchisee employees; and did not hire, fire, set the hours of, or have any control over any of the franchisee's employees, who were controlled by the franchisee. This decision was reversed on appeal to the Workers' Compensation Appeal Board, which held that the proper test for a statutory employer was not that of an actual employment relationship, but rather to be determined in accordance with § 302(a) of the Act. The Board held that based on the franchise agreement, Saladworks had a contractual obligation to ensure the franchisee had appropriate workers' compensation in place; because it had not done so, it was potentially liable.

Saladworks appealed, arguing the Board misunderstood the nature of its business and that the relevant statute applied only to contractors and subcontractors and not to franchisor/franchisee agreements. The court agreed, finding the work performed by the franchisee under the franchise agreement was not a regular or recurrent part of the business, occupation, profession, or trade of Saladworks, as required under the Act. Rather, it agreed that Saladworks's main business was the sale of franchises to franchisees and that it was not in the restaurant business or the business of selling salads.

NONCOMPETE AGREEMENTS

***Elder Care Providers of Ind., Inc. v. Home Instead, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,617, No. 1:14-cv-01894-SEB-MJD, 2015 WL 6036282 (S.D. Ind. Sept. 14, 2015)**
This case is discussed under the topic heading "Injunctive Relief."

***Jackson Hewitt Inc. v. Cline*, Bus. Franchise Guide (CCH) ¶ 15,645, No. 14-6931, 2015 WL 7779908 (D.N.J. Oct. 29, 2015)**
This case is discussed under the topic heading "Injunctive Relief."

***MetroPCS Pa., LLC v. Arrak*, Bus. Franchise Guide (CCH) ¶ 15,649, No. C15-0769JLR, 2015 WL 9261782 (W.D. Wash. Nov. 4, 2015)**
This case is discussed under the topic heading "Injunctive Relief."

ORAL AGREEMENTS

***Jonibach Mgmt. Trust v. Wartburg Enters., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,621, Civil Action H-10-600, 2015 WL 6036296 (S.D. Tex. Sept. 30, 2015)**
Wartburg Enterprises, Inc. was a distributor of baby seats in the United States for South African company Jonibach Management Trust, doing business as Bumbo International Trust, under an oral distribution agreement. A dispute arose when Wartburg failed to make timely payments for products delivered by Bumbo on credit. Wartburg objected to Bumbo hiring another distributor and refused to distribute the baby seats in its possession. Wartburg also asserted that it was the exclusive distributor in the United States of Bumbo baby seats to Wal-Mart, Toys "R" Us, and Babies "R" Us. Bumbo responded by filing suit in the U.S. District Court for the Southern District of Texas for breach of the distributorship agreement and seeking a preliminary injunction requiring Wartburg to distribute its inventory of baby seats. The court granted the preliminary injunction on the condition that Bumbo post a $2,000 bond. Thereafter, Wartburg distributed its remaining inventory, but also filed counterclaims against Bumbo for breach of contract, fraud, and quantum meruit.

Bumbo thereafter dismissed all of its claims because Wartburg had depleted its inventory of child seats and Bumbo had found a replacement distributor. Bumbo also moved to dismiss Wartburg's counterclaims. The court dismissed all counterclaims with the exception of the breach of contract claim. The breach of contract claim was divided by the court into three separate claims: (1) the "refusal of sale claim" based on Bumbo refusing to sell product to Wartburg; (2) the "customer relationship claim" based on Bumbo taking over Wartburg's customers; and (3) the "retailer limitation claim" based on Bumbo demanding that Wartburg sell only to Wal-Mart, Toys "R" Us, and Babies "R" Us.

The court initially granted summary judgment on all breach of contract claims to Bumbo on the grounds that the statute of frauds, as set forth in Texas Business & Commerce Code § 2.201(a), precluded Wartburg from enforcing the oral distributorship agreement. Wartburg appealed to the Fifth Circuit, which upheld the dismissal as to the refusal of sale claim and the customer relationship claim. However, the court reversed and remanded the dismissal of the retailer limitation claim on grounds, among other things, that an exception to the statute of frauds had been met because Bumbo asserted in court filings that a distributorship agreement existed.

On remand to the district court, the court heard an additional motion for summary judgment filed by Bumbo that characterized Wartburg's retailer limitation claim as a claim that Bumbo wrongfully obtained a preliminary injunction requiring Wartburg to distribute its remaining baby seats. Bumbo argued that Wartburg had no damages based on the rule that a party injured by the issuance of an injunction later determined to be erroneous has no claim in the absence of a bond. Wartburg argued that its claim was more broadly related to a breach of the terms of the oral distribution agreement. The court agreed with Wartburg on that point. The court went on to note, however, that Wartburg failed to timely disclose information relating to its damages, as required by Federal Rule of Civil Procedure 26. Bumbo sought exclusion of damage evidence under Rule 37. The court denied Bumbo's motion on the policy ground favoring disposition of a case on its merits. The court thus determined that Wartburg's retailer limitation claim survived Bumbo's motion for summary judgment.

As to Wartburg's motion for summary judgment in favor of its retailer limitation claim, the court noted that the oral distributorship agreement at issue involved a mix of goods and services, but that goods were a "dominant factor." Thus, the Texas version of UCC article 2 applied. The court further noted that pursuant to the applicable provisions of UCC article 2, including Section 2.309 where a contract is for an indefinite period, the contract can be terminated by either party upon reasonable notice. In such instance, recovery for damages for breach of the contract is limited to the notice period. Based on those statements of law, the court concluded that it could not grant Wartburg's motion for summary judgment because the "he said/she said" nature of the allegations raised a number of factual issues relating to the specific terms of the oral agreement.

PETROLEUM MARKETING PRACTICES ACT (PMPA)

***Amphora Oil & Gas Corp. v. Cumberland Farms, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,633, No 15-cv-4638 (ADS) (AYS), 2015 WL 7779899 (E.D.N.Y. Oct. 19, 2015)**

The plaintiff, Amphora Oil & Gas Corp., brought an action in the U.S. District Court for the Eastern District of New York against defendants Cumberland Farms, Inc., its subsidiary Gulf Oil Limited Partnership, and 750 Motor Parkway Realty LLC to enforce rights under lease and franchise agreements, seeking relief under the Petroleum Marketing Practices Act (PMPA). Following Cumberland Gulf's decision not to renew the underlying lease for the service station, it sent a notice of termination to Amphora for both the franchise agreement and sublease. Before the court was a motion, brought by Amphora, for a preliminary injunction preventing the defendants from (1) interfering with Amphora's operation of the service station, (2) terminating the lease and franchise agreements at issue, and (3) tolling the relevant time periods set forth in those agreements while the litigation is pending. The court denied Amphora's motion for a preliminary injunction.

The court found that Congress enacted the PMPA due to "the imbalance of power in favor of refiners and franchisers in the making, modifying, renewal and termination of contracts with franchisees" and that the statute prohibits termination or nonrenewal of a franchise relationship by the franchisor, except in certain scenarios. One of those scenarios is the occurrence of an event that is both relevant to the franchise relationship and, as a result of that event, where termination or non-renewal is therefore "reasonable."

The defendants argued the expiry of Cumberland Gulf's underlying lease was a scenario in which termination of the lease was permitted by the statute. Section 2802(c)(4) of the PMPA stipulated that the expiry of an underlying ground lease could provide a basis for a franchisor to terminate or not renew a franchise relationship, provided that, among other things, within ninety days of giving notice the franchisor offers to assign to the franchisee any option to extend the underlying lease or purchase the premises. Because Cumberland Gulf offered to assign to Amphora the rights that it had to extend the underlying lease, the court found that the franchisor's obligation to offer to assign the option to extend the lease to its franchisee was satisfied. The court's conclusion was not altered by the fact that Cumberland Gulf predicated its offer of assignment on an unconditional release of future liability.

Given that the termination of the franchise agreement was terminated pursuant to the PMPA, the court found that the motion did not present sufficiently serious questions going to the merit to warrant injunctive relief. Accordingly, the plaintiff's motion was denied.

***Transbay Auto Service, Inc., v. Chevron USA Inc.*, Bus. Franchise Guide (CCH) ¶ 15,657, Nos. 13-15439, 3:09-cv-04932-SI, 14-15297, 2015 WL 9261787 (9th Cir. Nov. 30, 2015)**

The defendant franchisor, Chevron USA Inc., appealed a decision of the U.S. District Court for the Northern District of California that found that Chevron violated the Petroleum Marketing Practices Act (PMPA) by failing to provide a bona fide offer to sell a gas station to its franchisee, Transbay Auto Service, Inc. The Ninth Circuit determined that the third party appraisal of the property should have been admitted as an adoptive statement and that the lower court improperly excluded it as evidence. As a result, the Ninth Circuit reversed the district court's decision to award $495,000 in damages, remanding the matter back for another trial.

The district court had awarded $495,000 in damages against Chevron for failing to make an offer that approached fair market value in the course of making a "bona fide offer" under the PMPA. Transbay had accepted an offer under protest to buy the gas station property at $2.375 million and agreed to have the property appraised in order to obtain financing. The appraisal, which valued the property at $2.52 million and was provided to another bank in order to secure the loan, was not admitted into evidence by the lower court on the basis that Transbay's owner had not actually looked at it and thus did not "actually hear, understand, and accede to the statement."

The Ninth Circuit used the "possession plus" test to determine whether the appraisal was an adopted statement and thus could be admitted as evidence under Federal Rule of Evidence 801(d)(2)(B). Previous courts had held that a party who relies on a third-party document by submitting it to another, albeit after reviewing the document, constitutes adoption. The court in this case found that, although this was a novel scenario, it was irrelevant that Transbay did not review the document first. The court held that "a party who is only vaguely aware of the contents of a document manifests an intent to adopt these contents by using the document to accomplish an objective." In this case, the objective was obtaining a loan to finance the purchase of the gas station property. The jury should have been presented with the appraisal, the verdict was accordingly reversed by the court, and the case was remanded for a new trial.

STATUTE OF LIMITATIONS

***TL of Florida, Inc., v. Terex Corp.*, Bus. Franchise Guide (CCH) ¶ 15,624, No. 13-2009-LPS, 2015 WL 6036303 (D. Del. Sept. 24, 2015)**

TL of Florida, Inc. alleged that it would not have entered into a distributorship agreement with Terex Corporation had Terex not misrepresented four material facts: (1) that there was a market for Terex heavy equipment in Southern Florida (the equipment market representations); (2) that there was a market for Terex parts in Southern Florida; (3) that Terex was in financial distress and selected distributors on the basis of whether they were financially able to purchase whole goods (the dealership selection representative); and (4) that TL was surrounded by dealers with authorized Terex parts that could sell those parts to customers without having to maintain the inventory of whole goods or infrastructure that TL would have to maintain. Upon becoming aware of the alleged misrepresentations, TL filed suit in the U.S. District Court for the District of Delaware claiming fraudulent non-disclosure, negligent misrepresentation, violation of the Florida Deceptive and Unfair Trade Practices Act, and breach of the implied covenant of good faith and fair dealing.

Terex brought a motion for summary judgment, arguing TL's claims pertaining to equipment market representations and dealership selection representations were beyond the three-year limitation period and barred because of interrogatory responses. Terex also sought judgment on the pleadings, arguing claims based on dealer representations and omissions were barred because they were expressly contradicted in, or adequately covered by, the dealership agreement between the parties.

The court granted summary judgment motion with respect to the equipment market representations, which it was undisputed were outside the limitation period, but denied summary judgment with respect to the dealership selection representations, holding that although they were related to the equipment market representations, they did not overlap to such an extent that the bar should be extended to the dealership selection representations. The court denied Terex's motion for summary judgment on TL's counterclaims except to the extent those counterclaims were based on time-barred representations.

In its motion for judgment on the pleadings, Terex argued claims based on dealer representations and omissions were barred because they were expressly contradicted in, or adequately covered by, the dealership agreement. The court held that a party to a contract could not press fraud claims that were contradicted by or adequately addressed in a subsequent agreement, but that the relevant portions of the dealership agreement neither contradicted nor adequately addressed TL's claims based on dealer representations and omissions. The court accordingly denied the motion for judgment on the pleadings.

***Two Bros. Distrib. Inc. v. Valero Mktg. & Supply Co., LLC*, Bus. Franchise Guide (CCH) ¶ 15,651, No. CV-15-01509-PHX-DGC, 2015 WL 9261784 (D. Ariz. Nov. 25, 2015)**

The plaintiffs in this case included Two Brothers Distributing, Inc., which was a gasoline distributor to third-party retailers in the Phoenix area, and ten associated gasoline retailers (the station plaintiffs). Defendant Valero Marketing and Supply Company is a foreign corporation that sells gasoline at the wholesale level and at its own retail stations. In 2013, Valero spun off all of its retail operations to CST Brands, Inc. In February 2007, Two

Brothers entered into a distributor agreement with Valero pursuant to which Valero agreed to sell, and Two Brothers agreed to purchase, a minimum quantity of gasoline at a price fixed by Valero. Around the same time, Valero and Two Brothers entered into brand conversion incentive agreements for each of the stations supplied by Two Brothers. Under those agreements, the stations became Valero-branded stations and were approved to purchase fuel from Two Brothers under the terms of the distributor agreement. Between the consummation of the distributor agreement in February 2007 and August 2009, Two Brothers frequently complained to Valero about its pricing but nonetheless executed two other distributor agreements in July 2011 and July 2014.

In May 2015, the plaintiffs filed a complaint against Valero in Maricopa County Superior Court and the defendant removed to the U.S. District Court for the District of Arizona. In August 2015, the plaintiffs filed an amended complaint asserting claims for breach of contract, fraud, tortious interference, and violation of the Robinson–Patman Act (RPA). Each of the claims related to Valero's pricing practices under its contracts with Two Brothers, which the plaintiffs alleged were unfair and designed to drive them out of business. Valero moved to dismiss all claims for failure to state a claim. The court granted the motion to dismiss the plaintiffs' fraud and RPA claims but denied it as to the remaining claims.

First, the court dismissed the plaintiffs' fraud claim as time-barred. In their complaint, the plaintiffs alleged that Valero made several misrepresentations during the negotiations that culminated in the execution of the distributor agreement and brand conversion incentive agreements in 2007, that the plaintiffs noticed discrepancies between Valero's representations and its behavior almost immediately, and that the plaintiffs frequently complained to Valero about its pricing between 2007 and August 2009. Based on these allegations, the court found the claim to be time-barred. The court found that the plaintiffs were aware of the facts underlying their fraud claim by August 2009 at the latest, which fell outside the applicable three-year statute of limitations that expired in September 2012.

Second, the court held that the RPA claim failed as a matter of law. Two Brothers contended that Valero violated the RPA by charging Two Brothers a higher price for Valero-branded fuel than it contemporaneously charged its own Valero-owned stations. The court found that the claim was insufficient as a matter of law because the RPA "does not apply to intra-corporate transfers or transfers between a parent and a wholly-owned subsidiary." Further, the Seventh Circuit has specifically held that the RPA "does not apply to transfers of gasoline from a gasoline supplier to its own retail station." *O'Byrne v. Cheker Oil Co.*, 727 F.2d 159, 164 (7th Cir. 1984). The plaintiffs insisted that Valero violated the RPA by giving price breaks to stations formerly owned by Valero after those stations were spun off to CST. Because this argument was not fairly set forth on the face of the complaint, the court granted plaintiffs leave to amend it to add this allegation.

Third, the court did not dismiss the plaintiffs' claim for tortious interference with contract, rejecting Valero's arguments that the claim was time-barred, insufficiently plead, and that the station plaintiffs lacked standing. The court first considered whether the claim was barred under the applicable two-year statute of limitations. In the complaint, the plaintiffs alleged that Valero engaged in tortious interference by manipulating prices so as to disrupt the relationships between Two Brothers and the station plaintiffs. Although the complaint was mainly concerned with pricing activities from 2008 to 2010, it also alleged that Valero continued to manipulate prices to the present day. Based on these allegations, the court did not dismiss the claim as time-barred, but stated that it would consider only events occurring on or after May 20, 2013 (two years prior to commencement of the lawsuit) in determining whether plaintiff stated a claim. On this point, the court cited *Garcia v. Sumrall*, 121 P.2d 640, 643 (Ariz. 1942), for the proposition that "damages may be recovered for all of the statutory period prior to the commencement of the action[.]" Next, the court concluded that the plaintiffs adequately plead a claim for tortious interference under Arizona law. The complaint contained allegations that, during the relevant time period, Two Brothers had exclusive contracts with station plaintiffs to sell fuel to each station, Valero knew about these contracts, Valero engaged in price manipulation in bad faith with the intention of driving the plaintiffs out of business and reducing competition among gasoline retailers, Valero's conduct made Two Brothers' performance more expensive, and plaintiffs were economically harmed as a result. These allegations established, the court determined, a prima facie case for tortious interference under Arizona law. Last, the court rejected Valero's contention that the station plaintiffs lacked standing to assert this claim. The station plaintiffs alleged that they suffered direct economic injury as a result of Valero's tortious interference with Two Brothers' performance; the court held that was sufficient injury to support their claim.

Finally, the court addressed Valero's arguments that the plaintiffs' contract claims should be dismissed as time-barred, waived, and foreclosed by the integration clauses in the contracts and the statute of frauds. Addressing the statute of limitations issue first, the court found that the claims were not barred by the four-year statute of limitations applicable to contract claims. The plaintiffs alleged in their complaint that Valero materially breached the 2007, 2010, and 2013 distributor agreements and the various brand conversion incentive agreements by setting prices in bad faith. Although timely claims would have included breaches after May 20, 2011 (four years before the lawsuit was filed), and some of the breaches alleged occurred earlier, the plaintiffs also alleged that the breach was ongoing until at least 2013. Further, at this early stage, the court determined that it did not have "sufficient factual information regarding the alleged breaches to draw fine lines between timely and untimely breach claims." Therefore, the contract claims were not dismissed as untimely. Next, the court rejected Valero's argument that Two Brothers waived its claims by entering into contracts with Valero after learning of the alleged price manipulation. “Because waiver is an affirmative defense and a question of fact, it is not properly resolved on a motion to dismiss unless the plaintiff’s claim to have preserved its rights is totally implausible.” There was no such implausibility here; thus, the court did not dismiss the contract claims on waiver grounds. The court, however, did dismiss the station plaintiffs’ breach of contract claim without leave to amend based on lack of standing. The station plaintiffs simply had no standing to assert claims based on the contracts between Two Brothers and Valero because they were neither parties to those agreements nor third-party beneficiaries. The contracts expressly included “no third-party beneficiary” clauses and disclaimed any relationship between Valero and “any Dealer(s) or Distributor” of Two Brothers. With respect to the plaintiffs’ oral contract claims, the court also dismissed those claims based on the statute of frauds.

STATUTORY CLAIMS

Motor Werks Partners, LP v. General Motors LLC, Bus. Franchise Guide (CCH) ¶ 15,622, No. 14 CV 119, 2015 WL 6036298 (N.D. Ill. Sept. 29, 2015)

Motor Werks Partners, LP owned and operated a Cadillac dealership in Barrington, Illinois. In 2000, the plaintiff requested and received permission from General Motors to move the dealership location from a former site to Barrington. In 2013, the plaintiff requested permission to move the dealership back to its former location to move into a renovated auto mall. The defendant denied the request on the grounds that operating in the new location would violate the franchise agreement requirement that Cadillacs not be serviced and sold in close proximity of competitor brands. The plaintiff brought an action in Illinois state court against the defendant, arguing that the defendant’s refusal to grant permission was a violation of several provisions of the Illinois Motor Vehicle Franchise Act. The defendant removed the case to the U.S. District Court for the Northern District of Illinois based on diversity jurisdiction. The plaintiff moved for summary judgment that the defendant’s refusal was unlawful under the Act.

The court analyzed the matter under Section 4(g) of the Act, which prohibits manufacturers from conditioning their approval of franchise changes on the dealer’s willingness to enter into an exclusive use agreement. The defendant argued that Section 4(g) did not apply because the plaintiff never actually entered into any agreement in association with the proposed relocation. The court disagreed, noting that the Act prohibits manufactures from indirectly conditioning changes on entering into an exclusive use agreement. The court held that the franchise agreement, which was renewed in 2012, contained the offending provision and that GM’s later refusal to grant permission was simply an attempt to do something sequentially that it could not have done all at once. The defendant also argued that Section 4(d)(8) of the Act, which makes it a violation for a manufacturer to compel a dealer to underutilize its facilities, limits the scope of Section 4(g). The court disagreed with this as well, holding that nothing in the Act suggests such a limitation. Finally, the defendant argued that there could be no violation of the Act because GM never approved anything, conditional or otherwise. The court once again disagreed, holding that the Act applies not only to consummated deals, but also to deals that were not consummated as a result of proscribed conduct. The court ultimately concluded that, although its reading of Section 4(g) favored the plaintiff, the court would not grant summary judgment because of certain remaining factual disputes.

***Paso del Norte Motors, LP v. Tri Star Partners, LLC*, Bus. Franchise Guide (CCH) ¶ 15,632, No. EP-15-CV-33-PRM, 2015 WL 7779900 (W.D. Tex. Oct. 20, 2015)**

A Texas Kia dealership was allowed to proceed with claims that a competitor in the same market filed a false Franchised Motor Vehicle Dealer's License Application with the Texas Department of Motor Vehicles.

This case arose out of a dispute between two Kia dealerships in El Paso. Plaintiff Paso del Norte Motors, LP was the sole Kia dealer in the El Paso market until defendant Tri Star Partners, LLC reached an agreement with Kia Motors America, Inc. (KMA) authorizing the defendant to operate a second Kia dealership in the El Paso market. To operate the dealership, the defendant was required to file a Franchised New Motor Vehicle Dealer's License Application with the Texas Department of Motor Vehicles. To prevent the opening of a second Kia dealership in the same market, the plaintiff filed a protest with the vehicle agency alleging that no good cause existed to issue the license to the defendant. To resolve the protest and clear the way for two Kia dealerships in El Paso, the plaintiff, the defendant, and KMA assented to a written confidential settlement agreement. Under the settlement agreement, the plaintiff received $850,000 from the defendant and KMA and at least 150 new Kia vehicles from KMA. In exchange, the plaintiff agreed to dismiss the protest case against the defendant and not to file any claim or otherwise hinder the opening or operation of the defendants' Kia dealership.

Sometime thereafter, the plaintiff learned that the defendant's application purportedly contained false information regarding the defendant's management and ownership structure and filed suit in Texas state court in January 2015. Although the plaintiff initially obtained an ex parte temporary restraining order (TRO) preventing the defendant from opening its new Kia dealership, the defendant obtained the necessary licenses and began operating its dealership once the TRO expired. After the defendant removed the case to the U.S. District Court for the Western District of Texas, the plaintiff filed another complaint with the vehicle agency in February 2015, alleging that the defendant violated the Texas Transportation Code by submitting a false application regarding its management and ownership structure and that the application was untimely. The plaintiff asserted these same claims in the lawsuit. In March 2015, the vehicle agency's director issued a letter determining that (1) the plaintiff lacked standing to bring a claim under the code; and (2) even if the plaintiff had standing, the defendant was in compliance with the vehicle agency requirements because the defendant properly amended its licensing information to reflect a change in its management. Moreover, the department's current records were complete and accurate. Based on this letter, the defendant filed a motion for summary judgment alleging that res judicata barred the plaintiff's claims and that the court should defer to the vehicle agency's decision to dismiss the complaint.

The court held that res judicata did not attach to the vehicle agency's decision because Texas law provides a specific framework for the vehicle agency to issue final orders that can be given the force and effect of a final judgment, including separate findings of fact with respect to each issue, which the vehicle agency failed to do here.

On the issue of deference to the agency's decision, the court noted that Texas law has adopted agency deference regarding its own state agencies. *See R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 625 (Tex. 2011). Under this doctrine, a Texas agency's interpretation of a statute will generally be upheld "so long as the construction is reasonable and does not contradict the plain language of the statute." Taking each of the vehicle agency's determinations, the court declined to afford any deference to the determination that the plaintiff lacked standing to bring a claim under the code. The code expressly permits "any interested person" to bring an action and the agency did not even analyze this language of the statute. Moreover, the plaintiff was an interested person, the court concluded. As a Kia dealer, the plaintiff no doubt had an interest in ensuring that the defendant, a fellow competitor Kia dealer, complied with the code. Next, although the agency's letter supported a finding that defendant did not falsify its application, and the plaintiff presented no evidence to the contrary, the court was troubled by the agency's determination that the defendant's amendment to the application was conducted in a "reasonable time" when it took defendant nearly six months to amend. According to the court, only a fact-finder could determine whether six months was a "reasonable time" to amend under the relevant statute, which precluded granting summary judgment. Accordingly, the defendant's motion for summary judgment was denied.

TERMINATION AND NONRENEWAL

Amphora Oil & Gas Corp. v. Cumberland Farms, Inc., Bus. Franchise Guide (CCH) ¶ 15,633, No 15-cv-4638 (ADS) (AYS), 2015 WL 7779899 (E.D.N.Y. Oct. 19, 2015)

This case is discussed under the topic heading Petroleum Marketing Practices Act (PMPA).

***Azhar Chaudhry, v. Int'l House of Pancakes, LLC,* Bus. Franchise Guide (CCH) ¶ 15,656, 15-cv-3504, 2015 WL 9261788 (N.D. Ill. Nov. 18, 2015)**

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

***Colonial Chevrolet Co. v. United States*, Bus. Franchise Guide (CCH) ¶ 15,613, Nos. 10-647C, 11-100C, 12-900C, 2015 WL 6036279 (Ct. Cl. Sept. 9, 2015)**

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

***One Hour Air Conditioning Franchising, LLC v. Dallas Unique Indoor Comfort, Ltd.*, Bus. Franchise Guide (CCH) ¶ 15,612, Case No. 8:13-cv-3278-T-30JSS, 2015 WL 6036275 (M.D. Fla. Sept. 11, 2015)**

Our Hour Air Conditioning Franchising LLC filed suit against Dallas Unique Indoor Comfort Ltd. in the U.S. District Court for the Middle District of Florida for several claims, including breach of contract, unfair competition, trademark infringement, and false designation of origin. The franchise agreement at issue related to an air conditioning repair franchising concept that advertised itself as ensuring a repairman would arrive within an hour or the customer would not pay. The franchisor's logo that included a round-faced stopwatch and the slogan "Always on Time . . . Or You Don't Pay a Dime!" The franchise agreement provided that if a franchisee failed to ensure timely arrival, the franchisee would be required to do the repair work for free. The franchise agreement applicable in the case did not have a noncompete agreement.

The franchisee terminated the franchise agreement after operating a franchise in the Dallas/Fort Worth area for a number of years. The franchisee went on to open a non-franchised air conditioning repair business named On Time Experts with a logo that included a round-faced clock and the slogan "When Comfort Can't Wait." The franchisor alleged in its suit that the franchisee had breached a post-termination obligation in the franchise agreement to refrain from using any name or mark similar to the franchisor's slogan and marks. Both parties moved for summary judgment. In addition, the franchisee filed a motion under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), seeking to exclude experts identified by the franchisor on such topics as damage calculation and marketing issues allegedly relevant to whether the marks were "similar."

The court refused to exclude the experts, principally on the grounds that *Daubert* is a gate-keeping function; because the matter was a bench trial, the court was its own gate-keeper and would accord the expert testimony its proper weight. The court also denied both parties' summary judgment motions on the grounds that the case was "rife" with disputed facts, including whether the franchisee's subsequent business was sufficiently similar to the franchisor's to constitute a breach of the franchise agreement; whether the breach, if one occurred, was material; and whether there were material damages.

***Rochester Drug Co-Operative, Inc. v. Biogen Idec U.S. Corp.*, Bus. Franchise Guide (CCH) ¶ 15,626, No. 6:15-cv-6388 EAW, 2015 WL 6036301 (W.D.N.Y. Sept. 18, 2015)**
This case is discussed under the topic heading "Antitrust."

***Safe Step Walk-In Tub Co. v. CKH Indus., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,629, No. 15-cv-07543 (NSR), WL 77779898 (S.D.N.Y. Oct. 26, 2015)**
This case is discussed under the topic heading "Injunctive Relief."

***Wilbern v. Culver Franchising Sys., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,608, No. 13 C 3269, 2015 WL 6036176 (N.D. Ill. Sept. 29, 2015)**
This case is discussed under the topic heading "Unfair Competition and Unfair and Deceptive Practices."

TORTIOUS INTERFERENCE

***Two Bros. Distrib. Inc. v. Valero Mktg. & Supply Co., LLC*, Bus. Franchise Guide (CCH) ¶ 15,651, No. CV-15-01509-PHX-DGC, 2015 WL 9261784 (D. Ariz. Nov. 25, 2015)**
This case is discussed under the topic heading "Statute of Limitations."

***IP Truck Ctr., LLC v. Volvo Trucks N. Am.*, Bus. Franchise Guide (CCH) ¶ 15,655, No. 15-cv-12381, 2015 WL 9261789 (E.D. Mich. Nov. 20, 2015)**
The U.S. District Court for the Eastern District of Michigan dismissed a truck dealer's tortious interference with business relationship claim against a truck manufacturer, based on the dealer's failure to show that the manufacturer's conduct interfered with any of its business relationships and the claim being a mere restatement of the breach of contract claim, which was insufficient to state a tort claim under Michigan law.

Plaintiff VIP Truck Center, LLC sued defendant Volvo Trucks North America alleging that Volvo breached and wrongfully terminated a dealer sales and service agreement between the parties. VIP asserted five claims, including claims for breach of contract and "Tortious Interference with Present and Future Business." VIP's tortious interference claim alleged that Volvo: (1) interfered with VIP's relationships with employees, customers, suppliers, and others; (2) "refused to objectively evaluate the market area given the available product supplied to Volvo . . . and the limitations of the market and customer demand;" and (3) "adopted an arbitrary, capricious, and inequitable system for measuring sales performance penetration by VIP in a bad faith attempt to pretextually and constructively terminate the franchise and deprive VIP of the value of its franchise." Volvo moved to dismiss the tortious interference claim for failure to state a claim.

The court agreed that VIP's tortious interference claim was deficient under Michigan law. In Michigan, the elements of tortious interference with a business relationship are: (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy on the part of the defendant, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resultant damage to the plaintiff. Applying these factors, the court found that VIP failed to sufficiently allege that Volvo's conduct induced or caused termination of any of its business relationships or expectancies. VIP's complaint contained no allegations that any person or entity declined to do business with VIP and/or terminated a relationship with VIP because of any act or omission by Volvo. The general allegation that Volvo interfered with VIP's relationships with employees, customers, suppliers, and others was not enough; it alleged no facts and was a mere conclusion. Moreover, the claim was a mere restatement of the breach of contract claim, and under Michigan law, it is "no tort to breach a contract." VIP based its tortious interference claim entirely on conduct it alleged was in breach of the parties' agreement. For example, VIP's breach of contract claim alleged that Volvo wrongfully refused to supply VIP with certain vehicles, assigned VIP an unfairly large area of responsibility, and failed to fairly apply its internal policies to VIP. But if the parties had no contract, then Volvo would have had no obligation to do any of the foregoing. Because Michigan law requires that a tort be independent of a contract, and VIP's tort claim was entirely dependent upon, not independent of, the parties' contract, the court granted Volvo's motion to dismiss VIP's tortious interference claim.

TRADEMARK INFRINGEMENT

***Choice Hotels Int'l, Inc. v. Zeal, LLC*, Bus. Franchise Guide (CCH) ¶ 15,623, No. 4:13-cv-1961, 2015 WL 6036291 (D.S.C. Sept. 29, 2015)**
This case is discussed under the topic heading "Injunctive Relief."

***Fruit Flowers, LLC v. Jammala, LLC*, Bus. Franchise Guide (CCH) ¶ 15,607, Civil Action No. 14-5834 (ES), 2015 WL 6036173 (D.N.J. Sept. 29, 2015)**
A franchisor obtained default judgment against a franchisee that failed to meet its financial obligations. The franchisor also obtained an injunction against the franchisee's continued use of its trademark following termination of the franchise agreement.

Fruit Flowers, LLC (FFL) owned registered trademarks in connection with its fruit product designs and ran a franchising program. The defendants entered into a franchise agreement that allowed them to use FFL's trademarks in exchange for royalty payments. Upon failure to pay and thirty days' written notice, FFL could terminate the agreement. The defendants defaulted on their payments and the deficiencies were never cured. As a result, FFL terminated the agreement. Despite the termination, the defendants continued to use FFL's trademarks in their store and online.

The clerk of the U.S. District Court for the District of New Jersey entered default for failure to appear, plead, or otherwise defend the case. FFL then sought default judgment and an injunction enjoining the defendants' unauthorized use of FFL's trademarks.

As a preliminary item, the court determined that it had the requisite subject and personal jurisdiction in this matter because the Lanham Act is a federal trademark statute, trademark infringement is a violation of that Act, and the defendants were resident in New Jersey.

The court found that the plaintiff demonstrated that it was the owner of these marks and the marks were validly and legally protectable. Once the franchise agreement was terminated, the defendants' continued use of the trademark was unauthorized and thus in violation of the Lanham Act. The court did not engage in a detailed analysis of whether the use of the mark created confusion, simply noting that there is a high likelihood of confusion where an infringer uses the exact trademark. The court determined that because the defendants were using the trademark concurrently with FFL, this would create consumer confusion. Thus, the court determined that the defendant violated the Lanham Act and there was a sufficient cause of action for the purposes of the default judgment motion.

The court then considered whether default judgment was appropriate in this case, considering three factors: (1) prejudice to the plaintiff if default is denied; (2) whether the defendant appears to have a litigable defense; and (3) whether the defendants' delay is due to culpable conduct. Because the defendants failed to plead or otherwise defend, the court concluded that it could not assess whether it had a meritorious defence or whether the delay was due to culpable conduct. Further, the court noted that where the defendants have not answered a complaint or otherwise availed themselves of an opportunity to defend, if default is not entered, no other recourse would be available to the plaintiff. On this basis, the court determined that default judgment was proper.

The court then granted a permanent injunction because an injunction is the "usual and standard remedy" under the Lanham Act. Further, FFL demonstrated that: (1) there was irreparable injury; (2) other remedies would be inadequate; (3) on the balance of hardships, a remedy in equity was warranted; and (4) that the public interest would not be disserved by a permanent injunction.

***Hetronic Int'l, Inc. v. Hetronic Germany GmbH*, Bus. Franchise Guide (CCH) ¶ 15,647, No. CIV-14-650-C, 2015 WL 9261779 (W.D. Okla. Nov. 6, 2015)**

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

***One Hour Air Conditioning Franchising, LLC v. Dallas Unique Indoor Comfort, Ltd.*, Bus. Franchise Guide (CCH) ¶ 15,612, Case No. 8:13-cv-3278-T-30JSS, 2015 WL 6036275 (M.D. Fla. Sept. 11, 2015)**

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

***Rib City Franchising, LLC v. Bowen*, Bus. Franchise Guide (CCH) ¶ 15,637, Case No. 2:15-cv-00636, 2015 WL 7779907 (D. Utah Nov. 3, 2015)**

Rib City Franchising LLC is a franchisor of barbeque restaurants around the country. Way Out West Restaurant Group, Inc. (WOW) was a franchisee. In July 2015, Rib City terminated its licensing agreement with WOW following various alleged breaches, including failure to make required payments. The principal of WOW (Jorgensen) alleged she had assigned the franchise agreement to a former Rib City manager (Bowen). Thereafter, Jorgensen changed the name of the restaurant to Pig City BBQ, while keeping the same phone number and website. Rib City also alleged that WOW did not change the décor at the restaurant, offered a substantially similar menu, and kept using trade secret information. Rib City filed suit in the U.S. District Court for the District of Utah against WOW, Jorgensen, and Bowen, making claims for breach of contract, trademark infringement, unfair competition, misappropriation of trade secrets, and civil conspiracy. Rib City sought a preliminary injunction requiring the defendants to cease using Rib City marks; disable all websites and social media pages; disconnect the phone number; cease using the name Pig City BBQ on the grounds that it is confusingly similar to Rib City; remove all Rib City trade dress from the premises; and cease using any confidential, proprietary, or trade secret information.

The court addressed whether Rib City was entitled to a preliminary injunction, focusing on the likelihood that Rib City would prevail on its various claims. As to the trade secret and civil conspiracy claims, the court noted that allegations made regarding WOW's use of proprietary information and products were insufficient to show that Rib City would prevail. As to the trademark infringement claim, the court analyzed various factors, including the fact that the Pig City BBQ mark differed substantially from the Rib City mark. The court also concluded that Rib City had failed to establish that its mark was conceptually or commercially strong. Furthermore, the court held that Rib City had failed to provide credible evidence of customer confusion. The court stated that evidence that Bowen intended to produce a product similar to Rib City was not sufficient. Rather, Rib City was required to provide evidence that Bowen intended to copy particular marks for the purpose of deceiving customers. The court next addressed Rib City's trade dress claims. The court held that demonstrating success on the merits of such claim required Rib City to show that: (1) its claimed dress was either inherently distinctive or had acquired secondary meaning, (2) the operation of the

Pig City restaurant created a likelihood of confusion, and (3) Rib City's claimed trade dress is nonfunctional.

The court concluded that Rib City had failed to provide facts demonstrating the required elements. Nothing in Rib City's décor, the court found, would intrinsically serve to identify a particular source that signals to customers a particular brand.

TRANSFERS

RWG Ventures, Inc. v. Sunoco, Inc. (R&M), Bus. Franchise Guide (CCH) ¶ 15,654, Civil Action No. 1:15cv-0662 (AJT/MSN), 2015 WL 9261781 (E.D. Va. Nov. 20, 2015)

Franchisees that operated Sunoco branded gas stations and convenience stores in Virginia filed suit against franchisor Sunoco, Inc. (R&M) in the U.S. District Court for the Eastern District of Virginia, alleging that Sunoco violated the Virginia Petroleum Products Franchise Act (VPPFA) in relation to a transfer of the franchise. The VPPFA provides that "refiner" franchisors are prohibited from selling, transferring, or assigning their interest in certain gas station properties unless the franchisor "first either made a bona fide offer to sell, transfer, or assign to the dealer the franchisor's interest in the premises . . . or, if applicable, offered to the dealer a right of first refusal." The plaintiffs sought a declaratory judgment that Sunoco violated the VPPFA by transferring certain gas stations at issue to Sunoco, LLC without providing the plaintiffs with a right of first refusal. The plaintiffs also sought damages and an injunction requiring Sunoco to make a bona fide offer to purchase the premises to the plaintiffs.

Sunoco argued that it was not subject to the VPPFA for three reasons: (1) Sunoco is not a "refiner" under the VPPFA because neither it nor any of its affiliates refine crude oil to produce motor fuel; (2) even if Sunoco is subject to the VPPFA, the transfer was to an affiliate and therefore was not a transfer to "another person," as required by the statute; and (3) the applicable transfer occurred prior to the amendment to the VPPFA that added the right of first refusal requirement.

The court addressed each argument. The court first determined that Sunoco was a refiner because the definition under the VPPFA includes affiliates that refine crude oil into motor fuel. Sunoco had a substantial, although not controlling, interest in refiner Philadelphia Energy Solutions, LLC. The court concluded that the relationship was sufficient to qualify as an affiliate for the purposes of the VPPFA. Next, the court addressed whether the transfer was to "another person" as required under the VPPFA. The court determined that a person can include a company and may even include multiple legal entities. The court also concluded that Sunoco controlled Sunoco, LLC either through its direct ownership of membership interests or through other entities Sunoco controlled. The court therefore concluded that Sunoco, LLC was not "another person" under the statute. Finally, the court addressed whether the transfer occurred before the applicable amendment to the VPPFA. The court determined that a complete and lawful transfer of the property was concluded approximately one month prior to the enactment of the amendment.

For those reasons, the court concluded that the VPPFA did not apply and that Sunoco was entitled to judgment as a matter of law.

UNFAIR COMPETITION/UNFAIR AND DECEPTIVE PRACTICES

***Wilbern v. Culver Franchising Sys., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,608, No. 13 C 3269, 2015 WL 6036176 (N.D. Ill. Sept. 29, 2015)**
The U.S. District Court for the Northern District of Illinois refused to strike proposed expert witness testimony and declined to strike all but one claim following allegations from an African American franchisee that he had been differentially treated by the franchisor to the detriment of his business.

Michael Wilbern and Wilbern Enterprises, LLC alleged Culver Franchising System, Inc. (CFSI) engaged in a pattern of racial discrimination in violation of 42 U.S.C. § 1982, which prohibits discrimination in making and enforcing contracts. Wilbern had repeatedly requested a Culver's franchise on the South Side of Chicago, but alleged CFSI steered him away from the predominantly African American neighborhood to a western suburban location in Franklin Park. When the Franklin Park franchise experienced financial difficulties, CFSI allegedly refused to make accommodations given to other franchisees and lulled Wilbern into thinking he would receive support and financial assistance before engaging in a calculated scheme to string him along prior to terminating the franchise agreement upon bankruptcy. CFSI sought to strike proposed testimony from an expert witness and to obtain summary judgment on a number of counts.

CFSI sought to strike proposed testimony from Wilbern's expert to the effect that CFSI had departed from normal practice with respect to Franklin Park to the detriment of Wilbern; that the decision to deny franchises at sites likely to be more successful had not made sense from a business perspective; and that Wilbern had been treated differentially than other franchisees. On the basis that the expert was a member of the American Association of Franchisees and Dealers and had published numerous relevant articles, the court rejected CFSI's argument that the expert was not qualified in restaurant franchising. It further ruled that he had not "cherry picked" data in evaluating disparate treatment and that to discount the assumptions underlying his report would usurp the role of the jury.

CFSI sought summary judgment on a number of grounds. In dismissing summary judgment for all but one claim, the court held, among other things, that (1) none of the alleged wrongful acts prior to termination were sufficiently decisive so as to begin the limitation period; (2) there was sufficient evidence to support a prima facie case of discrimination; and (3) the rights Wilbern was entitled to were not limited to the contents of the franchise agreement, such that he could claim discrimination under § 1981(b), notwithstanding that there was no dispute CFSI had complied with the terms of the agreement.

VICARIOUS LIABILITY

NLRB v. AJD, Inc., Bus. Franchise Guide (CCH) ¶ 15,666, 2015 WL 9261798 (S.D.N.Y. Nov. 12, 2015)

The NLRB brought a series of actions against McDonald's and various McDonald's franchisees alleging obstruction of union-related activities and that McDonald's and the franchisees were joint employers. After the NLRB filed complaints in regional offices, the matters were consolidated in January 2015. In February 2015, the NLRB's General Counsel served subpoenas duces tecum on McDonald's and the franchisees seeking documents related to the joint employer issue. The franchisees filed petitions seeking to revoke the petitions, which were denied by an administrative law judge. Thereafter, the parties held a series of discovery conferences but franchisees continued to refuse to produce documents. The NLRB filed an action in the U.S. District Court for the Southern District of New York seeking an order compelling the franchisees to comply with the subpoena.

The court noted that the National Labor Relations Act provides the NLRB with broad subpoena authority and that the court's role in enforcing an administrative subpoena is very limited. A court will enforce such a subpoena upon the NLRB showing: (1) that the investigation will be conducted pursuant to a legitimate purpose, (2) that the inquiry may be relevant to the purpose, (3) that the information sought is not already within the agency's possession, and (4) that the administrative steps required have been followed. Once the NLRB shows a prima facie case under these elements, the burden then shifts to the opposing party to show that enforcement is inappropriate because compliance would be unnecessarily burdensome.

The court held that the NLRB made its prima facie case by showing that it was investigating the alleged obstruction of union-related activities and that there was a reasonable connection between that investigation and the joint liability issue. The franchisees then argued that the burden of production would be "astronomical" because they had virtually no staff to handle the voluminous requests. The court held that the franchisees had failed to provide specific evidence of their lack of capacity to comply. Moreover, the court found the franchisees' arguments unpersuasive relating to burdens associated with alleged duplicate requests made to McDonald's and the franchisees because the NLRB showed that it made multiple offers to stipulate to duplicative documents. The court therefore found in favor of the NLRB and ordered compliance with the subpoenas.

***Ochoa v. McDonald's Corp.*, Bus. Franchise Guide (CCH) ¶ 15,620, Case No. 14-cv-02098-JD, 2015 WL 6036294 (N.D. Cal. Sept. 24, 2015)**
This case is discussed under the topic heading "Labor and Employment."