Franchise (& Distribution) Currents

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ANTITRUST

***Ervin Equip. Inc. v. Wabash Nat'l Corp.*, Bus. Franchise Guide (CCH) ¶ 15,901, 2017 WL 416304 (N.D. Ind. Jan. 31, 2017)**

Wabash, which manufactures semitrailers, offered a dealership agreement to Ervin Equipment. Wabash later terminated the dealer's agreement, and the dealer asserted causes of action against Wabash under the Indiana Franchise Act and the Indiana unfair practices statute and for breach of contract in conjunction with its allegation that the manufacturer terminated the agreement without good cause and proper notice. The dealer sought a preliminary injunction to prevent Wabash from terminating the agreement. Wabash moved to dismiss these claims. The court dismissed the claims under the Indiana Franchise Act and breach of contract, but left the unfair practices act claim. The court denied the dealer's motion for a preliminary injunction.

The dealer then amended its complaint to add causes of action for conspiracy under the Sherman Act. The dealer alleged that Wabash conspired with other Wabash dealers to terminate it and impose illegal territorial restraints on Wabash dealers. Wabash moved to dismiss this claim as well; however, the court concluded that the dealer did allege sufficient facts to state a claim at this stage of the case.

In response to the amended complaint, Wabash asserted two counterclaims: (1) sham litigation and (2) abuse of process. Wabash alleged that the dealer was using the litigation for the improper purpose of running up the costs incurred by the manufacturer and im-

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proper motive. The dealer moved to dismiss these claims pursuant to Federal Rule of Civil Procedure 12(b)(6). The court acknowledged that Rule 12(b)(6) required it to accept as true all allegations by the nonmoving party for purposes of determining the motion to dismiss; however, the court explained that it is "not required to accept threadbare recitals of a cause of action's elements, supported by mere conclusory statements." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). The court rejected the counterclaims as conclusory because the dealer was clearly attempting to preserve its ability to distribute the manufacturer's products.

The court further explained that sham litigation is not an independent cause of action but merely an exception to the *Noerr-Pennington* doctrine. *Noerr-Pennington* provides a party immunity under the First Amendment from antitrust claims asserted against it based on the party petitioning the court for relief. *Eastern R.R. Presidents Conference v. Noerr-Pennington Freight, Inc.*, 365 U.S. 127 (1961). Sham litigation has two elements: (1) objectively baseless claims such that no reasonable litigant would have a realistic expectation of success; and (2) baseless suit filed to interfere with the opposing party's business relationship. The court found no sham litigation as a matter of law, given that two of the dealer's original claims survived a motion to dismiss.

The court then examined Wabash's counterclaim for alleged monopolization under Section 2 of the Sherman Act based on the dealer's alleged predatory conduct. The court stated that a claim under Section 2 of the Sherman Act requires more than conclusory statements, including (1) predatory or anticompetitive conduct, (2) specific intent to monopolize, and (3) dangerous probability of achieving monopoly power. *Spectrum Sports v. McQuillan*, 506 U.S. 447, 456 (1993). The court determined that Wabash failed to allege that the dealer maintained a certain percentage of market power. Wabash merely alleged the dealer was the "largest seller of used dry van semitrailers in the country." Absent an allegation that the dealer maintained at least 50% of the market share, a manufacturer's claim fails as a matter of law to allege a Section 2 Sherman Act claim. *Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1250 (11th Cir. 2002) ("[A] market share at or less than 50% is inadequate as a matter of law to constitute monopoly power.").

Abuse of process is not a federal cause of action, so the court looked to state law for guidance. Indiana does recognize such a claim when there is proof of an ulterior purpose and a willful act in the use of the process not proper in the regular conduct of the proceedings. *Hart v. Mannina*, 798 F.3d 578, 593 (7th Cir. 2015). For many of the same rationales discussed above, the court found no abuse of process and denied the manufacturer's motion to dismiss. The court explained that the remaining dealer causes of action would survive a motion to dismiss at this time. Should the litigation reveal the dealer falsified any information or otherwise misrepresented facts to the court, the court noted, Wabash could avail itself of relief under Federal Rule of Civil Procedure 11 for sanctions against the dealer, its attorney, or both.

ARBITRATION

***Capelli Enters., Inc. v. Fantastic Sams Salons Corp.*, Bus. Franchise Guide (CCH) ¶ 15,915, 2017 WL 130284 (N.D. Cal. Jan. 13, 2017)**

In this case, the court took up the issue of whether a declaratory judgment action filed by a franchisee is subject to arbitration and, if so, where the arbitration should be conducted. The franchisee entered into a ten-year franchise agreement in 2011. In April 2016, the franchisee closed the business and did not relocate. At some time thereafter, the franchisor attempted to collect amounts from the franchisee that the franchisor maintained were owed under the franchise agreement. The franchisee then filed a declaratory judgment action on June 17, 2016, seeking a declaration that it did not owe the franchisor any money. The franchisor filed a motion and demand for arbitration with American Arbitration Association (AAA). The franchisee attempted to enjoin the arbitration by seeking a temporary restraining order, but this injunctive relief was denied. The franchisor filed a motion to compel arbitration and dismiss the action or, alternatively, to stay the action before the court while arbitration proceeded.

The franchise agreement contained an arbitration clause as follows:

> Except for matters relating to the collection of monies owed to [the franchisor] by [the franchisee] and/or as otherwise explicitly exempted herein, any controversy or claim arising out of or relating to this agreement or with regard to its interpretation, formation or breach of any other aspect of the relationship between [the franchisees] and [the franchisor] . . . which is not settled through negotiation or mediation, shall be arbitrated in accordance with the Commercial Arbitration Rules of the [AAA]. Unless required otherwise by state law or by mutual agreement, the parties agree to arbitrate in Boston, Massachusetts. The parties agree further that the Arbitrators may tender an interim ruling, including injunctive relief, an[d] all claims of any type by either party, including defenses, are included in the jurisdiction of the arbitration.

The court held that a written arbitration agreement is "valid, irrevocable, and enforceable" in much the same way as any other contract or contractual provision. 9 U.S.C. § 2; *see also Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010). Further, the court noted that when there is a dispute about whether parties should proceed in arbitration, a court must consider (1) whether an arbitration agreement exists and (2) whether it encompasses the dispute at issue. The party resisting arbitration bears the burden of proving the claims are not suitable for arbitration. *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 (2000).

Normal contract interpretation rules apply to interpretation of arbitration provisions; any doubts are resolved in favor of arbitration. "[A]rbitrability 'is left to the court unless the parties clearly and unmistakably provide otherwise.'" *Momot v. Mastro*, 652 F.3d 982, 987–88 (9th Cir. 2011). The arbitration clause at issue required that "any controversy or claim arising out of or relating to this Agreement or with regard to its interpretation . . ." be referred to arbitration. The court read this language broadly enough to find a clear intent on the part of the parties to arbitrate even the declaratory relief claim.

Further, in incorporating the AAA's rules, the parties adopted the AAA's rule that the parties agree to arbitrate arbitrability. The franchisee challenged whether the adoption of those rules was "clear and unmistakabl[e]" evidence of the parties' intention given the franchisee's lack of business sophistication to understand the significance of adopting AAA's rules. In the absence of the Ninth Circuit providing guidance on whether lack of sophistication in the commercial context is enough to shift the scale away from compelling arbitration, the court looked to two other district court cases. Neither case foreclosed the possibility that an unsophisticated party could clearly and unmistakably delegate arbitrability to an arbitrator by merely incorporating the AAA rules. *See Galen v. Redfin Corp.*, No. 14-cv-05229-THE, 2015 WL 7734137 (N.D. Cal. Dec. 1, 2015) and *Zenelaj v. Handybook Inc.*, 82 F. Supp. 3d 968, 973 (N.D. Cal. 2015). More interesting is the fact that the court rejected the franchisee's assertion that it was unsophisticated, citing the complicated nature of the transaction involved to acquire the business initially and the fact that the franchisee had its own attorney. This experience was sufficient for the court to deem the franchisee sophisticated enough to possess the "modicum of sophistication" necessary to understand the franchise agreement's terms even though the franchisee may not have been represented by counsel as to the franchise agreement itself.

The franchisee next argued that there was a contradiction in the franchise agreement that warranted disregarding the arbitration provision. The franchise agreement contained language that the parties consented to the "jurisdiction of any appropriate court to enforce the provision of this section and/or to confirm any award rendered by the panel of arbitrators." The court held that this provision did not manifestly contradict the arbitration language and added that the provision did not take the arbitrability away from the arbitration, but instead merely meant that any arbitration award can be enforced in a court of law.

The court next determined where arbitration would take place. The arbitration clause designated Boston. The California addendum to the franchise agreement stated Orange County. The franchisee argued this provision should not be enforced because there was no meeting of the minds on the location of the arbitration; however, the court determined that this question (mutual assent) was one the parties placed with the arbitration as well. However, the plaintiff correctly argued that arbitration cannot be compelled to occur outside the district pursuant to the Ninth Circuit's holding in *Continental Grain Co. v. Dant & Russell*, 118 F.2d 967, 968–69 (9th Cir. 1941).

Finally, the court noted that, according to the Ninth Circuit, it may stay or dismiss an action pending completion of arbitration in the court's discretion. *Sparling v. Hoffman Construction Co.*, 864 F.2d 635, 638 (9th Cir. 1988). The court chose to stay the action pending a determination by the arbitrator of whether the claims are arbitrable.

***Lee v. Doctor's Ass'ns, Inc. d/b/a Subway Rests.*, Bus. Franchise Guide (CCH) ¶ 15,885, 2016 WL 7332982 (E.D. Ky. Dec. 16, 2016)**

The issue of the enforceability of an arbitration provision against a non-signatory comes up fairly often; however, the more typical situation is one in which the franchisor sues a franchisee and non-signatory. In this case, the wife of the franchise developer initiated a suit against Subway under a 2009 development agreement, alleging she had rights under the agreement and asserting violations of the Kentucky Business Opportunity Law and Consumer Protection Act. The development agreement required all claims to be arbitrated.

Subway filed a motion to dismiss all the claims, given the arbitration provision, or at least stay the provisions pending arbitration. The non-signatory wife sought to amend the original complaint in an attempt to escape dismissal. The court noted that if a party can demonstrate that an amendment would be futile, the court need not grant leave to amend. Federal Rule of Civil Procedure 15(a)(2). The non-signatory argued that she was not a party to the agreement on paper but that she invested in the business and was not in the development agreement at the insistence of Subway. One claim involved the issue of whether the development agreement amounted to a franchise agreement, potentially requiring Subway to make disclosures. Another claim related to alleged tortious interference related to Subway's approval of proposed transfer of rights under the development agreement. The court zeroed in on the fact that the claims pursued by the non-signatory arose solely as a result of the development agreement.

The developer argued that Subway had waived the right to enforce the arbitration provision; however, although the court acknowledged cases holding waiver, the present case did not involve any appreciable delay in filing a motion to dismiss. "There is a strong presumption in favor of arbitration and waiver of the right to arbitration is not to be lightly inferred." *O.J. Distributing, Inc. v. Hornell Brewing Co., Inc.*, 340 F.3d 345, 355–56 (6th Cir. 2003) (quoting *Cotton v. Stone*, 4 F.3d 176, 179 (2nd Cir. 1993)) (ellipsis deleted).

The court further reasoned that this ruling would avoid cherry picking of provisions in the contract to enforce while omitting the applicability of other less favorable provisions such as the mandatory arbitration provision.

According to the court, dismissal, rather than a stay, was appropriate because all the claims at issue were subject to arbitration.

ATTORNEYS FEES

***Len Stoler, Inc. v. Volkswagen Grp. of Am., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,911, WL 367604 (E.D. Va. Jan. 25, 2017)**

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

***Lofgren v. AirTrona Canada*, Bus. Franchise Guide (CCH) ¶ 15,909, 2017 WL 384876 (6th Cir. Jan. 27, 2017)**
This case is discussed under the topic heading "State Disclosure/Registration Laws."

BUSINESS OPPORTUNITY LAWS

***Sears Home Appliances Showrooms, LLC v. Appliance Alliance, LLC*, Bus. Franchise Guide (CCH) ¶ 15,927, 2017 WL 839483 (N.D. Ill. Mar. 3, 2017)**
This case is discussed under the topic heading "Contract Issues."

***Sonic Indus. LLC v. Halleran*, Bus. Franchise Guide (CCH) ¶ 15,913, 2017 WL 239388 (W.D. Okla. Jan. 19, 2017)**
This case is discussed under the topic heading "Statutory Claims."

CHOICE OF FORUM

***Bower v. Zounds Hearing Franchising, LLC*, Bus. Franchise Guide (CCH) ¶ 15,930, 2017 WL 898042 (N.D. Ohio Mar. 7, 2017)**
Challenges to forum selection clauses come up frequently in franchise cases, especially in matters in which the franchisee claims protection under a franchise protection statute of a state different from the law of the forum selected in the agreement. The U.S. District Court for the Northern District of Ohio was asked to determine whether a case originally filed in that district, the home state of the franchisees, should be transferred to federal district court in Arizona pursuant to a forum selection clause in the franchise agreement. The franchisees opposed transfer given that the arrangement was subject to the Ohio Business Opportunity Protection Act, OHIO REV. CODE ANN. § 1334.01 *et seq*. Specifically, the franchisees alleged that the franchisor failed to provide the required five-day right to cancel. The franchisees sought rescission of the franchise agreements, statutory damages, treble damages, and attorneys fees.

The court concluded that, when faced with a challenge to the enforcement of a forum selection clause, it must follow the direction of the U.S. Supreme Court's opinion in *Atlantic Marine Construction Co. Inc. v. U.S. District Court for the Western District of Texas*, 134 S. Ct. 568, 581 (2013), and first determine whether (1) the forum selection clause is valid and enforceable and (2) whether the clause is mandatory or permissive. If the clause is valid, enforceable, and mandatory, "[t]he forum selection clause must be given 'controlling weight in all but the most exceptional circumstances.'"

The forum selection clause at issue stated:

> [T]he parties agree any actions arising out of or related to this Agreement *must* be initiated and litigated in the state court of general jurisdiction closest to Phoenix, Arizona or, if appropriate, the United States District Court for the District of Arizona. Franchisee acknowledges that this Agreement has been entered into in

> the State of Arizona, and that Franchisee is to receive valuable and continuing services emanating from Franchisor's headquarters in Arizona, including but not limited to training, assistance, support and the development of the System. In recognition of such services and their origin, Franchisee hereby irrevocably consents to the personal jurisdiction of the state and federal courts of Arizona as set forth in this Section. (Emphasis added)

Given the mandatory nature of the clause, the court determined that it did not need to consider any private interest factors because those were presumed to favor the preselected forum. *Atlantic Marine*, 134 S. Ct. at 582. The court noted that it may still consider public interest factors such as judicial economy and docket congestion, as well as whether one court might be more appropriate for addressing the legal issues in the case. The court determined that neither of these factors weighed in favor of the franchisees' preferred forum; the court granted franchisor's motion to transfer the case to the U.S. District Court for the District of Arizona.

CHOICE OF LAW

***Sonic Indus. LLC v. Halleran*, Bus. Franchise Guide (CCH) ¶ 15,913, 2017 WL 239388 (W.D. Okla. Jan. 19, 2017)**
This case is discussed under the topic heading "Statutory Claims."

CLASS ACTIONS

***Gessele v. Jack in the Box, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,887, 2016 WL 7223324 (D. Or. Dec. 13, 2016)**
This case is discussed under the topic heading "Labor and Employment."

***In re Volkswagen "Clean Diesel" Mktg., Sales Practices & Prods. Liab. Litig.*, Bus. Franchise Guide (CCH) ¶ 15,914, 2017 WL 316165 (N.D. Cal. Jan. 23, 2017)**
This multidistrict litigation resulted from Volkswagen's installation in nearly 600,000 Volkswagen and Audi branded "clean diesel" vehicles of a defeat device that allowed the cars to pass emissions tests. The U.S. District Court for the Northern District of California examined and approved a proposed settlement agreement submitted by one of the plaintiffs, J. Bertolet, Inc., in a class of Volkswagen-branded franchise dealers.

On September 30, 2016, the plaintiff filed an amended and consolidated class action complaint against Volkswagen Group of American, Inc. and Volkswagen AG (together, Volkswagen), in addition to Bosch GmbH and Bosch LLC, on behalf of the franchise dealer class asserting federal claims under the Automobile Dealers' Day in Court Act, 15 U.S.C. § 1221 et seq., and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(C)-(D). The complaint also asserted on behalf of only certain dealerships: (1) Florida state claims for violations of FLA. STAT. ANN. § 320.64(4), breach of contract, and fraudulent concealment; and (2) Illinois state claims for violations of the Illinois Motor Vehicle Franchise Act, fraud by concealment, and breach of contract. Along with the complaint, the plaintiff filed a proposed class action settlement seeking the court's preliminary approval. The settlement was negotiated among two groups of franchisees, two law firms representing those groups, and Volkswagen and related entities. The court preliminarily approved the settlement on October 18, 2016. The plaintiff then moved the court for final approval of the settlement. On January 18, 2017, the court held a fairness hearing regarding final approval. In this opinion, the court granted final approval of the settlement, concluding that the settlement was fair, reasonable, and adequate.

The settlement agreement defined the relevant settlement class as "all authorized Volkswagen dealers in the United States who, on September 18, 2015, operated a Volkswagen branded dealership pursuant to a valid Volkswagen Dealer Agreement," but excluded dealers that opted out of the settlement. In total, the class consisted of 651 authorized Volkswagen dealers. The settlement provided a maximum payment amount of $1.208 billion, with individual dealers receiving a cash payment of approximately $1.85 million. Volkswagen also agreed to continue making certain incentive payments at the amounts being paid as of the date of the settlement for a period of twelve months. Further, Volkswagen agreed to allow class members to defer, for two years after the opt-out deadline, any obligations to renovate or construct dealership facilities or to make other capital investments and additionally agreed to repurchase any affected vehicles for which it was unable to provide an emissions modification kit, among other benefits. In exchange for the benefits of the settlement, class members agreed to release claims essentially against any person or entity that could be responsible in any way whatsoever for the conduct asserted in the complaint. Excluded from the released claims were those claims against Bosch GmbH and Bosch LLC or any of their related entities and agents.

In conducting its final settlement approval analysis, the court explained that Ninth Circuit policy favors class action settlements, but because settlement class actions create unique due process concerns, court approval is necessary and the court must look after the interests of absent class members by determining if the settlement is fundamentally fair, adequate, and reasonable. Before granting final approval of a settlement, the court also had to entertain objections to the treatment of the litigation as a class and the terms of the settlement.

Turning to the treatment of the settlement as a class, the court summarily determined that the class satisfied the requirements of Federal Rules of Civil Procedure 23(a) and (b) based on its reasoning in its earlier order granting preliminary approval to the settlement. The court then turned to the requirements of Rule 23(c), noting that individual notice must be provided to class members who are identifiable through reasonable effort. The court noted that there were 651 class members, each of whom was notified of the settlement via overnight express delivery. Class counsel also contacted each class member to ensure delivery, maintained a publicly available case website with relevant information, and maintained a toll-free support hotline to answer franchise dealer questions. To comply with the Class Action Fairness Act, notice of the settlement was also mailed to the U.S. Attorney General and the attorneys general of all fifty states. The court found that these efforts ensured adequate notice. Accordingly, the court granted final class certification.

Next, the court assessed the fairness, adequacy, and reasonableness of the settlement. The court noted that pre-class certification settlements must meet a higher bar than post-class certification settlements to ensure that collusion has not taken place. The first factor examined by the court was the strength of the plaintiffs' case. The court found that this factor did not favor settlement because liability was conceded; thus, only damages were in dispute, and the declaration of the plaintiff's expert reliably showed that the damages would be substantial and likely recoverable. Second, the court analyzed the risk, expense, complexity, and likely duration of further litigation. It found that this factor favored settlement because there are always risks in litigation; the dealers faced an uncertain future (saddled with thousands of vehicles that they could not sell, representing as much as thirty-five percent of their total vehicle sales); Volkswagen could severely limit and potentially prohibit recovery under several critical damages theories at trial; and protracted litigation would jeopardize the cooperation between Volkswagen and the dealers and, consequently, the success of the consumer action settlements. Third, the potential difficulties in obtaining and maintaining class certification favored final settlement approval because the class could be decertified at a later date due to the size of potential recoveries and the sophistication of class members. Fourth, the settlement amount, which was the most important factor, favored final approval because its value was at the top end of the likely exposure faced by the plaintiffs. Fifth, the court examined the extent of discovery completed and the stage of the proceedings. It noted that discovery is not necessary where the parties have sufficient information to make an informed decision about the settlement. It specifically found that class counsel had sufficient information to make an informed decision based on an extensive pre-filing investigation and extensive review of discovery materials produced by Volkswagen. Therefore, this factor also favored settlement approval. Sixth, the class counsel's considerable experience and belief that the settlement provided more than adequate benefits to class members further favored settlement. Seventh, the court found that the presence of a government participant also favored approval because notice was provided to federal and state officials and no officials objected. The court found this particularly notable given the heavy state and federal interest involved in actions of this type. Eighth, the court considered the reactions of class members. It found that the class members' interest in the settlement was high based on hundreds of calls class counsel answered from class members. Only seven dealers (one percent of class members) opted out of the settlement, and only eight dealers (one percent of class members) filed objections to the settlement. Furthermore, 539 class members (eighty-four percent) had taken the step of completing their individual releases in order to initiate benefits under the settlement. The court therefore found that this factor strongly favored settlement.

Even so, the court addressed objections to the settlement by eight dealers. The objections centered on the settlement payment they would receive. These objections were summarily rejected because they did not establish that the settlement formula was unfair or unreasonable. One dealer objected that the release language was too broad, but the parties modified the language to satisfy the dealer's concerns. Another dealer claimed that the settlement violated the California Vehicle Code, which prohibits a manufacturer from obtaining from a dealer a waiver that constrains its rights to file an action with the California New Motor Vehicle Board, but the code expressly carves out settlements in civil actions. Finally, a dealer who became a Volkswagen dealer in August 2016 and, thus, fell outside the class definition, attempted to object to the class definition. But as a non-class member, the dealer had no standing to object to the settlement, held the court.

In conclusion, the court found that the above factors (known as the *Churchill* factors) favored settlement. But because the settlement was reached prior to class certification, the court was required to examine additional factors (known as the *Bluetooth* factors) to ferret out collusion. The court concluded that none of the *Bluetooth* factors were present, however, because: (1) class counsel would not be compensated through the settlement; (2) the parties did not negotiate a "clear sailing" agreement for the payment of attorneys fees separate from class funds; instead, class counsel would not seek more than $36.24 million in fees, which Volkswagen agreed not to contest; and (3) the settlement did not provide for the reversion to the defendants of funds not awarded to class members. The court therefore granted final approval of the class settlement.

Finally, using its power under the All Writs Act, 28 U.S.C. § 1651(a), the court enjoined all class members who had not opted out of the settlement from participating in any state court litigation related to the released claims, except to dismiss or stay released claims.

***In re Volkswagen "Clean Diesel" Mktg., Sales Practices & Prods. Liability Litig.*, Bus. Franchise Guide (CCH) ¶ 15,928, 2017 WL 914066 (N.D. Cal. Mar. 6, 2017)**

Following the U.S. District Court for the Northern District of California's approval of the class action settlement discussed earlier, one of the class members, City Chevrolet, filed a motion to enforce the settlement, and a non-class member, Mission Bay Motors, Inc., sought to intervene to oppose the motion. The question presented to the court was whether City Chevrolet or Mission Bay, which purchased a Volkswagen dealership from City Chevrolet on August 1, 2016, was entitled to settlement payments from Volkswagen under the settlement. The court granted City Chevrolet's motion to enforce the settlement.

Mission Bay objected to the class definition, which required class members to have operated a Volkswagen branded dealership on September 18, 2015. In its order approving class settlement, the court concluded that Mission Bay was not a class member and, therefore, lacked standing to object. Afterward, Mission Bay commenced a state court action in the County of San Diego against City Chevrolet and Volkswagen alleging that, as the express contractual assignee of City Chevrolet, Mission Bay was entitled to any income paid by Volkswagen after August 1, 2016, which would include any settlement proceeds. Volkswagen attempted to delay payment under the settlement until the state court litigation was resolved.

The district court first rejected Mission Bay's request to intervene in order to object to the settlement and oppose City Chevrolet's motion to enforce the settlement. Mission Bay sought permissive intervention under Federal Rule of Civil Procedure 24(b)(1). The court found that Mission Bay could not satisfy the first factor for intervention, which requires that a party share a common question of law or fact with the main action, because any rights to which City Chevrolet was entitled under the settlement were separate and apart from any rights set forth in the purchase agreement between City Chevrolet and Mission Bay.

The district court then turned to City Chevrolet's motion to enforce the settlement. Volkswagen admitted that City Chevrolet was entitled to its settlement payment, but because of its concern about potential double liability, it withheld all settlement payments and requested that the court defer distribution of the settlement payment until after the state court resolved the issue. The district court denied Volkswagen's request and required Volkswagen to make the settlement payment to City Chevrolet. In so doing, the court found that Volkswagen would not be subject to double liability for the settlement proceeds because Mission Bay was not a party to the settlement and, thus, had no claim to the settlement proceeds. To the extent Mission Bay believed it was entitled to recover any funds from City Chevrolet pursuant to its asset purchase agreement, it could attempt to recoup them through its pending state court action. The court, however, acknowledged that Mission Bay could file an independent claim against Volkswagen, because it was not a party to the settlement. But even so, any such suit would not subject Volkswagen to double liability under the settlement because Mission Bay would be seeking damages apart from the settlement. Ultimately, City Chevrolet had complied with the terms of the settlement and Volkswagen was obligated to begin making payments to City Chevrolet. The court therefore granted City Chevrolet's motion to enforce the settlement agreement.

CONTRACT ISSUES

***Armstrong v. Curves Int'l, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,934, 2017 WL 894437 (W.D. Tex. Mar. 3, 2017)**

This case involved 111 franchisees of the fitness center Curves that brought suit in Missouri state court against Curves, generally asserting claims related to Curves' alleged misrepresentations relevant to the plaintiffs' decision to enter into the franchise agreements and also alleging subsequent breaches of the agreements by Curves. Curves removed the cases to the U.S. District Court for the Eastern District of Missouri. The Missouri district court dismissed some of the cases based on statute of limitations and granted Curves' motion to transfer venue to the U.S. District Court for the Western District of Texas based on a venue selection clause in the franchise agreements.

The plaintiffs dismissed certain claims and agreed to summary judgment on others, leaving only Curves' motion seeking dismissal of sixty-two breach of contract claims. The plaintiffs alleged that Curves failed to provide any meaningful support following execution of the franchise agreements. Curves argued that, according to a particular provision of the franchise agreement (Section 7(A)), Curves had the sole discretion on whether to provide such support. The court disagreed that the franchise agreement terms precluded the plaintiffs from being able to state a breach of contract claim against Curves. First, the court noted that other provisions in the agreements—separate and apart from Section 7(A)—used language such as "must" and "will" that affirmatively imposed obligations upon Curves. Second, the court analyzed the language in Section 7(A) that provided Curves with a great deal of discretion of when to provide services to franchisees. The court held that if Section 7(A) were interpreted to provide Curves with absolute discretion, the entire section would be meaningless or illusory. The court also noted that even if Section 7(A) provided "a rather low bar" for Curves to meet in providing services to franchisees, Curves still had to act reasonably in exercising its discretion of whether or not to provide such services. Therefore, the court refused to dismiss the claim on the basis that the franchisees could potentially state a claim that Curves had failed to meet the standard for providing services under the agreement.

The court next turned to a clause in the franchise agreements known as the reasonable business judgment clause. Generally speaking, the clause provided that Curves was entitled to a reasonable business judgment standard in any action taken by Curves that required its approval or consent. Curves argued that the clause protected Curves from any suit related to its decision not to provide franchisees with support. The court disagreed, noting that the clause was inapplicable to mandatory obligations under the agreement. Thus, if the franchisees could show that the support obligations were mandatory, the clause was irrelevant. The court also noted that merely applying a reasonable business judgment does not absolutely foreclose the possibility of bringing a claim against a party. The court noted that corporate officers and directors are entitled to a reasonable business judgment standard, but they could still be held liable under certain claims, including bad faith breaches of their fiduciary duties. Moreover, the terms of the reasonable business judgment clause prohibited Curves from taking action not intended to benefit the entire Curves system. The court held that it was an issue of fact as to whether Curves' refusal to provide support was unreasonable and not intended to benefit the system.

The court then addressed the statute of limitation issues as applied to each grouping of plaintiffs. Although the facts differed for each group, the court noted Curves' common argument that the four-year statute of limitations had expired for a large number of the plaintiff franchisees because they entered into their franchise agreements more than four years previously and they further acknowledged their opinion that Curves had failed to provide support from "day one." The court held that such acknowledgments did not necessarily trigger the running of the statute of limitations because the plaintiffs' expectation that services should be provided from the first day of operation was not necessarily the same thing as Curves being in breach of contract for failing to provide such services. The court held that it remained an issue of fact as to when the breaches occurred.

Finally, the court addressed certain releases signed by various plaintiff franchisees. Again, the facts differed from plaintiff to plaintiff and, therefore, required the court to separately analyze the different plaintiff groups. However, the analysis generally focused on whether the releases were procedurally or substantively unconscionable. A release is procedurally unconscionable under applicable Texas law if the facts surrounding the bargaining process show that the process is unfairly one-sided. A release is substantively unconscionable if, "given the parties' general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract." The court further noted that whether the releases were unconscionable was an issue of law and that the terms must be "sufficiently shocking or gross to compel the court to intercede."

The court held that some of the releases were enforceable although others were not. The court was especially critical of an assignment provision in certain of the releases that purported to assign to Curves all current and future claims against Curves. The court held that such an assignment was against public policy because it ran "directly counter to Texas' broad protections for freedom of contract" and because certain claims, such as those based on intentional conduct, recklessness, or gross negligence, could not be waived under Texas law. Certain other releases, however, were enforced as narrowly drafted and applicable to the relevant time frame.

***Ervin Equip. Inc. v. Wabash Nat'l Corp.*, Bus. Franchise Guide (CCH) ¶ 15,901, 2017 WL 416304 (N.D. Ind. Jan. 31, 2017**

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

H&R Block Tax Servs., LLC. v. Strauss, Bus. Franchise Guide (CCH) ¶ 15,908, 2017 WL 395119 (N.D.N.Y. Jan. 27, 2017)

The enforceability of post-termination obligations is often litigated, but in this case the defendant and former franchisee developed a rather novel idea for why the post-termination noncompete and nonsolicitation clauses did not apply. She took the position that those obligations applied only if the agreement was terminated. Because the franchisee did not renew the agreement, the franchisee argued that the noncompete and nonsolicitation clauses were not triggered.

The defendant operated an H&R Block franchise from September 1984 until September 1, 2014. The franchise agreement contained an automatic renewal provision, which stated as follows:

> The initial term of this Agreement begins on the date hereof and ends five years after such date, unless sooner terminated by Block [for cause]. Unless Franchisee is in default hereunder or under any agreement with or obligation to Block or any subsidiary or affiliate of Block, this Agreement shall be automatically renewed for successive Renewal Terms. Franchisee may terminate this Agreement effective at the end of the initial term or any Renewal Term, but only upon at least 120 days written notice to Block prior to the end of such term.

Prior to the expiration of the last five-year term, the franchisor provided notice that it would not be renewing the 1984 version of the franchise agreement but would offer the franchisee the "current form" of the franchise agreement. The franchisee declined to sign the new franchise agreement, and the term expired on September 1, 2014. Despite language in the franchise agreement prohibiting competition in or within 45 miles of the franchise territory or soliciting H&R Block customers or other franchisee's customers, the franchisor alleged that the franchisee continued operating at the same location offering tax services.

The franchisor filed an action alleging breach of contract. The franchisee asserted: (1) the affirmative defense of unclean hands; (2) that the noncompete clause was unenforceable due to unlimited geographic scope; (3) that the noncompete clause served no legitimate interest of franchisor and was unduly burdensome to the franchisee; and (4) that the parties' established course of dealing and language in the franchise agreement forbade the franchisor from unilaterally refusing to renew the franchise agreement under its original terms. The franchisee also bought a counterclaim for the franchisor's failure to honor the automatic renewal provision in the 1984 contract.

The franchisor moved to dismiss the counterclaim and strike the affirmative defenses. The franchisee also moved to amend to add a counterclaim based on both breach of contract and breach of the implied covenant of good faith and fair dealing. The franchisee operated her franchise in New York and argued that New York law applied, rather than Missouri law as designated in the franchise agreement.

The court began the analysis by noting that a motion to dismiss a counterclaim is governed by the same standard as a motion to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6). Survival of a motion to dismiss, the court stated, requires that the "complaint contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). All allegations in the complaint are accepted as true for purposes of this assessment and all inferences are drawn in favor of the party asserting the claims.

The basis for the franchisee's counterclaim, which was the subject of the motion to dismiss, was the fact that the franchisor did not renew the franchise agreement in 2014 under the same terms as the 1984 agreement. The franchisor relied on the agreement's choice of law provision designating Missouri law and argued that under Missouri law, "automatic renewal provisions, such as the one at issue here, must be construed to allow either party to elect not to renew the agreement at the end of any term." The court noted that the Missouri Supreme Court made clear that a contract intended to be perpetually renewed must adamantly state the same for the parties' agreement to be enforceable. *H&R Block Tax Servs. LLC v. Franklin*, 691 F.3d 941, 944 (8th Cir. 2012) (quoting *Preferred Physicians Mut. Mgmt. Grp., Inc. v. Preferred Physicians Mut. Risk Retention Grp., Inc.*, 961 S.W.2d 100, 103 (Mo. Ct. App. 1998)). If Missouri law governed, the franchisor would clearly be permitted to elect not to renew without cause; however, the court was required to determine whether New York or Missouri law governs.

A federal court sitting in diversity applies the substantive law of the state in which it sits, including choice of law rules. *In re Coudert Bros. LLP*, 673 F.3d 180, 186 (2d Cir. 2012) (internal citation omitted). Given that the court sat in New York, it first considered New York's choice of law rules, which typically enforce choice of law provisions unless the chosen law violates a fundamental principle of justice. *Welsbach Elec. Corp. v. MasTec N. Am., Inc.* 859 N.E.2d 498, 500–01 (N.Y. 2006). The court considered that the franchisor's principal place of business was in Kansas City, Missouri, and that this alone was enough to create a reasonable relationship between the designated state law (Missouri) and the parties. The next inquiry was whether applying Missouri law would offend any fundamental policy in New York.

New York, like Missouri, disfavors perpetual contracts. However, New York draws a distinction between perpetual contracts and indefinite contracts. Indefinite contracts are those that do not provide a fixed term but are terminable upon the happening of a specific condition or event. *Payroll Express Corp.* v. *Aetna Cas. & Sur. Co.*, 659 F.2d 285, 292 (2d Cir. 1981). Indefinite contracts are enforceable in New York. The court deemed the franchise at issue an indefinite contract because it could go on indefinitely or end at the end of the five-year term if the franchisee is in default. Barring no default, New York law would dictate that franchisor could not choose to renew without cause.

The analysis does not end there, however. Although application of Missouri law or New York law would yield a different result, the court turned to whether applying Missouri law would violate any fundamental New York policy. The court pointed out that the franchisee did not cite any support that New York had taken a fundamental policy stance on the distinction between perpetual contracts and indefinite contracts. Thus, Missouri law was applicable, and the franchisor did not breach the contract. Consequently, the franchisee's counterclaim had to be dismissed.

The court further determined that it may strike a pleading pursuant to Rule 12(f) for any "insufficient defense or redundant, immaterial, impertinent, or scandalous matter." The court noted that there is a general prohibition against striking affirmative defenses "unless it appears to a certainty that plaintiff would succeed despite any state of facts which could be proved in support of the defense." *William Z. Salcer, Panfeld, Edelman v. Envicon Equities Corp.*, 744 F.2d 935, 939 (2d Cir. 1984) (internal quotation omitted). There are three prongs to this consideration: "(1) there is no question of fact which might allow the defense to succeed; (2) there is no question of law which might allow the defense to succeed; and (3) the plaintiff would be prejudiced by inclusion of the defense." *SEC v. McCaskey*, 56 F. Supp. 2d 323, 326 (S.D.N.Y. 1999).

The franchisee withdrew her affirmative defense relating to geographic scope; however, she maintained her affirmative defense of unclean hands based on the alleged wrongful ending of the franchise agreement. Given that the defense was based solely on the assumption that the nonrenewal of the original terms was wrongful, the court held that this affirmative defense must be stricken because there was no way the franchisee could prevail.

Regarding motions to amend, a court should freely permit a party to amend when justice so requires pursuant to Rule 15(a)(2). Granting such a motion is left to the district court's discretion. "A district court has discretion to deny leave for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007).

The franchisee also sought leave to amend to add counterclaims for breach of contract and breach of the covenant of good faith and fair dealing and additional affirmative defenses related to unclean hands premised on the contract claim. This breach of contract claim was based on the franchisor's attempt to enforce the noncompete and nonsolicitation provisions when these provisions are allegedly triggered only by a termination rather than a nonrenewal. The court determined that the argument was unpersuasive because the very language in the agreement did not limit the obligations to termination and actually referred to "other disposition of this franchise" as well. The court held that "other disposition" encompassed nonrenewal. Thus, the court held that it must deny the franchisee's motion to amend given there was no basis for argument that the post-termination covenants were not triggered.

***Lee v. Doctor's Ass'ns, Inc. d/b/a Subway Restaurants*, Bus. Franchise Guide (CCH) ¶ 15,885, 2016 WL 7332982 (E.D. Ky. Dec. 16, 2016)**
This case is discussed under the topic heading "Arbitration."

***Neubauer v. FedEx Corp.*, Bus. Franchise Guide (CCH) ¶ 15,921, 849 F.3d 400 (8th Cir. 2017)**
Mark Neubauer was a FedEx delivery independent contractor pursuant to a standard operating agreement (SOA). The SOA provided that it was governed by the laws of Pennsylvania. Neubauer was granted a proprietary interest in serving FedEx customers within a certain area, known as the primary service area (PSA). The SOA permitted a contractor to assign its rights to another party, but that FedEx had to approve the assignment and that, upon assignment, FedEx would enter into a new SOA with the assignee on substantially the same terms. The SOA also provided that any consideration to be paid by the assignee on to the assignor on account of the assignment was strictly a matter between the assignor and the assignee and that FedEx was not a party to the assignment transaction.

In 2011, FedEx advised Neubauer that it would not be renewing the SOA when it expired according to its terms. FedEx further advised that it intended to move contractors such as Neubauer to a new system under an independent service provider agreement (the ISP agreement), rather than the terms of the SOA. The ISP agreement differed from the SOA in that, when an agreement was assigned, the assignee would obtain only the remaining term under the agreement, rather than being entitled to a new agreement with a full term. Neubauer voluntarily agreed to transition to the new agreement terms and, in exchange for a $10,000 payment, executed a release whereby he agreed not to sue or demand arbitration from FedEx as a result of the transition.

In 2014, FedEx terminated its relationship with Neubauer based on alleged breaches of the ISP agreement. Neubauer assigned his rights to another contractor, hoping that FedEx would enter into a new full term agreement with the assignee. However, FedEx agreed to permit the assignee to operate only for the remaining term of the ISP agreement. Neubauer sued FedEx bringing claims for breach of contract, fraud, constructive fraud, fraudulent inducement, violation of North Dakota's Franchise Investment Law, and violations of North Dakota's RICO Act. FedEx moved in the U.S. District Court for the District of North Dakota to dismiss the matter under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. The district court granted FedEx's motion. Neubauer then appealed to the Eighth Circuit.

As to the breach of contract claim, the court held that the SOA provisions did not apply because they expired in 2011. Neubauer also argued that he had an enforceable agreement with FedEx that permitted assignment, even if the SOA had expired. The court disagreed, noting that the SOA plainly stated that FedEx was not a party to any assignment agreement. Neubauer further argued that language in the SOA prevented FedEx from altering the SOA in any way. The court again disagreed, noting that the language was taken out of context and that Neubauer's interpretation would lead to the absurd result of forbidding "any modification of the SOA in perpetuity, even if the SOA expired and the parties agreed to a new contract with different terms."

The court next considered Neubauer's fraud claims. Neubauer argued that FedEx knowingly made misrepresentations to him to induce him to enter into the SOA, the ISP agreement, and the release. The court noted the requirement under Federal Rule of Civil Procedure 9(b) that allegations of fraud must be pleaded with particularity, including "such facts as the time, place, and content of the defendant's false representations, as well as the details of the defendant's fraudulent acts, including when the acts occurred, who engaged in them, and what was obtained as a result." The court held that Neubauer's general statements and conclusory allegations against FedEx had not met the Rule 9(b) standard and therefore were properly dismissed.

The court then turned to Neubauer's allegations that FedEx sold him an unregistered franchise in violation of North Dakota's Franchise Investment Law. The court noted that for such a claim to survive dismissal, Neubauer was required to plead facts sufficient to show that Neubauer was a franchisee, meaning: "(1) he was granted the right to engage in the business of offering, selling, or distributing good or services under a marketing plan or system prescribed in substantial part by the franchisor; (2) the operation of his business pursuant to such a plan was substantially associated with FedEx's trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor or its affiliate; and (3) he was required to pay directly or indirectly, a franchise fee." (quoting N.D. CENT. CODE § 51-19-02(5)(a), internal quotation marks deleted). The court noted that Neubauer delivered and picked up FedEx packages, but did not allege facts sufficient to show that he had a right to offer, sell, or distribute his services to individual customers. Moreover, the court noted that the SOA explicitly stated that Neubauer was an independent contractor and that Neubauer received payments not from customers, but directly from FedEx. For these reasons, the court held that Neubauer had failed to plausibly state a claim that he was a franchisee.

Finally, the court addressed Neubauer's RICO claims under North Dakota law. The court dismissed the claim for the same reason as the fraud claims. Specifically, Neubauer had failed to plead any facts with particularity that FedEx had engaged in criminal racketeering.

***Owa v. Fred Meyer Stores*, Bus. Franchise Guide (CCH) ¶ 15931, 2017 WL 897808 (W.D. Wash. Mar. 7, 2017).**

In 2012, Pilrang Boe Owa entered into a franchise agreement with Advanced Fresh Concepts Franchise Corporation (AFCFC), whereby Owa operated a sushi counter on premises leased by AFCFC from Fred Meyer. Owa was provided a percentage of the sushi sales; Meyer reported such sales to AFCFC. Meyer was not a party to any agreement with Owa. The franchise agreement between AFCFC and Owa stated that Owa was an independent contractor and not an employee of AFCFC.

Owa was a Korean native who spoke little English. She alleged that Meyer's employees harassed, bullied, and discriminated against her while she was working at the premises. In 2016, Owa filed suit against AFCFC and Meyer in Washington state court alleging claims for discrimination, as well as loss of consortium based on Owa's husband leaving and seeking a divorce during the relevant time period. Meyer removed the action to the U.S. District Court for the Western District of Washington and filed a motion to dismiss the claims against it.

Owa's claims were based on alleged violations of the Washington Law Against Discrimination (WLAD), as well as state law governing loss of a consortium. The court first turned to the WLAD claims, which included five sub-parts: (1) retaliation, (2) failure to provide a reasonable accommodation, (3) race-based harassment, (4) unlawful discrimination, and (5) discrimination by association.

The court held that the claims for retaliation, failure to provide reasonable accommodation, and race-based harassment required an employer/employee relationship under Washington law. Owa attempted to show such a relationship based on the "payroll method test" whereby a party will be considered an employee if his or her name appears on the other party's payroll. Owa submitted some evidence regarding policies and procedures for her operation of the sushi counter, but failed to show that she was listed on Meyer's payroll. Therefore, the court dismissed these claims based on Owa's failure to show an employer/employee relationship.

The court next addressed unlawful discrimination, which is not limited to employer/employee relationships. However, the claim does require some sort of contract relationship. Because Owa was unable to show any sort of contractual relationship between her and Meyer, the court dismissed that claim as well. In addition, the discrimination by association claim was dismissed because such claims are not recognized under Washington law.

The court then turned to the loss of consortium claims. The court noted that Washington law classifies the two spouses at issue as either the "deprived" spouse or the "impaired" spouse. The deprived spouse suffers the loss and services from the impaired spouse. Owa claimed that she was both an impaired spouse, based on alleged injuries from Meyer, and a deprived spouse, based on her being deprived of her husband's affection and services when he filed for divorce. The court held that Owa had failed to identify any legal authority that she can have a claim as both a deprived and impaired spouse. The court noted that if Owa truly was the impaired spouse, she was not the proper party to bring the claim. The court therefore dismissed the claim without prejudice as improperly pleaded.

The court further addressed Owa's claim of Meyer's alleged tortious interference with her business expectancy under the franchise agreement. The court noted that such a claim required a showing of the following elements: (1) the existence of a valid contractual relationship or business expectancy; (2) the defendants had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) defendants interfered for an improper purpose or used improper means; and (5) resultant damage. The court held that Owa had met the first and second elements because there was a contract between her and AFCFC and, because sales were reported to Meyer, Meyer was aware of the relationship. However, the court held that there were no facts in evidence suggesting that Meyer acted with an improper purpose or used means to interfere with Owa's business expectancy. Owa offered no evidence on why she was eventually removed from the premises or Meyer's role, if any, in that event.

Finally, the court addressed Owa's claim for wrongful termination in violation of public policy. Owa alleged that Meyer had created a harassment-based work environment. The court noted that the elements for wrongful termination are: (1) the existence of a clear public policy, (2) that discouraging the conduct in which the defendant engaged would jeopardize the public policy, and (3) the public policy linked conduct caused the dismissal. The court held that Owa had failed to allege facts showing a causal link between a clear public policy and her dismissal. Owa alleged that she was dismissed because she injured her hand, but she provided no facts linking the injury to her dismissal or otherwise linking her dismissal to Meyer discriminating against her.

***Sears Home Appliances Showrooms, LLC v. Appliance Alliance, LLC*, Bus. Franchise Guide (CCH) ¶ 15,927, 2017 WL 839483 (N.D. Ill. Mar. 3, 2017)**

The U.S. District Court for the Northern District of Illinois granted in part and denied in part the Sears franchisor's motion to dismiss several counterclaims raised by a former franchisee, Appliance Alliance, LLC, and its owners, Brent and Minena Turley, who owned and operated six former franchised Sears stores. Sears filed a lawsuit alleging that Alliance and the Turleys breached the parties' franchise agreements. The defendants responded by bringing numerous counterclaims against Sears and several third-party Sears entities and individuals, including breach of contract; conversion and trespass (conversion); tortious interference with contract and existing and prospective business relations (tortious interference); defamation, business disparagement, and unfair competition; breach of fiduciary duty, economic duress and business coercion, oppressive conduct, and constructive trust; violations of the Texas Business Opportunity Act (TBOA) and the Texas Deceptive Trade Practices Act (TDTPA); and fraud.

First, the court analyzed the Sears parties' motion to dismiss the claims for breach of contract, conversion, tortious interference, and unfair competition against third-party defendants Sears, Roebuck & Co. and Sears Holding Corporation. Because Sears Roebuck and Sears Holding were not parties to the franchise agreements underlying the defendants' breach of contract claim and the counterclaims did not allege that Sears Roebuck and Sears Holding were involved in the alleged actions, the court construed the relevant counterclaims as attempting to pierce the corporate veil. The court explained that to impose liability under the alter ego doctrine, the defendants would need to demonstrate that the Sears franchisor was so controlled in its affairs that it was a mere instrumentality of Sears Roebuck or Sears Holding and that observance of the separate existence of the entities would sanction a fraud or promote injustice. The court found that the defendants failed to allege the fraud or injustice, but instead merely alleged that a judgment against only the Sears franchisor would be useless because Sears Roebuck or Sears Holding own and control the franchisor. Because the defendants failed to plead a fraud or injustice, mere allegations that the Sears entities "worked together" were insufficient as a matter of law. Accordingly, the court dismissed these counterclaims without prejudice.

Next, the court turned to the Sears parties' motion to dismiss the breach of contract, TBOA, TDTPA, and fraud counterclaims against an individual third-party defendant, Samantha Wilks, a Sears employee who was assigned to oversee the defendants' franchised Sears stores. The court summarily dismissed with prejudice the breach of contract claim against Wilks because no contract with her was pleaded. Further, the court found that all of the allegations concerning the Texas statutory claims and the fraud claim related to statements allegedly made to the defendants during the sale of their franchises. Because Wilks was not involved in the sale, she could not be liable for those actions. The court therefore dismissed these claims with prejudice, finding that amendment would be futile.

The court then turned to the remaining claims, which were primarily against the franchisor. First, the court rejected Sears's motion to dismiss the breach of contract claim against it, finding that the claim provided adequate notice based on the allegations of wrongful termination of the franchise agreements and improper retention of the defendants' funds and property.

Second, the court turned to Sears's motion to dismiss the defendants' tortious interference claims. The tortious interference with contract claim properly pleaded that the Sears parties interfered with the defendants' leases. Likewise, the defendants sufficiently alleged their tortious interference with existing business relations claim because the complaint alleged that Sears unlawfully locked the defendants out of their store, thereby interfering with their existing business relationships with employees and suppliers. The court, however, dismissed without prejudice the defendants' claim of tortious interference with prospective business relations because the complaint did not identify "any specific *future* employees, suppliers, or customers" on which the claim was based; it identified only existing business relationships.

Third, the court denied the motion to dismiss the defendants' unfair competition claim. The defendants alleged that the Sears parties engaged in unfair competition by defaming them and disparaging their business reputation. The court noted that unfair competition has an "amorphous existence" under Texas law because it generally is a derivative tort that encompasses "all statutory and nonstatutory causes of action arising out of business conduct which is contrary to honest practice in industrial or commercial matters." Therefore, to pursue this claim, the defendants had to plead "some underlying cause of action giving rise to their allegations of unfair competition." Because the defendants sufficiently pleaded their unfair competition by supporting it with independent allegations of defamation and business disparagement, the court denied the motion to dismiss.

Fourth, the defendants' breach of fiduciary duty claim was also insufficient as a matter of law. The court began its analysis with the general rule that franchisors do not owe franchisees a fiduciary duty, but noted that such a duty can arise where the relationship is "one of particular trust and confidence." Although the defendants offered "a laundry list of actions" that the Sears parties purportedly took in the course of the franchise relationship to show "total domination and control" to rise to the level of "particular trust and confidence," including requiring certain uniforms and décor and fixing store hours and prices, the defendants simply did not allege *how* such measures differed from that of a typical franchisor-franchisee relationship. Without more, the list did not give rise to a fiduciary duty.

Fifth, the court declined to dismiss the defendants' claim for economic duress. Under Texas law, that claim requires: (1) a threat of unlawful activity; (2) an illegal exaction, fraud, or deception; and (3) imminent restraint of the threatened party without a means of protecting itself. The court found a properly pleaded claim based on the complaint allegations that (1) Sears imposed improper requirements on the defendants to manufacture unlawful grounds to terminate the franchises; (2) Sears's threat of termination forced the defendants to turn over the keys to their stores; and (3) because of Sears's control, the defendants had no way of protecting themselves.

Sixth, the court dismissed with prejudice the defendants' oppressive conduct claim, finding no applicable statutory or common law cause of action for oppressive conduct.

Finally, the court turned to the defendants' claims for violations of the TBOA, the TDTPA, and fraud. The Texas statutory claims were based on allegations that the franchisor misrepresented commissions and returns the defendants would earn, failed to pay the defendants a promised marketing fee, and failed to disclose the "overall competitive structure" surrounding the franchise and the control Sears would exert. Similarly, under their fraud claim, the defendants alleged that the Sears parties made four different misrepresentations and omissions: (1) a promise to pay the defendants a two percent marketing fee; (2) a failure to disclose an intent to impose various pricing and competitive conditions; (3) statements about the minimum average commissions the defendants should expect to receive; and (4) failure to disclose competition that defendants would face from other franchisees and Sears. The Sears parties moved to dismiss all of these claims for failure to comply with Federal Rule of Civil Procedure 9(b), which requires one to plead the "who, what, when, where, and how" of an alleged fraud.

The court found that the claims were insufficiently pleaded in three respects. First, simply claiming that, in buying their franchises, the defendants spoke with "Sears representatives" who made certain misrepresentations and reviewed "offering circulars" and Sears's "Franchise Disclosure Document" with some misrepresentations was insufficient to identify the source of the fraudulent statements because the parties' relationship spanned many years. Second, identifying an indeterminate time period, such as the date the defendants purchased their initial franchises and the period of time leading up to that purchase and the purchase of their second set of franchises, was also insufficient under Rule 9(b). The court noted that, based on the circumstances of this case, the defendants should have been able to plead certain misrepresentations "down to the month (or even the day) they occurred." Third, some of the fraud allegations amounted to promissory fraud, which is actionable under Texas law only where the promise is made with the intention of deceiving and with no intention of carrying out the underlying promise. Here, the defendants merely alleged that Sears promised to pay the defendants a marketing fee in the future, but pled no fraudulent intent. Accordingly, the court dismissed the TBOA, the TDTPA, and fraud counterclaims without prejudice.

***Sonic Indus. LLC v. Halleran*, Bus. Franchise Guide (CCH) ¶ 15,913, 2017 WL 239388 (W.D. Okla. Jan. 19, 2017)**

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

CORPORATE VEIL PIERCING

***Sears Home Appliances Showrooms, LLC v. Appliance Alliance, LLC*, Bus. Franchise Guide (CCH) ¶ 15,927, 2017 WL 839483 (N.D. Ill. Mar. 3, 2017)**

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

DAMAGES

***Donald J. Ulrich Assocs., Inc. v. Tec Air, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,884, No. 15-cv-00657, 2016 WL 7374236 (N.D. Ill. Dec. 20, 2016)**

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

DEFINITION OF FRANCHISE

***Lofgren v. AirTrona Canada*, Bus. Franchise Guide (CCH) ¶ 15,909, 2017 WL 384876 (6th Cir. Jan. 27, 2017)**
This case is discussed under the topic heading "State Disclosure/Registration Laws."

***Neubauer v. FedEx Corp.*, Bus. Franchise Guide ¶ 15,921, 849 F.3d 400 (8th Cir. 2017)**
This case is discussed under the topic heading "Contract Issues."

DISCRIMINATION

***Owa v. Fred Meyer Stores*, Bus. Franchise Guide (CCH) ¶ 15931, 2017 WL 897808 (W.D. Wash. Mar. 7, 2017).**
This case is discussed under the topic heading "Contract Issues."

FRAUD

***Neubauer v. FedEx Corp.*, Bus. Franchise Guide (CCH) ¶ 15,921, 849 F.3d 400 (8th Cir. 2017)**
This case is discussed under the topic heading "Contract Issues."

***Sears Home Appliances Showrooms, LLC v. Appliance Alliance, LLC*, Bus. Franchise Guide (CCH) ¶ 15,927, 2017 WL 839483 (N.D. Ill. Mar. 3, 2017)**
This case is discussed under the topic heading "Contract Issues."

***Sonic Indus. LLC v. Halleran*, Bus. Franchise Guide (CCH) ¶ 15,913, No. CIV-16-709-C, 2017 WL 239388 (W.D. Okla. Jan. 19, 2017)**
This case is discussed under the topic heading "Statutory Claims."

FTC FRANCHISING RULE

***Sonic Indus. LLC v. Halleran*, Bus. Franchise Guide (CCH) ¶ 15,913, 2017 WL 239388 (W.D. Okla. Jan. 19, 2017)**
This case is discussed under the topic heading "Statutory Claims."

GOOD FAITH AND FAIR DEALING

***Sonic Indus. LLC v. Halleran*, Bus. Franchise Guide (CCH) ¶ 15,913, 2017 WL 239388 (W.D. Okla. Jan. 19, 2017)**
This case is discussed under the topic heading "Statutory Claims."

LABOR AND EMPLOYMENT

Gessele v. Jack in the Box, Inc., Bus. Franchise Guide (CCH) ¶ 15,887, 2016 WL 7223324 (D. Or. Dec. 13, 2016)

The plaintiffs, employees of a Jack in the Box franchise, filed a putative class action against Jack in the Box, alleging Jack in the Box (1) was a joint employer, (2) was liable for violations of the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA) and Oregon wage and hour statutes, (3) failed to pay wages upon termination in violation of Oregon statutes, (4) took wrongful deductions in violation of Oregon Revised Statutes § 652.610, and (5) used a wrongful method of payment in violation of Oregon Revised Statues § 652.110. Jack in the Box filed a motion for partial summary judgment in which it argued it was not liable for the minimum wage and overtime claims of the employees for the period after March 29, 2010, at which time it franchised several corporate-owned restaurants to a franchisee and did not retain the power to hire and fire the franchisees' employees or control their day-to-day work activities.

In a detailed decision, the court applied the *Bonnette* factors and granted Jack in the Box's motion for partial summary judgment, finding that Jack in the Box did not have the power to hire or fire the franchisees' employees and was not responsible for or involved in the franchisees' employees work schedules, hours of employment, salaries, insurance, fringe benefits, or hours of work.

The court noted that the Ninth Circuit applies an "economic reality" test to determine the existence of a joint employment relationship. In *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983), the Ninth Circuit held that the economic realities test focuses primarily on four factors: "whether the alleged employer (1) had the power to hire and fire the employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records." 704 F.2d at 1470. Later in *Torres-Lopez v. May*, 111 F.3d 633, 646 (9th Cir. 1997), the Ninth Circuit identified five "regulatory factors" similar to those set out in *Bonnette* that courts should consider: (1) the nature and degree of control of the workers; (2) the degree of supervision, direct or indirect, of the work; (3) the power to determine the pay rates or the methods of payment of the workers; (4) the right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; and (5) preparation of payroll and payment of wages. 111 F.3d at 646 (citing 29 C.F.R. § 500.20(h)(4)(ii)).

The court was not persuaded by the plaintiffs' argument that Jack in Box's provision of (1) training to the individuals in the person-in-charge position, (2) "Hiring the Right People" handbook and Consistent Hiring Process Guidelines, (3) labor scheduling software, and (4) a payroll system made it a joint employer of plaintiffs and other employees of the franchisee. The court found that all such examples cited by the plaintiffs were merely non-mandatory advisory materials and tools provided by Jack in the Box to which franchises could refer but were not mandated to use. With regard to the payroll system provided and maintained by Jack in the Box, the court specifically noted, "ministerial functions are insufficient to support plaintiffs' argument that [the defendant] controls labor relations. Providing a 'payroll service to a franchisee's employees does not in any manner create an indicia of control over labor relations sufficient to demonstrate that the franchisor is a joint employer.'" Applying the *Bonnette* factors and considering Jack in the Box's relationship with the franchisee as a whole, the court concluded that the plaintiffs did not establish as a matter of law that Jack in the Box is their joint employer.

***Salazar v. McDonald's Corp.*, Bus. Franchise Guide (CCH) ¶ 15,818, 2017 WL 950986 (N.D. Cal. Mar. 10, 2017)**

The plaintiffs, employees of a McDonald's franchisee, brought suit against McDonald's for violations of the California Labor Code, both individually and on behalf of a putative class. The U.S. District Court for the Northern District of California previously granted McDonald's partial summary judgment, finding that McDonald's was not a joint employer because it did not directly or indirectly control the terms of employment, was not suffering or permitting plaintiffs to work, and was not engaging in an actual agency relationship with the plaintiffs. The court, however, previously found that a reasonable jury could find that McDonald's was a joint employer by virtue of an ostensible agency relationship. (For a summary of the court's prior ruling, see the Winter 2017 Currents under the topic heading "Labor and Employment.") McDonald's then filed a second motion for summary judgment, arguing that ostensible agency is not a viable predicate on which to impute liability for the plaintiffs' Labor Code claims.

Beginning its analysis with the definition of "employer" for purposes of Labor Code violations, the court looked to the Industrial Welfare Commission's (IWC) wage orders for guidance. The IWC actually defines the employment relationship and thus who may be liable under the Labor Code. "Employer" is defined as one who "directly or indirectly, or through an agent or any other person employs or exercises control over the wages, hours, or working conditions of any person." The court went on to consider the plaintiffs' argument that the Labor Code permits violations under an ostensible agency theory because the IWC's definition includes the phrase "through an agent," but found that the phrase is expressly restricted to an entity that "employs or exercises control over" the workplace. The court further rejected that any agent acting within his or her ostensible authority binds the principal. The court explained that the plaintiffs failed to identify any specific authority for the application of ostensible agency principles where application was inconsistent with the statutory definition at issue. Finally, the court rejected the plaintiffs' policy arguments, noting that although courts are to construe wage statutes broadly, the principle does not permit courts to rewrite applicable legislation. The court further noted that the "factual predicate" of the plaintiffs' policy arguments—that McDonald's can remedy the alleged Labor Code violations—was already previously rejected by the court. Based on the foregoing, the court concluded that applying ostensible agency principles to hold McDonald's liable for labor code violations would be inconsistent with the plain language of the IWC's wage orders and, accordingly, entered summary judgment in favor of McDonald's.

As to the plaintiffs' claims for declaratory relief and for relief under California's Unfair Competition Law and Private Attorneys General Act, the court also entered summary judgment in favor of McDonald's because these claims were merely derivative of the plaintiffs' Labor Code claims.

NON-COMPETE AGREEMENTS

***H&R Block Tax Servs., LLC. v. Strauss*, Bus. Franchise Guide (CCH) ¶ 15,908, 2017 WL 395119 (N.D.N.Y. Jan. 27, 2017)**

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

RELEASES

***Armstrong v. Curves Int'l, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,934, 2017 WL 894437 (W.D. Tex. Mar. 3, 2017)**

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

STATE DISCLOSURE/REGISTRATION LAWS

***Lofgren v. AirTrona Canada*, Bus. Franchise Guide (CCH) ¶ 15,909, 2017 WL 384876 (6th Cir. Jan. 27, 2017)**

The Sixth Circuit analyzed whether the plaintiff, Brian Lofgren, and the defendants, AirTrona Canada and Salvatore Barberio, entered into a franchise agreement under the Michigan Franchise Investment Law (MFIL), and, if so, whether Lofgren could rescind the agreement and seek restitution under MFIL based on AirTrona's failure to provide required disclosure statements. The Sixth Circuit affirmed the U.S. District Court for the Eastern District of Michigan's ruling that AirTrona and its agent, Barberio, attempted to sell to Lofgren a franchise business for sanitizing automobiles at car dealerships, the agreement should be rescinded because AirTrona failed to provide a disclosure statement, and Lofgren should recover payments related to the franchise sale and attorneys fees. The district court's ruling followed a bench trial against only Barberio because the court had entered a default judgment against AirTrona.

In 2009, Lofgren purchased a franchise from AirTrona Green Technologies, the predecessor of Airtrona, and in return, AirTrona Green Technologies provided Lofgren with the equipment necessary to start his franchise. In 2010, AirTrona formed and began offering a newer sanitization process that actually cleaned the interiors of used vehicles to eliminate the source of odors; the old process simply reduced odors. In 2011, Barberio presented Lofgren with a business plan to upgrade Lofgren's old franchise to the new sanitization process. During the course of negotiations, Barberio promised Lofgren that Lofgren would earn profits of $3,000 to $6,000 per month. At the conclusion of negotiations, AirTrona sent Lofgren an invoice that stated that Lofgren would receive one "Franchise Michigan Location" and identified Barberio as the salesperson for the deal. Lofgren never realized the profits promised by Barberio, and the business failed in 2013. In August 2013, Lofgren sued AirTrona and Barberio. After a bench trial on the claims against Barberio, the district court found that Barberio was an employee who had violated the MFIL and that rescission was proper. Barberio appealed.

First, the Sixth Circuit rejected Barberio's argument that Lofgren was not granted a franchise by AirTrona in 2011. Although Barberio claimed that the transaction merely expanded Lofgren's existing franchise by buying new equipment, the Sixth Circuit found that the older cleaning process franchise was materially different from the newer cleaning process franchise and an invoice AirTrona sent to the plaintiff in August 2011 explicitly stated that the agreement was for a franchise. The Sixth Circuit also rejected Barberio's argument that the MFIL incorporates a franchise adherence requirement through the language "prescribed by the franchisor" that was absent from the 2011 upgrade. According to Barberio, Lofgren ran his Michigan business independently from AirTrona, so AirTrona did not "prescribe" a marketing plan as required by the statute. The Sixth Circuit disagreed, reading the "prescribed by a franchisor" language to require general adherence to a franchisor's business plan, not to mandate a complete sacrifice or independence by the franchisee. The court found that Lofgren's business was reliant on AirTrona and Barberio for training, obtaining business relationships for the upgraded business model, business equipment, uniforms, and promotional support. Because this reliance is at the heart of the MFIL, there was no question that the relationship between AirTrona and Lofgren's upgraded business was a franchise that had multiple "prescriptions" tying them together. The Sixth Circuit also concluded that Lofgren was charged a franchise fee, rejecting the argument that the charge was just for the new equipment. Although the court acknowledged the impracticality of requiring a franchisor to generate new disclosure documents each time it adds a new product or service, it upheld the district court's finding that Lofgren was charged for more than the value of the equipment and the extra charge amounted to a franchise fee.

Barberio next argued that he was an independent contractor working for AirTrona and, thus, exempt from liability as an employee under the MFIL, but the Sixth Circuit disagreed. The MFIL provides for personal liability for an employee who materially aids in the act or transaction constituting a violation. Using an "economic realities" test that looks at "the totality of the circumstances surrounding the economic realities of the employment relationship," the court found that Barberio was an employee because he (1) was named the CEO/COO of AirTrona, (2) held himself out as an employee, (3) was involved in developing company strategy, and (4) personally negotiated this transaction on behalf of AirTrona. Furthermore, Barberio did not qualify for the employee safe harbor provision of the MFIL because he had intimate knowledge of the transaction; to reap the benefit of the safe harbor, an employee must have no knowledge of the underlying facts.

Finally, the Sixth Circuit rejected Barberio's argument that the remedies granted by the district court were improper. First, although Barberio claimed that rescission was improper for a technical violation, rescission is explicitly allowed by the plain language of the MFIL. Second, the court affirmed the final restitution award granted to Lofgren, rejecting Barberio's argument that he should not be personally liable (because he was an employee of AirTrona and made the deal with Lofgren) and further rejecting the argument that the restitution amount should exclude amounts paid to a third-party generator manufacturer. Although the generator was not delivered to Lofgren, the invoice made clear that it was AirTrona's responsibility to ensure delivery of the generator and stated that all inquiries should be directed to Barberio, indicating his responsibility for the delivery. Last, the court approved the attorneys fees award of $45,822.13 because the MFIL provides for "reasonable attorney's fees and court costs" for violations of the statute. Although a portion of the fees were spent litigating against AirTrona (not Barberio), Barberio was jointly and severally liable with AirTrona. The court, however, denied Lofgren's request for attorneys fees for the appellate proceeding.

***Sonic Indus. LLC v. Halleran*, Bus. Franchise Guide (CCH) ¶ 15,913, 2017 WL 239388 (W.D. Okla. Jan. 19, 2017)**
This case is discussed under the topic heading "Statutory Claims."

STATUTE OF LIMITATIONS

***Armstrong v. Curves Int'l, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,934, 2017 WL 894437 (W.D. Tex. Mar. 3, 2017)**
This case is discussed under the topic heading "Contract Issues."

STATUTORY CLAIMS

***Beck Chevrolet Co. v. Gen. Motors LLC*, Bus. Franchise Guide (CCH) ¶ 15,892, Nos. 13-4066 & 13-4310, 787 F.3d 663 (2d Cir. 2016)**
The plaintiff, Beck Chevrolet Co., initially appealed multiple adverse rulings related to its claims under New York's Franchised Motor Vehicle Dealer

Act. The Second Circuit denied several of the plaintiff's appeals in an earlier opinion but certified several questions to the New York Court of Appeals concerning the proper scope and application of the Dealer Act. Following guidance from the New York Court of Appeals, the Second Circuit reversed, in part, and ultimately remanded to the U.S. District Court for the Southern District of New York for further consideration.

The Second Circuit first examined Section 463(2)(gg) of the Dealer Act, which makes it unlawful for a franchisor to use an unreasonable, arbitrary, or unfair sales or performance standard in determining a franchised automobile dealer's compliance with a franchise agreement. Beck contended that a statewide average sales performance standard used by General Motors LLC to determine expected sales performance for its dealers was unlawful because it failed to adjust for certain local characteristics (such as brand popularity) beyond adjusting for the local popularity of general vehicle types. The New York Court of Appeals agreed, explaining that § 463(2)(gg) forbids the use of standards that are not based in fact or responsive to market forces because performance benchmarks reflecting a market different from the dealer's sales area cannot be reasonable or fair. Therefore, to comply with the Dealer Act, a franchisor intending to use statewide data for other dealers must account for market-based challenges that affect dealer success. Applying these principles, the New York Court of Appeals held that GM's exclusion of local brand popularity or import bias rendered the standard unlawful. And, not only is it unlawful to terminate a dealer on the basis of a below-average sales performance, it is also unlawful to use the performance standard, alone or in conjunction with other metrics, to assess a dealer's compliance with its franchise agreement. Accordingly, the Second Circuit found that GM's performance standard was unlawful and reversed the district court's ruling.

Next, the Second Circuit examined whether GM's changes to Beck's service area constituted an "unfair" modification under § 463(2)(ff) of the Dealer Act. It certified the following question for determination by the New York Court of Appeals: "Does a change to a franchisee's [service area] constitute a prohibited 'modification' to the franchise under § 463(2)(ff), even though the standard terms of the Dealer Agreement reserve the franchisor's right to alter the [service area] in its sole discretion?" Before any modification to a franchise agreement that may substantially and adversely affect the dealer, section 463(2)(ff) requires ninety days' written notice stating the specific grounds for the modification. A franchisee may challenge a modification as unfair. Then the burden shifts to the franchisor to prove that the modification is fair. A modification is unfair if it is not undertaken in good faith, is not undertaken for good cause, or would adversely and substantially affect the dealer under an existing franchise agreement.

Answering the certified question, the New York Court of Appeals concluded that a modification to a franchisee's service area is a "modification" under the Act because it may significantly impact the franchise agreement. A franchisor may therefore not insulate itself from the Dealer Act by reserving the right to modify a service area in the franchise agreement; otherwise, a franchisor could easily circumvent the Act's purpose by reserving the right to change franchise terms at will. Even so, only modifications that substantially and adversely affect the dealer's rights, obligations, investment, or return on investment are prohibited under the Dealer Act. Therefore, a revision to the service area is not perforce violative of § 463(2)(ff); rather, such changes must be assessed on a case-by-case basis by considering its impact on the dealer. Because the district court originally found that the modification at issue was not a modification under the Dealer Act and did not examine the modification's impact on the dealer, the Second Circuit vacated the district court's judgment and remanded to the district court for resolution.

***Donald J. Ulrich Assocs., Inc. v. Tec Air, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,884, 2016 WL 7374236 (N.D. Ill. Dec. 20, 2016)**

The plaintiff was an independent representative of automotive industry principals. The defendant produced parts, components, and assemblies used to manufacture automobiles. The parties entered an exclusive sales agreement under which the plaintiff was to be the exclusive sales representative of the defendant to specific customers. The agreement provided for commissions to be paid to the plaintiff for all business secured pursuant to the agreement, even sales made after the termination of the agreement, and for automatic yearly renewals absent written notice of termination. The parties believed that the agreement had been terminated when the lawsuit was filed, although neither had served the other with a written notice of termination.

The U.S. District Court for the Northern District of Illinois granted cross motions for summary judgment. The court granted the plaintiff summary judgment on his breach of contract claim because there was no dispute that the plaintiff procured business for the defendant or that the defendant did not pay the plaintiff commissions on those sales. The court also granted the plaintiff's request for a declaratory judgment for payment of future sales commissions on all business the plaintiff secured on behalf of the defendant. The court, however, granted summary judgment in favor of the defendant on the plaintiff's Illinois Sales Representative Act (ISRA) claim and claim for damages for "anticipated future sales."

The ISRA requires commissions due at the time of termination of a contract to be paid within thirteen days of termination. 820 ILL. COMP. STAT. 120/2. The Act is intended to protect sales representatives from being denied commissions that are due or may become due after a contract is terminated; therefore, the ISRA applies only where a contract has been terminated, not where a contract is still in effect. The defendant contended that the agreement was still in effect because neither party had complied with the termination provisions of the agreement. Those provisions required the parties to give each other written notice of termination; otherwise, the agreement automatically renewed for successive one-year terms. The plaintiff disputed that strict compliance with the termination provisions was necessary because the defendant's breach of the agreement prevented him from taking advantage of the terms of the agreement and the defendant should not be able to profit from its breach. Relying on Seventh Circuit case law, the court adopted the defendant's view and concluded that the ISRA did not apply because the parties' agreement remained in effect since neither party had given written notice of termination to the other. Moreover, compliance with the termination provisions did not require the plaintiff to forfeit anything and did not excuse the defendant's obligation to pay commissions.

With respect to the plaintiff's request for damages for anticipated future sales, the court found such expectation damages inappropriate because the plaintiff had not yet suffered any injury related to future sales and he could only expect to receive commissions after the defendant received payment from customers. Accordingly, the court granted summary judgment in favor of the defendant on this and the ISRA claim.

***Ervin Equip. Inc. v. Wabash Nat'l Corp.*, Bus. Franchise Guide (CCH) ¶ 15,901 (N.D. Ind. Jan. 31, 2017**

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

***Len Stoler, Inc. v. Volkswagen Grp. of Am., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,911, WL 367604 (E.D. Va. Jan. 25, 2017)**

The plaintiff, Len Stoler, Inc., a former operator of an Audi dealership in Maryland, brought suit against Volkswagen Group of America, Inc., d/b/a Audi of America, for violations of the Maryland Transportation Code (MTC). Stoler filed suit after selling its dealership to a third party after Stoler signed an agreement, at Audi's request, to construct a new facility that would sell Audi vehicles exclusively. Stoler was given the choice of building the new facility or being denied bonus payments he was currently receiving. The U.S. District Court for the Eastern District of Virginia granted in part and denied in part the parties' cross motions for summary judgment.

First, the court analyzed Stoler's claim that Audi violated the MTC's requirement that distributors offer the same consumer rebates, dealer incentives, price or interest rate reductions, and finance terms to all dealers of the same line-make. Stoler contended that Audi illegally implemented a two-tiered bonus program, which offered more generous incentives to exclusive Audi dealers than it offered to non-exclusive Audi dealers. The court disagreed and awarded summary judgment in favor of Audi because Audi offered Stoler and other dealers the same bonus opportunities. Although Stoler asked the court to focus on the disparate results of the incentive program offer, an offer that some dealers accepted and others did not, the relevant inquiry was on the scope of the offer, and the offer was made to all Maryland Audi dealers. Seeking to avoid this result, Stoler argued for the first time in a supplementary summary judgment brief that Audi treated new dealers differently from established dealers by offering them an easier path to receive the higher bonus payments. Because this new claim was not made in the complaint, the court declined to decide it.

Next, the court examined Stoler's claim that Audi violated the MTC by requiring Stoler to operate an exclusive Audi facility. MTC § 15-207(h)(2)(i) specifically prohibits a vehicle distributor from requiring a dealer "to alter or replace an existing dealership facility." Stoler contended that Audi required him to build a new facility when in 2008, and as part of Audi's Retail Capacity Guide, Audi implemented a market opportunity guide (MOG) that provided a sales projection for each dealer as calculated by Audi and that required Maryland dealers to agree to operate an exclusive facility if their respective MOG exceeded 400 units. The court determined that the MOG did not violate the MTC because the law does not prohibit an exclusivity requirement if it is either previously agreed to or uniformly applied to dealers across Maryland.

The court found that both circumstances were present and either would be independently sufficient to warrant summary judgment in favor of Audi. First, although the MOG was implemented nearly a decade after Stoler initially signed the dealer agreement, the agreement incorporated Audi's Standard Provisions and Retail Capacity Guide, which explicitly provided that Audi could prescribe new facility standards "from time to time," "taking into consideration . . . reasonably foreseeable future requirements." Indeed, those prescribed standards, specifically the Retail Capacity Guide and MOG calculation, required Stoler to build an exclusive facility, and "it was reasonable to anticipate that a dealership, over the course of two decades, may need to become exclusive." Second, the court found that Audi uniformly applied the MOG to all Maryland dealers; thus, it could not be said to have "required" Stoler to alter or replace a dealership facility. Further, the court rejected Stoler's additional argument that Audi did not uniformly apply its decisions regarding whether a dealer must operate out of exclusive facilities because, in applying its MOG formulas, Audi had unique inputs and outputs for each Audi dealer. Audi used the same MOG formulas and calculation methods for each dealer, the court found.

The court then analyzed Stoler's claim that Audi violated MTC § 15-207(h)(2)(ii) by denying or threatening to deny a "benefit generally available to all dealers," a bonus in this case, based on Stoler's failure to operate out of an exclusive facility. This claim too was without merit. To violate the law, Audi would have needed to withdraw a "benefit generally available to all dealers"; the bonus was a dealer incentive, not a benefit. Drawing a distinction between benefit and incentive, the court noted that an incentive includes conditions or criteria that the recipient must meet, while a "benefit generally available" is a useful aid that each Audi dealer receives by the mere fact of being an Audi dealer. The court found plenty of examples of such benefits, including service mailers, next-day parts delivery, and training, to name a few. By contrast, the bonus program required dealers to satisfy certain conditions to earn the bonus. Therefore, Audi was entitled to summary judgment on this claim.

The court next turned to Stoler's claim that Audi violated the MTC by reducing the price of its automobiles or changing the financing terms in exchange for dealers' agreeing to maintain exclusive sales or service facilities or building sales or service facilities. As an initial matter, the court rejected Audi's argument that Stoler lacked standing to bring this claim for lack of injury. Stoler's injury could be found in the sale of its business, millions of dollars in lost sales, and diminution in franchise value, all resulting from Audi's requirement that it build an exclusive facility. Regarding the merits of this price reduction claim, genuine issues of material fact precluded an award of summary judgment to either party. The parties presented conflicting evidence as to whether Audi's exclusive bonus program actually reduced the price of its automobiles, and factual disputes regarding Stoler's alleged damages also existed.

Audi also moved for summary judgment on Stoler's coercion claim. Stoler alleged that Audi violated MTC § 15-207(b) by coercing it into signing a facility agreement to build a new, exclusive facility by threatening to deny future bonus payments. Audi disputed that any such alleged threat was "coercion" under the Act because the bonus program was an incentive, not a benefit. The court disagreed with such a narrow reading of the statute, which defines "coercion" to include threats of "harm . . . or other adverse consequences" and noted that loss of bonus payments constitute such harm. Further, the court observed that "the offering of an incentive program does not immunize a distributor from a potential coercion claim." The court went on to deny summary judgment to Audi because there were disputed factual issues as to (1) whether Audi attempted to persuade or coerce Stoler into an agreement to build an exclusive dealership and (2) whether Stoler suffered damages by signing the facility agreement.

Finally, the court examined Audi's three affirmative defenses: a covenant not to sue contained in the facility agreement and two equitable defenses (unclean hands and in pari delicto). The court first weighed the covenant-not-to-sue defense, which Audi also brought as a counterclaim. Specifically, in the facility agreement Stoler agreed not to sue Audi "with respect to any alleged damages [Stoler] may suffer as a result of [Stoler]'s loss of the right to receive any [ ] [b]onus . . . arising out of [Stoler]'s failure to perform its obligations under the [facility] [a]greement." The court found the affirmative defense mooted by its grant of summary judgment to Audi on Stoler's bonus/benefit claim. The court further found that the counterclaim failed because no damages would result from the bonus claim since summary judgment was granted in favor of Audi on that claim. Moreover, neither Audi's attorneys fees nor its expert fees were recoverable damages in Maryland as a matter of law. Accordingly, summary judgment on Audi's counterclaim was awarded to Stoler.

With respect to Audi's equitable defenses, Audi argued that: (1) Stoler knowingly entered into the facility agreement, which Stoler claimed to be illegal in this litigation; (2) Stoler fraudulently represented in the facility agreement to having been fully advised of its legal nature; and (3) Stoler falsely stated in the agreement that its representatives and legal counsel had reviewed the applicable laws before signing the agreement. Stoler contended that the affirmative defenses failed as a matter of law because: (1) it could not be at fault given Audi's grossly unequal bargaining power; (2) in pari delicto could not apply where Stoler was part of a class protected by the allegedly violated statute; and (3) contract provisions cannot provide a basis for an unclean hands or in pari delicto defense. The court rejected Stoler's argument that alleged misrepresentations in the facility agreement could not form a basis for the defenses, but ultimately found that there was a genuine factual dispute as to Audi's equitable defenses because it was unclear if Audi had coercive or grossly unequal bargaining power at the time Stoler signed the facility agreement. It therefore denied Stoler's motion for summary judgment on these two defenses.

***Neubauer v. FedEx Corp.*, Bus. Franchise Guide (CCH) ¶ 15,921, 849 F.3d 400 (8th Cir. 2017)**
This case is discussed under the topic heading "Contract Issues."

***Owa v. Fred Meyer Stores*, Bus. Franchise Guide (CCH) ¶ 15931, 2017 WL 897808 (W.D. Wash. Mar. 7, 2017).**
This case is discussed under the topic heading "Contract Issues."

***Salazar v. McDonald's Corp.*, Bus. Franchise Guide (CCH) ¶ 15,818, 2017 WL 950986 (N.D. Cal. Mar. 10, 2017)**
This case is discussed under the topic heading "Labor and Employment."

***Sears Home Appliances Showrooms, LLC v. Appliance Alliance, LLC*, Bus. Franchise Guide (CCH) ¶ 15,927, 2017 WL 839483 (N.D. Ill. Mar. 3, 2017)**
This case is discussed under the topic heading "Contract Issues."

***Sonic Indus. LLC v. Halleran*, Bus. Franchise Guide (CCH) ¶ 15,913, 2017 WL 239388 (W.D. Okla. Jan. 19, 2017)**
The U.S. District Court for the Western District of Oklahoma granted in part and denied in part Sonic's motion to dismiss counterclaims brought by a franchisee of two Florida Sonic restaurants with the rights to develop twenty more Sonic restaurants in Florida. Sonic initiated the lawsuit asserting claims of breach of contract and unjust enrichment against the franchisee under Oklahoma law. Sonic alleged that the franchisee failed to pay all amounts due under the contracts and was therefore unjustly enriched by re-

taining "POP Kits" and other property of Sonic. The franchisee brought counterclaims for failure to provide proper financial disclosures in the franchise disclosure documents (FDDs) and making false representations regarding profitability and desirability of the restaurants under both Florida and Oklahoma law. Sonic moved to dismiss the counterclaims.

As a threshold matter, the court first had to determine whether Oklahoma or Florida law applied to the franchisee's counterclaims. Sonic argued that Oklahoma law should apply because the parties' agreements contained an Oklahoma choice of law clause and because the most significant relationship test required application of Oklahoma law to the franchisee's tort claims. Conversely, the franchisee argued that the agreements provided that the law of the state in which the restaurants were located governed franchise disagreements (here, Florida law) and that it had asserted claims under the laws of both states. Because the court was sitting in diversity, it applied the choice of law provisions of the forum state (Oklahoma). That required the court to apply the law of the state (1) chosen by the parties, (2) where the contract was made or entered into, or (3) the place of performance if indicated in the contract. Applying those factors, it was clear based on the plain language of the choice of law provision in the license agreement that Oklahoma law governed the agreement itself, and that, under limited circumstances, the franchise laws or regulations of the state in which the Sonic restaurant was located also applied. Based on this provision, the court concluded that the parties intended for both Oklahoma and Florida law to apply to disputes involving the agreement and that the franchisee could assert counterclaims stemming from both Oklahoma and Florida law.

As to tort claims, the court found that Oklahoma choice of law rules applied the law of the state with the most significant relationship to the parties. This test considers: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (4) the place where the relationship, if any, between the parties occurred. Here: (1) the injured party (the franchisee) resided in Florida; (2) the alleged breach and fraudulent acts occurred within Sonic's headquarters in Oklahoma, which was reinforced by a clause in the license agreement stating that any breaches would be deemed to have occurred at Sonic's corporate headquarters; (3) Sonic was located in Oklahoma and Delaware and the franchisee was located in Florida; and (4) all contracts between the parties were issued from Sonic's headquarters in Oklahoma. Accordingly, the court determined that Oklahoma law applied to the franchisee's tort claims for breach of the covenant of good faith and fair dealing and fraud.

Turning to the merits of the franchisee's counterclaims, the court first weighed the franchisee's claim of breach of the implied covenant of good faith and fair dealing. The franchisee alleged that Sonic abused its discretionary authority, failed to exercise its authority in good faith, and the alleged conduct was a willful and malicious breach of that duty. Although

Oklahoma recognizes an implied covenant in every contract, its breach is usually not recoverable as a tort independent from breach of contract. However, an independent bad faith claim can exist where there is a "special relationship" between the parties, such as a contract of adhesion and an elimination of risk. The court here found that the parties' franchise relationship was simply a traditional commercial relationship and that there was no evidence that the agreement was an adhesion contract or that Sonic eliminated its risk in the agreement. Accordingly, the court found that no amendment could save the counterclaim and dismissed it with prejudice.

With respect to the defendants' fraud claim, Sonic argued that the claim failed to meet the heightened pleading standards of Federal Rule of Civil Procedure 9(b), which requires specification of "the time, place and contents of the false representation, the identity of the party making the false statement[,] and the consequences thereof." The court found that the franchisee met the time requirement by stating that the fraud occurred in late 2007, prior to the signing of each license agreement. The court next found that the location of the fraud was properly pleaded because the counterclaim stated the location of the restaurants and the territories in question and the location a representative of Sonic visited when he allegedly made representations to the franchisee. Without analysis, the court then concluded that the contents of the fraudulent statements were sufficiently described. Further, the court found that the identity of the person making the statements was established by naming a representative of Sonic. This was sufficient because the Tenth Circuit does not require naming specific individual sources of statements where the statements are the result of group action (e.g., a corporation's board of directors). The court therefore denied Sonic's motion to dismiss the fraud counterclaim.

The franchisee also claimed that Sonic violated the Florida Franchise Act (FFA) by misrepresenting the prospects or chances of success of the Sonic franchises. More specifically, the franchisee claimed that Sonic assured it of the viability of a location despite knowing that it needed to generate at least $4 million in revenue to turn a profit and that no similar location had generated that level of revenue. Sonic argued that this claim failed because the license agreement expressly disclaimed all representations regarding profitability, including oral representations. The court concluded, however, that the FFA provides a remedy for any intentional words or conduct by the franchisor that concern the chances of success of the franchise, were relied upon by the franchisee to its detriment, and are untruthful, regardless of the disclaimer. Therefore, the court allowed the franchisee's FFA claim to proceed.

Next, the court examined the franchisee's claim under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). To state a FDUTPA claim, the franchisee had to show a deceptive act or unfair trade practice, causation, and damages. The franchisee contended that because the FDUTPA adopts any violation of the Federal Trade Commission (FTC) Act and Sonic failed to comply with the Franchise Rule, the claim survived a motion to dismiss. Sonic again argued that a disclaimer in the license agreement defeated the claim and that the claim was not alleged with sufficient specificity under Rule 9(b). The court rejected the pleading argument, but held that Florida courts bar recovery under FDUTPA if the party signs a contract with terms that contradict the alleged misrepresentations, such as the disclaimer here. Because the franchisee was barred from seeking relief under the FDUTPA given the disclaimer he signed in the license agreement, the court dismissed the claim with prejudice.

The court then examined the Oklahoma Business Opportunity and Sales Act (OBOSA) counterclaim that Sonic was no longer exempt from certain filing requirements with the Oklahoma Department of Securities when it provided allegedly false and misleading information in the FDDs or, in the alternative, that Sonic failed to deliver the FDDs. The franchisee also alleged that Sonic's FDD violated the OBOSA by containing fraudulent or deceitful information. Seeking dismissal, Sonic argued that the franchisee improperly pleaded this claim in the alternative. The court rejected that argument because alternative pleading is permissible in Oklahoma. Moreover, outstanding questions of fact regarding whether the FDD was provided and was sufficient remained. Accordingly, the OBOSA claim stood.

Finally, the court turned to the counterclaim that Sonic violated the Oklahoma Consumer Protection Act (OCPA). Sonic argued that the claim should be dismissed because the FTC has the authority to regulate franchisors and the OCPA exemption applies, making this claim inapplicable. The OCPA exemption provides that actions or transactions are exempt where regulated by a regulatory authority of Oklahoma or the United States. The court noted that the franchisee did not dispute Sonic's proposition that the FTC has authority to regulate Sonic's activity as a franchisor; in fact, the franchisee had alleged breach of the Franchise Rule. Because the OCPA exemption makes no requirement of a private cause of action and the FTC regulates the conduct at issue, the court dismissed the claim with prejudice.

***In re: Volkswagen "Clean Diesel" Mktg., Sales Practices & Prods. Liab. Litig.*, Bus. Franchise Guide (CCH) ¶ 15,914, 2017 WL 316165 (N.D. Cal. Jan. 23, 2017)**

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

TORTIOUS INTERFERENCE

***Owa v. Fred Meyer Stores*, Bus. Franchise Guide (CCH) ¶ 15931, 2017 WL 897808 (W.D. Wash. Mar. 7, 2017).**

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

***Sears Home Appliances Showrooms, LLC v. Appliance Alliance, LLC*, Bus. Franchise Guide (CCH) ¶ 15,927, 2017 WL 839483 (N.D. Ill. Mar. 3, 2017)**
This case is discussed under the topic heading "Contract Issues."

UNFAIR COMPETITION/UNFAIR AND DECEPTIVE PRACTICES

***Sears Home Appliances Showrooms, LLC v. Appliance Alliance, LLC*, Bus. Franchise Guide (CCH) ¶ 15,927, 2017 WL 839483 (N.D. Ill. Mar. 3, 2017)**
This case is discussed under the topic heading "Contract Issues."

***Sonic Indus. LLC v. Halleran*, Bus. Franchise Guide (CCH) ¶ 15,913, 2017 WL 239388 (W.D. Okla. Jan. 19, 2017)**
This case is discussed under the topic heading "Statutory Claims."

VICARIOUS LIABILITY

***Lofgren v. AirTrona Canada*, Bus. Franchise Guide (CCH) ¶ 15,909, 2017 WL 384876 (6th Cir. Jan. 27, 2017)**
This case is discussed under the topic heading "State Disclosure/Registration Laws."