Franchising (& Distribution) Currents

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ARBITRATION

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***Fantastic Sams Franchise Corp. v. FSRO Ass'n, Ltd.*, No. 11-2300, 683 F.3d 18, Bus. Franchise Guide (CCH) ¶ 14,854 (1st Cir. June 27, 2012)**

On behalf of thirty-five of its members, a franchisee association (FSRO) commenced arbitration against a hair salon franchisor (Fantastic Sams) through which FSRO sought declaratory relief regarding alleged breaches of contract and consumer protection claims. Fantastic Sams moved to stay the arbitration and sought to require all thirty-five members to arbitrate their claims on an individual basis. The District of Massachusetts stayed the arbitration as to the claims of twenty-five of the FSRO members because their contracts prohibited arbitration on a class-wide basis and required their claims to proceed on an individual basis. The court, however, declined to stay the arbitration with respect to the claims of ten FSRO members whose contracts were silent as to class arbitration. Fantastic Sams appealed to the First Circuit, which affirmed the district court's ruling.

In denying Fantastic Sams' requested relief with respect to the claims of the ten franchisees, the district court found that the arbitration clause in those franchise agreements was very broad and applied, without qualification, to all controversies or claims arising from or related to the contract, including issues of interpretation and breach. The clause also incorporated by reference the rules of the American Arbitration Association, which in turn provide that arbitrators have the power to rule on their own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement. The court thus concluded that the question of whether the agreements prohibited FSRO's associational claims did not raise a question of arbitrability, but rather was a matter of contract interpretation that the parties had agreed to submit to arbitration.

On appeal, the First Circuit affirmed the district court's decision, rejecting Fantastic Sams' contention that proceeding with a collective arbitration of the claims of the ten franchisees would run afoul of the Supreme Court's ruling in *Stolt-Nielsen SA v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), which held that class arbitration may not be imposed on a party to an arbitration agreement unless there is a contractual basis for concluding that the party agreed to submit to class arbitration. In *Stolt-Nielsen*, the parties to the arbitration agreement stipulated that they had, in fact, reached no agreement on that subject. After noting several practical differences between a class arbitration, as was present in *Stolt-Nielsen*, and the associational arbitration presented here, the First Circuit further distinguished that case by noting that, since the parties in *Stolt-Nielsen* had stipulated to their lack of agreement on the availability of class arbitration, the Supreme Court did not have occasion in that case to consider what might constitute a contractual basis for class arbitration. The First Circuit further noted that both the Second and Third Circuits had recently found that *Stolt-Nielsen* does not foreclose the possibility that parties may reach an implicit agreement to authorize class arbitration.

The First Circuit found that given (1) the broad language in the Fantastic Sams' arbitration agreement, (2) the fact that the parties vigorously disputed both its meaning and the intentions underlying it, and (3) the 1988 change to the arbitration language in the agreement to which the other twenty-five FSRO members were party, the arbitrator could conceivably discover a conscious choice by the parties to thereafter exclude certain forms of arbitration, such as class or associational arbitration, that had been available prior to that change.

***Ironson v. Ameriprise Financial Services Inc.*, No. 3:11cv899, Bus. Franchise Guide (CCH) ¶ 14,891 (D. Conn. Sept. 10, 2012)**

An Ameriprise Financial Services franchisee sued Ameriprise, alleging that the franchisor had violated the Connecticut Franchise Act (CFA) and the Connecticut Unfair Trade Practices Act (CUTPA) in terminating his franchise agreement for failing to complete certain required written deliverables for clients. The court granted Ameriprise's motion to stay the litigation and compel arbitration.

The franchisee (Ironson) maintained that the arbitration clause of the parties' franchise agreement was unenforceable because he had signed the agreement under economic duress.

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Ironson further argued that, even if the arbitration clause could be enforced, it did not encompass his claims against Ameriprise. The court rejected both arguments.

Ironson had been the sole proprietor of a financial planning business since 1991. He served as a financial advisor affiliated with IDS Financial Services, which later became Ameriprise. Beginning in 2000, Ameriprise required all of its affiliated financial advisors, including Ironson, to choose whether to become Ameriprise employees or independent Ameriprise franchisees. According to Ironson, he chose the latter option under economic duress, having been told that the terms and conditions of the franchise agreement were not subject to negotiation, and that if he did not sign the agreement his clients would be transferred and he would be assigned to another Ameriprise office. Citing the substantial disparity in bargaining power that existed between his sole proprietorship and Ameriprise, Ironson attested that he believed at that time that in the absence of signing the agreement immediately, he would have been "summarily stripped of everything that [he] had worked for and built up over the course of the preceding fifteen years, and upon which [he] depended entirely for income to support [his] family."

The court was not persuaded. It observed that under Connecticut law, economic necessity cannot be the sole basis for a claim of economic duress. The court further observed that the mere act of conditioning continued employment upon the acceptance of an arbitration agreement likewise is insufficient to establish economic duress, according to previous decisions interpreting Connecticut law. In concluding that Ironson had failed to establish that he was under economic duress when he signed the franchise agreement, the court noted that (1) Ironson is an "educated businessperson capable of understanding a contract;" (2) he had received the agreement a month in advance, which the court believed had provided him with ample time to review its terms and consult with an attorney; and (3) he would have had the opportunity to continue working as an Ameriprise employee even had he chosen to reject the agreement.

Ironson also maintained that his claims were exempted from arbitration under the agreement, because (1) the claims did not implicate the rules of the Financial Industry Regulatory Authority (FINRA), the self-regulatory organization governing the financial industry formerly known as the National Association of Securities Dealers, Inc.; (2) the Ameriprise franchise disclosure document that had been provided to Ironson in 2000 identified Connecticut as a state that had laws which "may supersede" the agreement with respect to termination and renewal; and (3) the arbitration clause was void with respect to claims under the CFA, which was intended to preserve access to state courts for claimants such as Ironson.

In rejecting Ironson's arguments, the court first observed that the arbitration clause itself clearly contemplated the arbitration of claims that do not implicate FINRA's rules. The court further found that even if Ironson's claims were not specifically included within the scope of the arbitration clause, they were presumptively included as a result of the broad language of the arbitration clause itself which covered "any dispute, claim or controversy that may arise" between the parties. In particular, applying an established Second Circuit analytical framework, the court determined that because the arbitration clause was broad, it created a "presumption of arbitrability," under which the arbitration of even a collateral matter will be ordered if the claim implicates issues of contract construction or the parties' rights and obligations. The court further found the vague reference in the Ameriprise franchise disclosure document that Connecticut state law may supersede the agreement's termination provisions did not constitute forceful evidence that the parties intended to exclude a non-FINRA claim from arbitration as would overcome the presumption of arbitrability. Finally, the court noted that several courts in that district had previously held that CFA and CUTPA claims are properly arbitrable, thereby disposing of Ironson's third argument.

***Senior Servs. of Palm Beach v. ABCSP Inc.*, No. 12-80226-CIV., Bus. Franchise Guide (CCH) ¶ 14,830 (S.D. Fla. June 7, 2012)**

Defendant was a corporation franchising businesses that provide nonmedical in-home personal care. Plaintiff franchisee filed a suit asserting nine different claims, including claim for declaratory judgment that the arbitration clause was unconscionable, which the court addressed as a threshold matter.

The court first addressed whether the question of unconscionability is a matter for the arbitrator. In arguing that the Florida court would have jurisdiction, Senior Services relied on the general rule that the procedurally proper first step is for the court to examine the validity of the arbitration clause before it can determine whether the clause compels arbitration. However, the court reminded the parties that an exception to that general rule exists if the parties agree to arbitrate the validity of the arbitration clause. In the clause in question, the parties agreed that arbitration would be conducted by AAA rules, which state that the arbitrators shall have the power to rule on their own jurisdictions. The court dismissed the suit to allow the arbitrator to determine whether the arbitration clause was unconscionable.

Despite this dismissal, the court went on to explain that, even if the matter were to be decided by the court, the clause would not be found unconscionable. Under California law, an arbitration clause is analyzed for both procedural and substantive unconsionability. Procedural unconsionability is found where an inequality in bargaining power results in an absence of meaningful choice or where supposedly agreed upon terms were hidden in the form drafted by the party seeking to enforce them. Senior Services contended that a form agreement was used by ABCSP and that there was no opportunity to negotiate the terms. The court rejected this argument on the grounds that some of the terms had successfully been modified in a modification agreement between the parties. Further, the court remarked that Senior Services is a sophisticated and experienced party and was represented by legal counsel during the negotiations. However, there was no evidence that Senior Services attempted to negotiate the arbitration clause. Substantive unconsionability is found where the results of negotiations are overly harsh or one-sided, with the primary focus being on mutuality. Senior Services argued that two provisions in the arbitration clause were unfair. The first provision stated that ABCSP could seek specific performance or injunctive relief, but did not grant Senior Services the same right. The court held that this provision was not overly harsh as claims at issue in the provision (claims for unpaid franchise fees) are usually brought by the franchisor and require immediate resolution; furthermore, a later clause allows both parties to institute proceedings for injunctive relief for multiple other types of claims. The second provision challenged by Senior Services was the forum selection clause, which specified that arbitrations were to be held at ABCSP's corporate headquarters. The court stated that mere expense or inconvenience is not the test of unreasonableness, but rather that the cost must be prohibitively high such that the party is precluded from participating.

Having rejected Senior Services claims of unconscionability and having found that the question of unconscionability as a threshold matter was a question for the arbitrator, the court then dismissed the action and compelled arbitration.

ATTORNEY FEES

***Alboyacian v. BP Prods. N. Am., Inc.,* No. 9-5143, Bus. Franchise Guide (CCH) ¶ 14,894 (D.N.J. Sept. 5, 2012)**

Following the court's rulings in two related cases in which it (1) granted summary judgment to a group of BP franchisees on the issue of whether BP's proposed nonrenewal of the parties' commissioner marketer agreements without good cause would constitute a violation of the New Jersey Franchise Practices Act (NJFPA), but (2) dismissed all but one of the remaining claims filed by the franchisees, BP moved to dismiss the final remaining claim. While that motion was pending, the parties informed the court that they had reached a settlement on that claim, regarding which plaintiffs would file a notice of voluntary dismissal pursuant to Fed. R. Civ. P. 41. However, the parties could not agree as to which side should be awarded legal fees.

The franchisees maintained that they were entitled to legal fees and costs by virtue of their having successfully sued to prevent a violation of the NJFPA. BP meanwhile asked that the court condition the voluntary dismissal upon an award of attorney fees to BP because it had been forced to defend against a meritless claim. In the alternative, BP requested attorney fees for the time that its counsel had expended in briefing the pending motion to dismiss. The court held that only the franchisees were entitled to attorney fees and costs.

The NJFPA provides franchisees with a private right of action to seek injunctive relief and to recover damages sustained "by reason of any violation" of the Act. The NJFPA further provides that, if successful, a franchisee "shall also be entitled to the costs of the action including but not limited to reasonable attorney fees." BP argued that the NJFPA limits the definition of successful franchisees to those that have shown actual violations of the NJFPA. BP further argued that its franchisees were not entitled to fees because the court had merely found that BP's proposed nonrenewal—not its past conduct—would violate the NJFPA.

The court rejected BP's position, characterizing it as a "fundamental misreading of the statute," and concluded that the BP franchisees were entitled to reasonable fees and costs under the NJFPA because they had successfully sued to prevent a violation of the Act. The court observed that other franchisees have routinely been awarded fees in actions seeking injunctions to prevent an alleged violation from occurring under the NJFPA, even where no actual violation had been proven. The court reasoned that under BP's interpretation of the NJFPA, franchisees would be unable to seek an injunction under the act to prevent a violation from occurring—relief that logically would be at issue in many cases.

The court did, however, accept BP's argument that the attorney fees awardable to the franchisees under the NJFPA should be limited to the time spent on their only successful claim and not on the nine claims that had been dismissed or on the remaining claim that had not been adjudicated. The court agreed with BP that the billing statements of the franchisees' counsel were insufficiently detailed to determine how much time had been spent on the successful claim. The court directed the franchisees to submit a revised attorney certification that included only those fees, costs, and expenses relating to the drafting and filing of the complaint and the motion for partial summary judgment, including the briefs and other documents supporting the motion, to be used by the court in calculating a final fee award.

In denying BP's requests for attorney fees, the court observed that where a defendant such as BP had neither answered the complaint nor filed a motion for summary judgment, the plaintiff retains the right to file a notice of voluntary dismissal under Rule 41. Such notice that would automatically end the action without any response from the defendant and without any order of the court. The court accordingly rejected BP's argument that the court had the authority to impose conditions upon a voluntary dismissal. Although the court agreed with BP that a Rule 41 voluntary dismissal probably would not deprive the court of jurisdiction to award attorney fees under general equitable considerations, it found that equity did not compel an award of fees to BP under the circumstances presented.

***Hamden v. Total Car Franchising Corp.*, No. 7:12-CV-00003, Bus. Franchise Guide (CCH) ¶ 14,879 (W.D. Va. Aug. 7, 2012)**

This case is discussed under the topic heading "Noncompete Agreements."

CHOICE OF FORUM

***Alan Carney & Oak Square Dev. Corp. v. Mark Sibbernsen & Home Instead, Inc.*, No. CIV.A-12-10184-RGS, Bus. Franchise Guide (CCH) ¶ 14,828 (D. Mass. May 7, 2012)**

Defendant in this case is a franchisor of non-medical home care service agencies (Home Instead) and plaintiff is a former franchisee (Oak Square). After identifying compliance deficiencies at the Oak Square franchise, Home Instead terminated the parties' franchise agreement and instituted legal proceedings. Those proceedings were voluntarily dismissed upon the execution of a settlement agreement, pursuant to which the franchise would be suspended for a specified period until it was sold. In conjunction with the settlement agreement, Oak Square appointed Home Instead as its power of attorney to maintain the franchise during the sale-period and until it was sold.

The instant dispute arose from the suit instituted by Oak Square in Massachusetts after the sale-period expired. Home Instead responded to the complaint by arguing that the case should be dismissed and transferred to Nebraska, which was the forum selected in the franchise agreement. Oak Square argued that Massachusetts is the appropriate forum, as it was the forum selected in the power of attorney controlling the sale-period. The District of Massachusetts agreed with Home Instead. The court examined the forum selection clause in the franchise agreement, which specified that all actions "arising out of or relating to" the franchise agreement be resolved in Nebraska. The court relied on a "but for" causation standard and found that, but for the existence of the franchise agreement, there would be no power of attorney. The dispute was therefore related to and arising out of the franchise agreement and should be resolved in Nebraska.

CHOICE OF LAW

***Century 21 Real Estate LLC v. All Prof'l Realty, Inc.*, Nos. CIV. 2:10-2751 WBS GGH; 2:10-2846 WBS GGH; 2:11-2497 WBS GGH, Bus. Franchise Guide (CCH) ¶ 14,884 (E.D. Cal. Aug. 8, 2012)**

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

CLASS ACTIONS

***Fantastic Sams Franchise Corp. v. FSRO Ass'n, Ltd.*, No. 11-2300, 683 F.3d 18, Bus. Franchise Guide (CCH) ¶ 14,854 (1st Cir. June 27, 2012)**

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

***Reid v. SuperShuttle Int'l, Inc.*, No. 08-CV-4854 JG VVP, Bus. Franchise Guide (CCH) ¶ 14,881 (E.D.N.Y. Aug. 10, 2012)**

This case involved a motion for final approval of a class action settlement. The court also certified the settlement class, approved the appointment of class representatives and counsel, and awarded attorney fees and costs. The class consisted of certain current and former franchisees of SuperShuttle International.

Settlement came after several years of litigation in which franchisees pursued claims against the franchisor regarding wages and unpaid overtime, asserting that they were employees rather than independent contractors. The settlement had two primary components: (1) it provided for monetary relief of $100 for each class member that was not a current franchisee, and (2) it established a program permitting current franchises to sell a new ten-year franchise using financing provided by SuperShuttle. In addition, the settlement clarified certain SuperShuttle policies, including an agreement that decisions to suspend or terminate franchisees would be made by high-level managers after the franchisee was given an opportunity to be heard.

The court noted that, in approving a class action settlement, it had the duty to "determine whether the proposed settlement is fair, adequate and reasonable." A fairness determination requires both procedural fairness, analyzed by examining the negotiations, and substantive fairness, evaluated by looking at the terms of the settlement. In its analysis of the procedural component, the court noted that experienced counsel on both sides worked on this case for several years and therefore concluded that settlement was procedurally fair.

The court's analysis of substantive fairness was more complex: the court considered nine factors set forth in various cases from the Second Circuit. The multifactor test considered factors that included the complexity, expense, and likely duration of the case; how the class reacted to the case; the stage of the case; the risks of the litigation; and the range of reasonableness of the settlement in light of the best possible recovery. The court regarded the reaction of the class to be nondeterminative; despite the fact that 38 percent of the class members opted out of the settlement, the court noted that such a level of nonparticipation does not bar settlement approval. The court then reviewed the various risk factors, finding that the risk of proving the franchisees were SuperShuttle employees rather than independent contractors was present, and there was a substantial risk that the claimants would receive nothing. The court concluded that the settlement was substantively fair.

The court then examined the requirements to certify a class, reviewing the familiar requirements of numerosity, commonality, typicality, and adequacy under Federal Rule of Civil Procedure 23(a), ultimately finding that the class of franchisees met the requirements for certification. The numerosity requirement was satisfied by the potential class of 192 former franchisees and 124 current franchisees. The commonality requirement was met by the presence of several questions of law and fact common to all class members, including the status of the claimants as employees or independent contractors. Furthermore, plaintiffs' claims, which were all based on the same types of injuries and legal theories, satisfied the typicality requirement. The court determined that the adequacy factor was met because the class representatives "have an interest in vigorously pursuing the claims of the class" and do not have interests antagonistic to those of the other class members. Lastly, because the common questions of law and fact predominated over those affecting individual class members and because the court found that a class action was the method best suited to fairly and efficiently adjudicating the dispute, the court determined that Rule 23(b) was satisfied.

Turning to attorney fees, the court determined that the lodestar method of multiplying a reasonable hourly rate times the number of hours required to litigate the case was an acceptable means to determine the appropriate award. The lodestar calculation resulted in an amount of $794,550; counsel had sought $394,500, which is 47.7 percent of the lodestar amount. The court determined that the request was fair and reasonable.

SuperShuttle provides a cogent review of the factors involved in approving a class action settlement. One of the primary legal issues in this case, whether the franchisees were employees or independent contractors, continues to make waves in the franchise world. This case provides a valuable illustration of the costs of settling a class action involving a relatively small number of class members where the employee/independent contractor issue is involved.

CONTRACT ISSUES

***AMTX Hotel Corp. v. Holiday Hospitality Franchising, Inc.*, No. 2:12-CV-035-J, Bus. Franchise Guide (CCH) ¶ 14,845 (N.D.Tex. June 7, 2012)**

AMTX, a franchisee of Holiday Hospitality Franchising, Inc., sued Holiday for breach of contract and the implied covenant of good faith and fair dealing, promissory estoppel, and fraud in the inducement. AMTX maintained that Holiday had refused to renew the parties' ten-year license agreement despite making a presale representation that the agreement would be renewed as long as AMTX was in compliance. AMTX further alleged that after making a pre-sale representation that no other full service Holiday Inns were "set to be licensed" in the Amarillo, Texas, area, Holiday licensed seven such hotels, including one over AMTX's objection. Holiday moved to dismiss the claims, asserting that each of the alleged acts was specifically authorized by the terms of the license agreement, which expressly stated that the ten-year license was not renewable and nonexclusive and that Holiday's right to license the system at any other location was not limited. The court dismissed the breach of contract and promissory estoppel claims but denied the motion to dismiss the fraud claim.

Applying the Georgia choice-of-law provision contained in the license agreement, the court observed that Georgia law does not recognize an independent claim for breach of the implied duty of good faith and fair dealing that is not tied to a specific contract provision. Because the license agreement specifically authorized Holiday to take each of the actions regarding which AMTX complained, and because AMTX did not allege that the agreement itself had been breached, the court concluded that AMTX had no viable claim for breach of the implied covenant of good faith and fair dealing.

With respect to the promissory estoppel claim, the court observed that, under Georgia law, the threshold requirement is the existence of an enforceable promise by the defendant. Accordingly, where a plaintiff seeks to enforce an underlying contract that is reduced to writing, promissory estoppel is not available as a remedy. The court found in this case that the promises alleged by AMTX concerned matters that were addressed in, and clearly contradicted by, the existing license agreement. The court held that Holiday was entitled to dismissal of the promissory estoppel claim as well.

The court declined to dismiss the fraud in the inducement claims, however, pursuant to which AMTX alleged that (1) Holiday intentionally concealed the fact that it was considering a competing application for the franchise in the Amarillo market; (2) Holiday failed to reveal that a full service franchise had been promised to someone else; and (3) Holiday failed to give full consideration to AMTX's objections to the competing hotels, despite its promise to do so. Applying Texas law, the court concluded that it would be premature to find that AMTX's allegations, if true, could not raise an entitlement to relief, because the circumstances pertaining to the fraud in the inducement claims had not been not fully developed. Addressing Holiday's contention that the claims were barred by a merger provision in the license agreement, as well as a recitation of AMTX's waiver of reliance, the court observed that although fraudulent inducement under Texas law is almost always grounds to set aside a contract despite a merger clause, under certain circumstances, it may be possible to preclude such a claim contractually as long as the disclaimer of nonreliance is clear and specific.

***Atchley v. Pepperidge Farm, Inc.*, No. CV-04-0452-EFS, Bus. Franchise Guide (CCH) ¶ 14,875 (E.D. Wash. July 24, 2012)**

The Eastern District of Washington denied a motion for summary judgment filed by Pepperidge Farm, Inc. (PFI) because genuine issues of material fact existed regarding each of the three elements for the definition of a franchise under the Washington Franchise Investment Protection Act (FIPA). This action arose out of PFI's dispute concerning payments with two independent distributors that marketed and delivered to PFI products retail outlets under PFI's pallet delivery program (PDP). Under the PDP, PFI shipped products directly to the central warehouses of certain customers in the distributors' territory. The distributors received commissions on these sales less a charge to cover part of PFI's costs and delivery of the product into their territory. The distributors sued for rescission of the contract, damages for breach of contract, misrepresentation, and violations of FIPA. PFI moved for summary judgment, arguing that FIPA did not apply because the distributors could not prove that a franchise agreement existed between the parties.

With regard to the franchise fee element of the FIPA definition of a franchise, the distributors argued that there were five kinds of hidden or indirect franchise fees in the agreement: (1) mandatory participation in the PDP and its deduction from commissions, (2) required purchases of stale products, (3) fees related to a handheld maintenance program, (4) unspecified extra consideration paid by one of the distributors, and (5) service charges.

The district court had previously ruled on a summary judgment motion that participation in the PDP and the deduction from commissions was not a franchise fee because plaintiffs received something of equal value in exchange for the payment. However, the Ninth Circuit reversed the decision, finding that issues of material fact existed as to whether this was a franchise fee, and held that payments for "the mandatory purchase of goods or services" are fees under FIPA. Because PFI effectively required the distributors to purchase goods by mandating inventory levels, controlling pallet shipments, and requiring them to pay for product that went stale prior to sale, a genuine dispute remained whether the distributors were required to purchase a set quantity of PFI products.

In the latest summary judgment motion, PFI argued that the deductions from commissions were not mandatory and, even if so, they were simply ordinary business expenses and not "unrecoverable capital investments." The district court held that since PFI had identified no new evidence to eliminate the issues of fact found by the Ninth Circuit, PFI's summary judgment motion was foreclosed by the law of the case. Similarly, the Ninth Circuit's ruling that issues of fact remained with regard to whether the required purchase of stale goods was a franchise fee was binding on the district court because no new evidence had been presented. The three other types of charges the distributors claimed amounted to franchise fees were not raised or ruled upon since the order that was overturned by the Ninth Circuit, so the court considered them abandoned. Therefore, material issues of fact remained as to whether the PDP's deduction from commissions and the required purchase of stale products were franchise fees under FIPA.

With regard to the substantial association element of FIPA's definition of a franchise, PFI argued that the distributors would not be able to demonstrate that the operation of their business was "substantially associated with a trademark, service mark, trade name, advertising, or other commercial symbol designating, owned by, or licensed by" PFI. PFI argued that the consignment agreement merely permitted the distributors to put PFI logos on its trucks and actually prohibited their using PFI's trade name in a "way which will tend to confuse the separate identities of" PFI and the distributors. After considering that this issue had not been the subject of any prior rulings, the court found that the language in the consignment agreement was sufficient to raise genuine issues of material fact, and summary judgment would be inappropriate.

Finally, with regard to the marketing plan element of the FIPA definition of a franchise, PFI argued that the distributors would not be able to show that they were "granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan prescribed or suggested in substantial part by the grantor or its affiliate." PFI pointed to case law in other jurisdictions with similar franchisee-protection acts that consider the degree of control the franchisor exercises over the franchisee's operations and argued that the consignment agreement was merely "aspirational" and afforded "the broadest discretion to distributors." The distributors countered by pointing to a provision of the consignment agreement that required them to "actively solicit all retail stores in the Territory" and "cooperate with [PFI] in the effective utilization of [PFI's] advertising, sales promotion and space merchandising programs." The district court found that this language on its face created a material issue of fact with regard to the marketing plan element. Because genuine issues of material fact remained as to all three of the required elements of a franchise agreement under FIPA, the court denied PFI's motion for summary judgment.

Following this decision the court held a three-day bench trial on December 3–5, 2012. The court concluded that the distributorship agreements in this case were not franchises under FIPA, and that PFI had not violated any provisions of FIPA.

***Brockman v. Am. Suzuki Motor Corp.* No. 6:11-3381-TMC, Bus. Franchise Guide (CCH) ¶ 14,885 (D.S.C. Aug. 10, 2012)**

This case is discussed under the heading "State Disclosure/Registration Laws."

***Desert Buy Palm Springs, Inc. v. DirectBuy, Inc.,* No. 2:11-CV-132 RLM, Bus. Franchise Guide (CCH) ¶ 14,851 (N.D. Ind. June 12, 2012)**

DirectBuy, Inc. sells franchises or clubs to operators, which in turn sell consumer memberships that allow members to purchase discounted goods through any DirectBuy franchise or club. One of its franchisees (Desert) sued DirectBuy and its parent company for breach of contract, conversion, unjust enrichment, and breach of trust for DirectBuy's alleged wrongful withholding of membership, renewal, and handling fees, as well as its alleged assessment of wrongful charges. Defendants moved to dismiss the claims. Applying Indiana law, the court denied the motion to dismiss with respect to all claims other than unjust enrichment against DirectBuy.

The court rejected DirectBuy's argument that Desert's breach of contract claim was barred because Desert breached the contract first. Although the court agreed that a party cannot seek damages against another party for breach of contract if it first commits a material breach, the court concluded that Desert's allegations that it had not been paid outstanding fees due to it since its center first opened allowed for a reasonable inference that DirectBuy was the first to breach the contract. Therefore, the parties' dispute as to who first breached the contract raised a question of fact requiring the court to deny DirectBuy's motion to dismiss.

The court also found that Desert had stated plausible claims for criminal and civil conversion by alleging that DirectBuy knowingly and intentionally took unauthorized control over fees belonging to Desert and converted those funds to a use not contemplated or authorized by DirectBuy's position as trustee of the funds. The court noted that the questions as to whether Desert had an unqualified right to the fees, whether DirectBuy possessed the requisite mens rea, and the extent to which the franchise agreement controlled the issues of debt set-off and punitive damages were fact-finding questions beyond the purview of a motion to dismiss. The court held that Desert's allegations of the specific sums converted for each type of fee, including a specific yet undetermined amount of renewal fees "that can and will be identified through discovery," satisfied the requirement of Indiana law that, in order for money to be the subject of a conversion action, "it must be a determinable sum that the defendant was entrusted to apply to a certain purpose."

Next, applying the doctrine that a claim for unjust enrichment may not be maintained when a valid and enforceable contract between the parties exists, the court dismissed the unjust enrichment claims against DirectBuy based upon the existence of the franchise agreement. The court found, however, that Desert had met the pleading requirement for unjust enrichment through its allegations that it conferred benefits upon the DirectBuy's parent company, which was not a party to the agreement, by depositing funds into escrow and trust accounts controlled by the parent and by being required to pay the parent for marketing leads assessed after Desert had ceased selling memberships. Consequently, the court denied the motion to dismiss the unjust enrichment claims against the parent.

Notwithstanding that the franchise agreement expressly disclaimed any trust relationship, the court declined to dismiss Desert's claims for breach of trust, finding that the claims plausibly suggested a fiduciary relationship between the parties, a breach by defendants as trustees, and harm to Desert as the beneficiary of the subject funds held in the trust. The court remarked that it was premature, based upon the allegation that DirectBuy was the first to breach the agreement and therefore might be unable to enforce it, to determine whether the franchise agreement's disclaimer of a trust relationship controlled the breach of trust claims against DirectBuy.

The court found that Desert had sufficiently stated an independent basis for its conversion and breach of trust claims against DirectBuyer's parent beyond the mere fact of the parent-subsidiary relationship because Desert alleged that the parent knowingly and intentionally took control of Desert's fees that were in trust or escrow accounts and refused to surrender the fees, and that the parent was a trustee and administrator of the funds at issue and occupied a position of trust of confidence with Desert.

***Fantastic Sams Franchise Corp. v. FSRO Ass'n, Ltd.,* No. 11-2300, 683 F.3d 18, Bus. Franchise Guide (CCH) ¶ 14,854 (1st Cir. June 27, 2012)**

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

***H & R Block Tax Servs. LLC v. Franklin,* No. 11-3690, Bus. Franchise Guide (CCH) ¶ 14,893 (8th Cir. Sept. 7, 2012)**

In a two-to-one decision, the Eighth Circuit reversed on an interlocutory basis the district court's grant of summary judgment in favor of an H & R Block Tax Services franchisee on the issue of whether H & R Block had the right not to renew even though the franchise agreements contained automatic perpetual five-year renewal terms unless the franchisee gave notice of nonrenewal.

Applying Missouri law, the district court concluded that the franchise agreements were enforceable and that Block did not have a right to not renew them. The court observed that Missouri courts had not described any "magic language" required to create a perpetual contract, and it found that the applicable contract language constituted "clear and compelling declarations" of the parties' intent to enter into perpetually enforceable contracts until either the franchisee elects to terminate or Block terminates for cause.

A majority panel of the Eighth Circuit disagreed, finding that there was no express language of the parties' intent as to the duration of the agreements such that a perpetually enforceable intent could be read into the contracts. The majority observed that Missouri courts "are prone to hold against the theory that a contract confers a perpetuity of right or imposes a perpetuity of obligation" and "will only construe a contract to impose an obligation in perpetuity when the language of the agreement compels that construction," i.e., the duration provision must "unequivocally express an intent of the parties to create a perpetual, never-ending franchise agreement." In fact, the only Missouri case where this high hurdle has been met analyzed a contract that contained the term "perpetually." The majority found that no similar express language appeared in the Block agreements, and it pointed out that the clause providing for automatic renewal contradicted an intention that the contracts would last forever because a contract that ran forever had no need for renewal. The majority thus reversed and remanded the matter to the trial court.

The dissenting judge observed that, in holding that the language of the Block agreements did not unequivocally express the parties' intent for the contracts to last forever, the majority had discounted two clearly applicable Missouri contract-interpretation principles in favor of an arguable public policy exception disfavoring perpetual contracts. The dissent pointed out that Block expressly limited its own right to cancel the agreements by requiring cause—a result that made sense in light of "the situation of the parties." The dissent also noted that Block's deliberate inclusion of these provisions in the agreement distinguished the case from the automatic renewal provisions at issue in the prior decisions upon which the majority relied, provisions that seemed "more a matter of oversight than intention." Because the plain language of the agreements expressly contemplated continuous renewals, the dissent concluded that they should not be rewritten, based on a public policy exception, to give Block a contract right that it did not bargain to receive.

***Jaguar Land Rover N. Am., LLC v. Manhattan Imported Cards, Inc.,* No. 11-1217, Bus. Franchise Guide (CCH) ¶ 14,850 (4th Cir. Apr. 23, 2012) (unpublished)**

The Fourth Circuit affirmed summary judgment in favor of Jaguar Land Rover of North America (JLR) against one of its franchisees (Manhattan), finding that JLR had properly suspended certain incentive payments under the terms of the parties' agreements.

Manhattan owned a Lincoln Mercury automobile dealership and a Jaguar Cars automobile dealership that it operated together in a single facility in Rockville, Maryland pursuant to various agreements, including a Jaguar dealer agreement and a Jaguar performance agreement. Manhattan later acquired a Land Rover franchise from another dealer, which it intended to operate at the same Rockville facility. To implement this proposed expansion, Manhattan needed to obtain the approval of both Jaguar and Land Rover North America, both of which were then owned by Ford Motor Co.

In April 2006 Ford submitted to Manhattan via e-mail an agreement package, containing three separate agreements related to the proposed expansion: a Land Rover letter of intent, an amendment to the Jaguar performance agreement, and a Land Rover dealer agreement. On May 3, 2006 Manhattan signed both the letter of intent, which contained Land Rover's approval of the anticipated transfer of the Land Rover dealership, and the amendment to the performance agreement, which contained Jaguar's approval to add the Land Rover dealership to the Rockville facility. Both documents addressed necessary improvements and renovations and also contained a paragraph in which Manhattan agreed to remove its Lincoln Mercury operations from the facility by no later than July 1, 2008.

On May 16, 2006 after completing its purchase of the Land

Rover dealership from an existing dealer, Manhattan signed the Land Rover dealer agreement, in which Land Rover authorized Manhattan to operate the new Land Rover dealership. The dealer agreement included a general integration clause that stated that the document "contains the entire agreement" between the parties and "cancels, supersedes and annuls any prior contract, agreement or understanding" between them.

In 2008 Ford sold the Land Rover and Jaguar brands. Following the ownership change, JLR notified Manhattan that it was suspending certain incentive payments based on Manhattan's failure to make necessary improvements to its facility pursuant to the timeline required under the letter of intent and performance agreement.

Manhattan maintained that JLR was not permitted to suspend the incentive payments based on its failure to meet the project milestones contained in the letter of intent and performance agreement because those documents had been nullified by the later-executed dealer agreement and its integration clause. Manhattan further maintained that, because the dealer agreement contained no facility improvement requirements, JLR lacked any basis to suspend the incentive payments. Neither the district court nor the Fourth Circuit found Manhattan's argument to be persuasive.

Applying Maryland law, the district court concluded that the integration clause in the dealer agreement did not cancel or supersede the letter of intent or the performance agreement. Notwithstanding that Manhattan had executed the dealer agreement later in time, the court found that the parties had treated the three agreements as part of a single transaction, based on the content of the agreements at issue, the franchisor's conduct in submitting the three agreements to Manhattan as a "package," and Manhattan's conduct in timely completing the first project milestone under the timeline set forth in the letter of intent and the performance agreement and in attempting to negotiate an amended schedule for the remaining milestones contained in those agreements—actions that showed that Manhattan considered itself bound by their terms. The Fourth Circuit agreed, finding that Manhattan's failure to comply with the facility improvement requirements set forth in the letter of intent and the performance agreement permitted JLR to suspend the incentive payments because the parties intended that all three documents remain in effect and be construed and enforced together.

The Fourth Circuit also affirmed the district court's award of summary judgment to JLR on Manhattan's counterclaims, which asserted that JLR had violated the Maryland Transportation Code (1) by requiring or coercing Manhattan to exclude from the use of its facilities the Lincoln Mercury dealership for which Manhattan had a franchise agreement to utilize the facilities, (2) by requiring Manhattan to alter the Rockville facility in a manner that imposed a "substantial financial hardship," and (3) by failing to act in "good faith" in carrying out the provisions of the dealer agreement.

While observing that the Code prohibits distributors (1) from engaging in a practice commonly known as "de-dualing," by which an existing dealer is required or compelled to accept additional or amended terms to a franchise agreement requiring the dealer to remove another distributor's vehicles from its facilities, and (2) from requiring or compelling an existing dealer to alter its facilities in a manner that would cause the dealer substantial financial harm, the Fourth Circuit concluded that JLR had not violated these statutory provisions because they were inapplicable to the parties' relationship at the time the three agreements were executed. The court found that the conduct prohibited by Code "presupposes that there is an existing franchise agreement between a distributor and dealer when the prohibited conduct occurs affecting a particular franchise." Because Manhattan was not yet a Land Rover dealer when it agreed to the relocation and renovation provisions as part of the parties' comprehensive agreement, the court found that neither JLR nor Land Rover had an existing contractual relationship with Manhattan that would render them liable for "requiring" or "coercing" Manhattan to engage in de-dualing within the meaning of Code. The court also found that the agreed upon relocation and renovation terms did not implicate the existing dealership relationship that Manhattan then had with Jaguar Cars, but dealt with the different subject of Manhattan's anticipated addition of a Land Rover dealership to its Rockville facility.

Finally, the court found that JLR had not violated the good faith requirement of the Code merely by seeking to enforce the bargained-for terms of the letter of intent and performance agreement, based on the plain language of those agreements. Both documents explicitly stated that their execution was conditioned upon Manhattan's agreement to relocate the Lincoln Mercury dealership, and that any failure to do so could result in suspension of the incentive payments.

***Johnson v. Dunkin' Donuts Franchising L.L.C.*, No. 11-1117, Bus. Franchise Guide (CCH) ¶ 14,833 (W.D. Penn. May 18, 2012)**

This case involved claims of promissory estoppel and race discrimination arising from the failed renovation of two buildings in the Pittsburgh area for a proposed commissary to supply local franchisees. Pittsburgh Bakers Dozen, Inc. (PBD) and PBD's sole shareholder, Edward Gandy, intervened in the case as additional plaintiffs. PBD had entered into an approved bakery manufacturing agreement (ABMA) with Dunkin' Donuts to manufacture and deliver baked goods and other products to franchisees in the Pittsburgh area. The three initial plaintiffs consisted of two individuals, Derrick J. Johnson and Charles Thompson, who acted as independent contractors to assist PBD and Gandy, and F & J Holdings, Inc., which Johnson had created to purchase PBD from Gandy. These initial plaintiffs were not parties to the ABMA. Dunkin' Donuts moved to dismiss all counts.

Plaintiffs alleged that the ABMA was part of a broader oral agreement, dubbed the Pittsburgh Supply Plan by Dunkin' Donuts, in conjunction with Pittsburgh area officials, to locate a donut commissary in an underdeveloped, minority-populated area of Pittsburgh. Plaintiffs allege that Dunkin' Donuts unilaterally cancelled the plan at the request of its largest franchisee in the area, which had discriminatory motives for urging Dunkin' Donuts to cancel the plan.

In 2006, all plaintiffs, except F & J, entered into negotiations with Dunkin' Donuts to establish an approved bakery manufacturer to supply and support franchisees in the Pittsburgh area. Plaintiffs alleged that their understanding was that the arrangement would require franchisees in the area to purchase products from plaintiffs' commissary. Ultimately, Dunkin' Donuts entered into the ABMA with PBD. Under the terms of the ABMA, PBD agreed to act as a supplier to manufacture and deliver approved baked goods to certain designated franchisees in the area. The ABMA was silent as to the construction of the commissary and specifically provided that PBD was not being granted any exclusive rights as a supplier. Meetings in connection with the construction of the commissary continued after the parties signed the ABMA.

While touring a potential site for the commissary, the largest Pittsburgh-area Dunkin' Donuts franchisee made "unwelcome comments" about the commissary and the predominantly African-American neighborhood where construction was being contemplated. At the urging of Dunkin' Donuts, plaintiffs selected a different site for the commissary. After completing architectural plans and beginning work on the new site, and without any previous objection, Dunkin' Donuts withdrew from the plan to build the commissary.

The court first examined the plaintiffs' respective promissory estoppel claims. Those claims centered around the allegation that Dunkin' Donuts promised that its local franchisees would be required to purchase donuts and other baked goods from plaintiffs' commissary if they built the commissary according to Dunkin' Donuts' specifications. The intervening plaintiffs further alleged that they had built the commissary based on their reliance on this promise. In general, when there is a written agreement, a promissory estoppel claim cannot be maintained when the written agreement covers the same subject matter as the alleged promise. However, the court held that PBD's claim could move forward because, despite the written ABMA, there remained the actions that PBD took in reliance on its understanding that under the oral Pittsburgh Supply Plan, if it built the commissary, Dunkin' Donuts would require its local suppliers to buy products from PBD. The court rejected Dunkin' Donuts' argument that the ABMA's integration clause precluded PBD's claim of reliance on oral representations because the "subject matter" of the ABMA was establishing PBD as an approved supplier and not the construction of the commissary and further because the promises alleged to have been made occurred, in part, after the ABMA was signed and thus could not have been integrated into the ABMA. However, the other plaintiffs did not allege sufficient facts indicating that Dunkin' Donuts had promised that they would recoup their investments, so the court was forced to grant the motion to dismiss as to the other plaintiffs with leave to amend.

As for the discrimination claims, plaintiffs generally pleaded that they were entitled to relief under 42 U.S.C. § 1981, which prohibits racial discrimination in the making and enforcement of contracts. The court granted the motion to dismiss as to the original plaintiffs with prejudice, holding that such an action could not be maintained when plaintiffs were not parties to the contracts at issue or the intended third-party beneficiaries.

The court ruled that PBD, as a party to ABMA, had standing to bring the discrimination claim. However, the court ultimately granted the motion to dismiss for PBD's failure to sufficiently plead that Dunkin' Donuts engaged in any discriminatory conduct. The court did, however, grant PBD leave to amend its claim because at the hearing on the motion, counsel for PBD suggested that it had other allegations that may bolster the claim.

***Midas Int'l Corp. v. Chesley,* No. 11-cv-8933, Bus. Franchise Guide (CCH) ¶ 14,853 (N.D. Ill. June 26, 2012)**

Upon learning that one of its New York franchisees (Chesley) was about to sell four of its ten locations to a competitor, Midas terminated all ten locations, changed the locks at two of them, and filed suit, seeking injunctive relief and damages. Chesley filed various counterclaims against Midas that included a claim for breach of contract based upon the alleged bad faith terminations and a claim for violation of the New York Real Property and Proceedings Law (RPAPL), which awards treble damages to persons ejected from real property "in a forcible or unlawful manner." Chesley alleged that Midas had violated the RPAPL by changing the locks without notice or warning.

Midas moved to dismiss those two counterclaims, arguing that (1) Chesley's bad faith claim was barred because it fell within an arbitration clause in the franchise agreements that required that any dispute over Midas's "right to terminate" be submitted to arbitration, and (2) Midas's actions in changing the locks were neither "forcible" nor "unlawful," because Chesley's abandonment of the properties gave Midas the contractual right to terminate the leases.

Applying New York law, the court stayed the bad faith claim, concluding that it came within the arbitration clause, but denied Midas's motion to dismiss the RPAPL claim, finding an issue of fact as to whether Chesley had abandoned the properties when Midas had changed the locks.

Chesley maintained that its bad faith claim did not come within the scope of the arbitration clause because the claim was not limited to the terminations themselves, but included a course of conduct by Midas that ruined the financial value of the franchises and made Chesley vulnerable to termination. The court found this argument to be unavailing because the allegations directly challenged whether Midas had "just or proper cause" to terminate the agreements. The court also noted that Midas's actions leading up to the terminations were the subject of two breach of contract claims that Midas had not moved to dismiss and would therefore remain a part of the litigation. The court also rejected Chesley's argument that its bad faith claim, by which Chesley was seeking damages, fell outside of the arbitration clause, which expressly prohibited an assessment or award of damages in arbitration. Reading the franchise agreements as a whole, the court found that Chesley would not be precluded from bringing an action in court to seek damages for its bad faith for the period between the termination and the date of an arbitrator's determination that the termination was wrongful, if an arbitrator were to make that determination. The court also rejected

Chesley's argument that the franchise agreements were unconscionable contracts of adhesion, finding that (1) the dispute resolution procedure set forth in the agreement was not substantively unfair, and (2) Chesley's allegation that the parties had "unequal bargaining power" was insufficient, because Chesley did not claim that Midas had employed "high pressure tactics" or deceptive contract language.

Regarding the RPAPL claim, although Midas's actions in changing the locks did not appear to be "forcible," the court found that Chesley had adequately alleged "unlawful" conduct and had created a question of fact as to whether the franchisee had abandoned the properties when Midas changed the locks, leaving an issue that the court could not determine in a motion to dismiss.

***Novus Franchising, Inc. v. Superior Entrance Sys., Inc.*, No. 12-CV-204-WMC, Bus. Franchise Guide (CCH) ¶ 14,902 (W.D. Wis. Aug. 16, 2012)**

The enforceability of a jury trial waiver in a franchise agreement between a Minnesota franchisor and a Wisconsin franchisee was the subject of a recent decision by the Western District of Wisconsin. Novus Franchising, Inc. entered into a renewal franchise agreement with Superior Entrance Systems, Inc. (SES). Knute Pedersen signed as a guarantor. Another defendant, Superior Glass, Inc. (SGI), did not sign the franchise agreement but acted as what the court described as a "de facto franchisee." The jury trial waiver contained in the franchise agreement was in all capital letters. The franchise agreement had a Minnesota choice of law clause, but this clause provided that the Minnesota Franchises Act did not apply unless the franchisee was a Minnesota resident or part of the franchise territory was in Minnesota. In deciding the validity of the jury trial waiver, the court considered: (1) the enforceability of the jury trial waiver under Minnesota law against SES and Pedersen, and (2) whether the jury trial waiver applied to SGI as a nonsignatory of the franchise agreement.

The court first examined whether the jury waiver clause was valid against SES and Pedersen under both Minnesota and Wisconsin law. The court noted that the validity of the jury trial waiver would be determined under the law of the jurisdiction whose law would decide the remainder of the dispute, and that it would follow the conflict of laws rules of the state in which it sits. The court determined that Wisconsin law left parties free to choose the law of a specified jurisdiction so long as the choice did not "compromise an important public policy of the state whose law would otherwise apply." The court noted that it had found no such public policy in Wisconsin except in the franchise and fair dealership area.

The court determined that Minnesota law generally permits jury trial waivers, but noted the prohibition against such waivers in the Minnesota Franchise Act. The court noted, however, that the franchise agreement provided that the Minnesota Franchise Act does not apply where neither the franchisee nor the franchise territory is in Minnesota. The court also noted that Minnesota cases have ruled against application of the Minnesota Franchise Act outside the state.

The court then ruled that the Wisconsin Fair Dealership Law would govern SES and Pedersen, both of whom were characterized by the court as Wisconsin residents. The court stated that Wisconsin public policy would require this conclusion regardless of the choice of law provision in the franchise agreement. The court also noted that the Wisconsin Fair Dealership Law does not prohibit jury trial waivers. Thus the court upheld the waiver as to SES and Pedersen.

The court then considered the enforceability of the jury trial waiver against the nonsignatory, SGI. Novus argued both equitable estoppel and agency theories in seeking to enforce the waiver against SGI. Defendants conceded that Minnesota law recognizes both theories but contended that neither applied here. The court determined that equitable estoppel principles supported enforcement of the jury trial waiver against SGI.

The court explained equitable estoppel as precluding a party from accepting the benefits of a contract while repudiating its obligations. The court noted that the Minnesota case recognizing equitable estoppel cited *MS Dealer Service Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999) (abrogated on other grounds), which the court in Novus characterized as stating a widely cited test to determine the applicability of equitable estoppel. The court said that the *MS Dealer* test applies equitable estoppel when a signer relies on the written agreement to assert claims against the nonsigner, or when a signer raises allegations of "substantially interdependent and concerted misconduct" by both signers and nonsigners. The court determined that both of these tests were satisfied in this case. The complaint by Novus was based on the franchise agreement and the parties whose conduct was intertwined with that of SGI were signers of the agreement. The court applied these tests to the facts in this case, noting that SGI advertised itself as a Novus franchisee and paid royalties to Novus. The court said that "since the facts read like they belong on the first page of an equitable estoppel textbook, this turns out to be an exceedingly straightforward exercise."

***Progressive Foods, LLC v. Dunkin' Donuts, Inc.*, No. 11-3296/11-3335, Bus. Franchise Guide (CCH) ¶ 14,882 (6th Cir. Aug. 9, 2012)**

A contractual limitations period proved to be a fatal obstacle to a franchisee's claims against Dunkin' Donuts, Inc. arising out of the development of three Dunkin' Donuts locations in the Cleveland area. Progressive Foods, LLC filed claims for breach of contract, unjust enrichment, unfair competition, frustration of commercial purpose, interference with contract, civil conspiracy, and fraud in state court in Ohio. Dunkin' removed the case to the Northern District of Ohio.

After a bench trial, the court found that Dunkin' breached its contracts with Progressive by failing to develop and equip three stores to Dunkin's specifications, placing Progressive on "development holds," and failing to assign certain warranties to Progressive. The court also determined that Dunkin' misrepresented the suitability of certain development sites; it ultimately awarded Progressive damages of $336,000 and Dunkin' $100,000 for unpaid franchise fees. The court granted Progressive injunctive relief in the form of rights to develop three additional sites within three years from the date of judgment and denied injunctive relief sought by Dunkin' that would have permitted it to terminate the store development agreement (SDA).

On appeal, Dunkin' argued to the Sixth Circuit that Progressive's claims were barred by a two-year limitation period in the SDA. Progressive filed suit on October 3, 2007, and in its initial complaint alleged that it had notified Dunkin' of its claims on or about August 3, 2005. Progressive later filed an amended complaint in which it made its notification allegations six times. Progressive argued that its statements in the complaints should not bar its claims because Dunkin' had produced no evidence regarding the alleged notification by Progressive. The district court impliedly determined that Progressive did not make a deliberate admission because it could not have known the extent of its claims in August 2005.

The Sixth Circuit overturned both these arguments, saying that an admission must be "deliberate, clear and unambiguous" but does not have to be true. Therefore, the fact that the admission may not have been factually correct was "beside the point." Progressive fared no better in arguing that the court that the admission was not deliberate. The court held that the fact that the admission was repeated multiple times removed any doubt that it was deliberate. Furthermore, Progressive did not try to change the admission after Dunkin' referred to it numerous times before the district court. Lastly, the court held that Progressive's statement in its pleadings was a binding admission regarding when it disclosed the factual basis of its claims.

In an attempt to salvage its claims against one defendant, Third Dunkin,' Progressive argued that the term "ADQSR," used in the SDA to identify the Dunkin' entities, did not include Third Dunkin.' Progressive further argued that Third Dunkin' was not a party to the limitations period applied to claims between parties to the SDA. The Sixth Circuit rejected these arguments, finding that the term "ADQSR" included Third Dunkin' as a "controlled affiliated" entity. The Sixth Circuit also found that the terms "ADQSR" and "party" were used interchangeably in the SDA so Third Dunkin' would be considered a party for purposes of the limitation section.

Progressive did prevail in arguing that the district court's denial of attorney fees to Dunkin' should be upheld. The court had determined that Progressive was not in material breach of the SDA when Dunkin put Progressive on development holds, and Progressive claimed that that was the basis on which the court denied Dunkin's attorney fee claim. Furthermore, Progressive argued that the court's determination was a question of fact to be reviewed under the clear error standard. The Sixth Circuit agreed and denied Dunkin's request for attorney fees.

This case is a cautionary tale pointing out the perils of how statements made in pleadings can undermine a party's entire case. The Sixth Circuit observed that judicial admissions trump evidence, which "is the basis for the principle that a plaintiff can plead himself out of court." This is precisely what happened to Progressive in this case.

***Stuller, Inc. v. Steak N Shake Enters., Inc.*, No. 10-CV-3303, Bus. Franchise Guide (CCH) ¶ 14,869 (C.D. Ill. June 12, 2012)**
The latest chapters in the saga between Steak N Shake (SNS) and its oldest franchisee played out in the Central District of Illinois and the Seventh Circuit. The district court granted in part and denied in part the franchisee's motion for summary judgment, found factual issues in one count in which both parties sought summary judgment, and denied motions for summary judgment by SNS.

Stuller, Inc., an SNS franchisee since 1939, operated five franchised Steak N Shake locations in Illinois. Stuller sued SNS in November 2010 after SNS adopted a policy requiring franchisees to follow menus and prices (except for breakfast items) mandated by SNS and to offer all company promotions as published (the policy). Count I of Stuller's complaint sought a declaratory judgment that the franchise agreements and applicable law did not require Stuller to comply with the policy. Count II alleged that SNS breached the franchise agreements and the covenant of good faith and fair dealing by attempting to compel Stuller to comply with the policy. In Count III, Stuller pled in the alternative that if SNS can impose the policy on Stuller, SNS violated the Illinois Franchise Disclosure Act (IFDA) because of language in SNS's UFOC regarding pricing.

On June 22, 2011, the court enjoined SNS from imposing the policy on Stuller and taking any adverse action against Stuller for refusing to implement the policy. In its motion for summary judgment, SNS argued that extrinsic evidence showed that Stuller was obligated to implement the policy. SNS relied on the definition of the "system" used by franchise companies, the removal of language regarding Stuller's right to set prices from certain of their franchise agreements, and the fact that the parties discussed Stuller's right to set prices during the 1990s but did not include language on pricing in subsequent franchise agreements. Stuller asserted that extrinsic evidence showed that SNS did not have the right to enforce the policy, based on the UFOC, the negotiation of the 1995 franchise agreement, the parties' course of dealings, and performance and trade usage. The court noted that resolution of the case depends largely on the language in the franchise agreements, which gives SNS the right to revise the system and requires Stuller to comply with these revisions. The court noted that SNS construes the system to include pricing and promotions, while Stuller does not.

Before February 1, 1995, Stuller operated three franchises under license agreements that specifically gave Stuller sole discretion in setting its prices. In 1993, the parties began to negotiate new franchise agreements for the existing locations and a development agreement for the opening of additional locations. In August 1993, SNS's negotiator sent a memorandum to SNS's president stating that Stuller was free to establish its own pricing and that by law all franchisees may set their own prices. SNS's negotiator testified that the parties did not intend to change their relationship regarding pricing when negotiating the new franchise agreement, but the express language from the prior license agreements regarding pricing was not included in the 1995 franchise agreement.

SNS's 1995 UFOC stated that franchisees are free to set prices different from the prices on SNS's menu. The current franchise agreements for Stuller's restaurants contain language defining the system and requiring the franchisee to comply with all aspects of the system, as revised from time to time. These franchise agreements address SNS's right to develop certain promotions but are silent on the ability of Stuller to control its pricing. SNS implemented its pricing and promotions policy for franchisees in 2010 as a modification of its operating standards, applicable to all franchised restaurants. In August 2010, SNS offered its franchisees marketing incentives if they agreed to follow the policy for the remainder of their franchise agreements and to release SNS from any liability related to the implementation of the policy.

Stuller argued that SNS did not have the right under the franchise agreements to enforce the policy. In granting a preliminary injunction, the court reiterated that the franchise agreements were ambiguous as to whether price terms are a part of the system that SNS may modify; it reached the same conclusion in deciding the motions for summary judgment. The court also ruled that the agreements were ambiguous as to whether Stuller must follow all SNS promotions.

Having found the language at issue to be ambiguous, the court used extrinsic evidence to determine the parties' intent. The court determined that Stuller was entitled to summary judgment on Count I, concluding that the extrinsic evidence demonstrated that the parties did not intend for the system to include pricing and promotions. Although the 1995 franchise agreement did not include the language from prior agreements permitting Stuller to determine its prices, the court said the extrinsic evidence did not show the parties intended to change their understanding regarding pricing. The court cited the 1995 UFOC language that franchisees could set their own prices as evidence of the parties' intent and said their course of performance supported Stuller's position.

The court denied the parties' motion for summary judgment on the breach of contract count after determining that the testimony was unclear as to whether Stuller was voluntarily implementing SNS promotions or doing so only because SNS breached the agreement by implementing the policy. Because the court granted motion for summary judgment on Count I, the court dismissed Count III, an IFDA claim that Stuller pleaded in the alternative, as being moot.

DAMAGES

***Century 21 Real Estate LLC v. All Prof'l Realty, Inc.*, Nos. CIV, 2:10-2751 WBS GGH; 2:10-2846 WBS GGH; 2:11-2497 WBS GGH, Bus. Franchise Guide (CCH) ¶ 14,884 (E.D. Cal. Aug. 8, 2012)**

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

DEFINITION OF FRANCHISE

***Garbinski v. Nationwide Mut. Ins. Co.,* No. 3:10CV1191 VLB, Bus. Franchise Guide (CCH) ¶ 14,872 (D. Conn. July 24, 2012)**

Gregory Garbinski operated an insurance business under an independent contractor agent's agreement with Nationwide, which permitted either party to cancel at any time with or without cause after delivering written notice. It also contained a good conduct provision, requiring Garbinski to maintain a good reputation within the community. After a widely publicized domestic disturbance between Garbinski and his wife that led to his arrest, Nationwide received several complaints from policyholders who referred to the incident and asked to change agents. Two weeks after the events that led to his arrest, Nationwide notified Garbinski of the termination of the agent agreement.

Garbinski sued Nationwide in the District of Connecticut alleging that the agent agreement was subject to the Connecticut Franchise Act (CFA), which requires good cause and sixty days' written notice for termination. Garbinski survived a motion to dismiss on this issue, when the court said it would be better decided by summary judgment or trial after the parties conducted discovery on issues related to the CFA. Nationwide argued in its motion for summary judgment that the CFA does not apply to insurance agency relationships. Further, Nationwide contended that no reasonable jury could conclude that it did not have good cause to terminate the agent agreement.

The court observed that Connecticut courts have utilized a two-step inquiry to determine if a relationship meets the definition of a franchise. "First, the franchisee must have the right to offer, sell or distribute goods or services. Second, the franchisor must substantially prescribe a marketing plan for the offering, selling or distributing of goods or services." The court noted that whether a franchise exists depends both on the parties' agreements and their conduct. The court concluded that an insurance agency in general, and this agency relationship in particular, is not a franchise under the CFA.

The court appeared to find significant the fact that Garbinski did not have an exclusive relationship with Nationwide. He was not required to sell only Nationwide policies, rather he had wide latitude to place his customers' business with other carriers. The court said that satisfying the substantial association requirement of the CFA required exclusivity or near exclusivity. The court quoted from a case from the Second Circuit describing franchises as typically involving an exclusive relationship where termination "could result in economic disaster for the franchisee." The court contrasted the insurance agency, which offers a variety of available products, with a McDonald's or Dunkin' Donuts, where selection is limited to the product provided by those concepts. The court also noted that an insurance agency did not involve the kind of risk associated with a franchise, observing that Garbinski did not buy Nationwide products for resale to customers or have minimum sales requirements.

After determining the CFA did not apply to the insurance agency relationship, the court said that, even if it did apply, the undisputed facts in this case show that Nationwide had the right to terminate the agent agreement. The court then granted Nationwide's motion for summary judgment on Garbinski's claim under the Connecticut Unfair Trade Practices Act, finding it to be contingent on his CFA claim. Similarly, the court granted Nationwide's motion for summary judgment on Garbinski's claim for interference with business expectancy, finding that claim also to be "supported solely on the basis of his termination." Even if that claim did not rely solely on the CFA claim, the court said no reasonable jury could conclude that Nationwide engaged in the type of wrongful conduct required to support this claim.

The court then dispatched Garbinski's breach of contract claims by granting summary judgment for Nationwide. The court found no genuine issue of material fact when the evidence showed that Garbinski had failed to make a timely request for a hearing before an agent review board following termination of the agent agreement. The court also granted summary judgment for Nationwide on Garbinski's claims that Nationwide improperly paid out some of his deferred compensation, failed to apply certain amounts to pay down loans from Nationwide Bank, and failed to provide certain requested records to him. Finally, the court granted a motion for summary judgment by Nationwide on its counterclaim for more than $290,000 payable by Garbinski to Nationwide Bank.

***JJCO, Inc. v. Isuzu Motors Am., Inc.,* No. 10-16597, Bus. Franchise Guide (CCH) ¶ 14,863 (9th Cir. July 5, 2012) (unpublished)**

The Ninth Circuit affirmed the judgment awarded by the District of Hawaii, following a jury trial, in favor of an auto distributor (Isuzu) on an auto dealer's claim that Isuzu acted unlawfully when it ceased distributing motor vehicles in North America and offered the dealer (JJCO) the option of being a service-only dealer.

The court found that the district court did not abuse its discretion in finding that adequate evidence supported the jury's finding that JJCO did not pay a franchise fee under the Hawaii Franchise Investment Law (HFIL). Although JJCO had paid fees to Isuzu, there was no evidence that such fees were paid "for the right to enter into a business or to continue a business under a franchise agreement," as required to trigger application of the HFIL.

The court also found that JJCO had failed to state a claim for coercion under Hawaii Motor Vehicle Industry Licensing Act because JJCO failed to establish that the Act has a private right of action. The court further noted that even if the court were to address this claim on its merits, JJCO could not show coercion because it declined to enter into Isuzu's offer.

The court affirmed the district court's grant of judgment as a matter of law to Isuzu regarding JJCO's claims for punitive damages resulting from Isuzu's alleged nondisclosure that it planned to cease distributing cars in North America. The court found that the record showed that, prior to disclosing its final decision to JJCO and other dealers, Isuzu had merely been considering such a plan, and that no final decision was made until the date of disclosure. The court found no fiduciary or franchise relationship between the parties that would require Isuzu's disclosure of preliminary business decisions under consideration. Isuzu thus was "free to make pricing and distribution decisions for its own benefit . . ."

Finally, the court endorsed the district court's finding that there is no independent tort claim under Hawaii law for breach of an implied covenant of good faith and fair dealing. Given that JJCO did not appeal the jury's finding that it had not proved that Isuzu breached the contract between the parties, the court declined to address its covenant of good faith claim arising from that contract dispute.

***St. Louis Motorsports, LLC v. Ferrari N. Am., Inc.*, No. 4:11CV01346 RWS, Bus. Franchise Guide (CCH) ¶ 14,831 (E.D. Mo. May 16, 2012)**

Plaintiffs, a high-end automobile dealership and its sole shareholder, sued defendant Ferrari North America, alleging that Ferrari breached its promise to grant plaintiffs a Ferrari dealership upon meeting certain conditions. Plaintiffs also alleged that they purchased property for a showroom in reliance on Ferrari's promise. Ferrari moved to dismiss each count of plaintiffs' seven-count complaint: (1) promissory estoppel, (2) fraudulent inducement, (3) unjust enrichment, (4) breach of oral contract, (5) civil conspiracy, (6) negligent misrepresentation, and (7) violation of the Missouri Motor Vehicle Franchise Practices Act (MMVFPA).

The court denied defendant's motion as to all counts except for civil conspiracy and violation of the MMVFPA because Ferrari's motion for those five counts was based on factual disputes that more properly belonged in a summary judgment motion.

In the civil conspiracy count, plaintiffs alleged that Ferrari and its agents conspired to falsely induce plaintiffs into taking certain actions with the promise of granting them a Ferrari dealership. The court, however, granted dismissal because a corporation and its agents, as a matter of law, constitute a single person, and a corporation cannot conspire with itself. As for the count alleging violation of the MMVFPA, the court found that to have standing under this statute, the aggrieved party must be a franchisee. The statutory definition of franchise requires a written agreement. Plaintiffs lacked standing because there was no written agreement with Ferrari. Instead, plaintiffs' entire complaint was predicated on the argument that Ferrari reneged on its oral promise and failed to proffer a written agreement.

ETHICS

***Mody v. Quizno's Franchise Co.*, No. A-2260-11T1, 2012 N.J. Super. Unpub. LEXIS 1719, Bus. Franchise Guide (CCH) ¶ 14,870 (N.J. App. Div. July 18, 2012)**

In this unpublished opinion, the New Jersey Appellate Division reversed the Superior Court's decision and disqualified plaintiffs' counsel in an action against various Quizno's entities and individuals. Plaintiffs in this case had opted out of a settlement entered into by a number of other Quizno's franchisees in a prior class action litigation. Andrew Bleiman was an associate at Cheng Cohen, one of the firms representing Quizno's in the class action, and one of the attorneys involved in the prior settlement. Within months of the settlement, Bleiman left Cheng Cohen to join Marks & Klein (M&K), the firm that represented the Quizno's franchisees in the class action settlement and represented plaintiffs in the present action against Quizno's entities and individuals.

The Superior Court determined that Bleiman's involvement in the prior litigation satisfied the requirement for individual disqualification under Rule 1.9 of the New Jersey Rules of Professional Conduct (RPC), but did not disqualify M&K from representation because he did not have "primary responsibility" in the prior Quizno's litigation. The court ruled that M&K had properly implemented the screening process required by RPC Rule 1.10 and refused to disqualify M&K from representation of the plaintiffs.

In reviewing the Superior Court decision, the Appellate Division stated that motions for disqualification of counsel require the court to weigh "the highest standards of the profession against a client's right to freely choose his counsel." The court stated that doubts must be resolved in favor of disqualification, and that a client is not entitled to demand to be represented by counsel disqualified due to an ethical requirement. Then the court discussed the three requirements of RPC 1.10: (1) the matter may not involve a proceeding where a personally disqualified lawyer had "primary responsibility"; (2) the disqualified lawyer must be timely screened from participating in the matter or being apportioned any part of the fee; and (3) written notice must be promptly given to any affected former client. The rule additionally requires that any screening arrangements undertaken by a firm must be established by appropriate written procedures.

With the issue of Bleiman's personal conflict of interest being uncontested, the Superior Court confined its review to whether he had with "primary responsibility" in the prior matter and whether M&K had an appropriate screening procedure in place. The RPC defines primary responsibility as "actual participation in the management and direction of the matter at the policy-making level or responsibility at the operational level as manifested by the continuous day-to-day responsibility for litigation or transaction decisions." A certification submitted by Cheng Cohen detailed Bleiman's participation in prior Quizno's matters and showed that he had billed 952 hours in four previous Quizno's cases and 1,631 hours overall representing Quizno's. In his certification opposing disqualification, Bleiman stated that he never had direct authority to implement policy-making decisions in the Quizno's cases and that most of the day-to-day decisions had to be approved first by other attorneys or representatives of the Quizno's legal department. The Appellate Division reasoned that "primary responsibility" does not require direct authority to implement policy decisions, but merely requires actual participation in the management and direction of the matter at the policy-making level. Given the nature of his participation, coupled with the number of hours he billed in Quizno's matters, the Appellate Division concluded that Bleiman was an attorney with primary responsibility within the meaning of the RPC.

Although the issue of primary responsibility was dispositive, the Appellate Division went on to discuss the deficiencies in M&K's screening process. The court found that M&K implemented an oral screening process when Bleiman joined the firm and did not provide the required written notice to Quizno's at that time. The court noted the clear and unambiguous language of the RPC that leaves "no room for the conclusion that an oral screening constitutes proper screening" and also stated that the screening must be timely. Because M&K was already representing plaintiffs when he joined the firm, it was "inexplicable" that written procedures were not established at the outset. Thus, even if he had not been an attorney with primary responsibility in the prior litigation, disqualification for noncompliance with the RPC's screening procedures was an additional basis upon which to disqualify M&K from representation.

FRAUD

JJCO, Inc. v. Isuzu Motors Am., Inc., No. 10-16597, Bus. Franchise Guide (CCH) ¶ 14,863 (9th Cir. July 5, 2012) (unpublished)

This case is discussed under the topic heading "Definition of Franchise."

***Massey, Inc. v. Moe's Sw. Grill, LLC*, No. 1:07-CV-741-RWS, Bus Franchise Guide (CCH) ¶ 14,886 (N.D. Ga. Apr. 17, 2012)**

This case is discussed under the topic heading "Statue of Limitation."

FTC FRANCHISING RULE

***Massey, Inc. v. Moe's Sw. Grill, LLC,* No. 1:07-CV-741-RWS, Bus Franchise Guide (CCH) ¶ 14,889 (N.D. Ga. Aug. 3, 2012)**

A group of franchisees alleged that their franchisor (Moe's) failed to reveal in its disclosure documents and also misrepresented the fact that Moe's CEO Martin Sprock received "kickbacks" as a part-owner of an approved supplier of food brokerage services (SOS). The court granted summary judgment against those plaintiffs that received a version of the disclosure document accurately disclosing the relationship between Sprock and SOS and that failed to bring their claims within a year of discovery, as required under their franchise agreements. Essentially, the court found that because plaintiffs argued that the kickback occurred by virtue of Sprock's ownership in SOS, and plaintiffs had knowledge of that ownership via the 2005 disclosure document, franchisees were on inquiry notice of the kickback scheme.

Plaintiffs moved to reconsider on the basis that the disclosure document also said that "we" did not derive any proceeds from approved suppliers, and it was reasonable for plaintiffs to believe that "we" included Sprock. The court disagreed and held that plaintiffs' interpretation contradicted the plain language of the disclosure document, which limited the definition of "we" to "Moe's Southwest Grill, LLC." The decision to dismiss those plaintiffs' claims was upheld.

INJUNCTIVE RELIEF

Econo-Lube N' Tune, Inc. v. Orange Racing, LLC, No. 3:12cv449, Bus. Franchise Guide (CCH) ¶ 14,890 (W.D.N.C. Sept. 10, 2012)

An automotive repair franchisor successfully enforced its post-term noncompetition agreement against a former franchisee and its principal, obtaining a preliminary injunction enjoining defendants from participating in a competing business for one year within twenty miles of the former franchise location.

Notably, neither defendants nor their counsel appeared for the preliminary injunction hearing.

Applying North Carolina law, the court found that (1) the noncompete was reasonably necessary to protect Econo Lube's legitimate interests, (2) the one-year, twenty-mile covenant was reasonable and well within the range typically upheld by North Carolina courts, and (3) enforcement of the covenant did not violate public policy. The court thus concluded that Econo Lube was likely to succeed on the merits of its enforcement claim.

The court also found that Econo Lube would be irreparably harmed if the covenant were not enforced since it would otherwise be deprived of the customers and the market that it had established over the course of its franchise relationship, and it would be difficult, if not impossible, to reestablish an authorized, reputable Econo Lube franchise in the same area.

The court also found that the balance of the equities weighed in favor of granting the injunction, observing that although an injunction would result in harm to defendants, they should have anticipated the harm, given that they agreed to the terms of the covenant at the outset of the franchise relationship. Moreover, the court continued, permitting defendants to continue operating a competing business in violation of the covenant would unfairly allow them to benefit from the confidential marketing and operational information that they received during their relationship with Econo Lube.

Finally, in finding that the public interest would be served by entry of a preliminary injunction, the court employed language that is certain to catch the attention of franchisor counsel in North Carolina and elsewhere. The court noted that the public derives a "substantial benefit" from franchisors that "train entrepreneurs and develop new businesses." The court continued:

> [i]f franchisors such as plaintiff are unable to protect themselves and their systems from those who would take unfair advantage of the benefits of exposure to a franchised system, plaintiff and other franchisors may be forced to alter their way of doing business, to the detriment of the consuming public. In addition, if this covenant is not enforced, defendants will continue to mislead the public, unfairly compete with plaintiff's authorized area franchisees, unfairly capitalize on plaintiff's trade secrets and unfairly take advantage of plaintiff's goodwill.

***Int'l House of Pancakes, LLC v. Parsippany Pancake House, Inc.*, No. CIV. 12-3307 WJM, Bus. Franchise Guide (CCH) ¶ 14,856 (D.N.J. Sept. 25, 2012)**

In an unsurprising result, the court granted an unopposed motion enjoining a terminated New Jersey IHOP franchisee from using the brand name or any related marks, in a case where termination was based upon an admission by the franchisee's president to having sexually assaulted a minor. The plea resulted in a conviction carrying a minimum three-year prison sentence and registration of the individual as a sex offender. The franchise agreement allowed IHOP to terminate the agreement immediately and without prior notice upon a conviction of the franchisee of a felony or any other criminal misconduct "which is relevant to the operation of the franchise." The court found that IHOP, as a family-friendly dining establishment with an interest in protecting that image, was likely to prevail on its claim. Moreover, the prison term of franchisee's president necessarily would render him unable to actively participate in the day-to-day operations of the franchised business, as he was obligated to do under agreement.

The more notable aspect of this case was an earlier ruling by the court that IHOP's termination was impermissible under the New Jersey Franchise Practices Act (FPA) in the absence of sixty days' advance notice. Although the FPA generally prohibits a franchisor from terminating a franchise without having first provided sixty days' advance written notice, the statute allows for immediate termination where the franchisee is convicted of an offense "directly related to the business conducted pursuant to the franchise." The court held that, standing alone, the potential damage to IHOP's brand that might result from the conviction was insufficient to satisfy the "directly related" standard of the FPA as would allow for immediate termination. The court found that, even if IHOP might have "good cause" for termination after sixty days' notice, nothing suggested that the crime occurred at the franchised location, that IHOP had received any adverse publicity, that any IHOP location had become less profitable as a result of the conviction, or that any other direct factual nexus between the conviction and the franchised business existed. The court observed that while there was scant case law interpreting the phrase "directly related to the business conducted pursuant to the franchise," even IHOP appeared to concede that this was "at the very best, a close call."

As a result of the court's preliminary ruling, IHOP provided an amended notice of termination to the franchisee and waited until more than sixty days before renewing its effort to enjoin the franchised business from operating as an IHOP franchise. This time, the franchisee made no effort to challenge the validity of the amended termination notice, a fact the court found telling.

***Lawn Doctor, Inc. v. Rizzo,* No. CIV.A. 12-1430 PGS, Bus. Franchise Guide (CCH) ¶ 14,858 (D.N.J. June 27, 2012)**

The District of New Jersey denied the request of a national lawn care franchisor (Lawn Doctor) to enforce a post-termination noncompete provision against a former franchisee. The franchise agreement provided in pertinent part that neither the franchisee nor its owners would for eighteen months following termination have any interest in a competitive business either (1) within a fifty-mile radius of the franchisee's former territory or (2) within a fifty-mile radius of the territory of any other Lawn Doctor business.

Applying New Jersey law, the court found that Lawn Doctor had not established a reasonable likelihood of success on the merits on its request for injunctive relief as to whether the restrictive covenant was valid and enforceable. Although restrictive covenants in New Jersey and elsewhere generally are enforced where they are found to be reasonable, protect the employer's legitimate interests, impose no undue hardship on the employee, and are not injurious to the public, the court concluded that Lawn Doctor's restrictive covenant was so broad and all-encompassing that it was unreasonable in geographic scope.

In declining to enforce the restrictive covenant as written, the court was troubled that Lawn Doctor was seeking to impose its covenant against the franchisee in at least thirty-eight states, even though the area in Bradenton-Sarasota (Florida) where the franchisee had operated was "relatively small." The court held that the covenant was not in reasonable proportion to Lawn Doctor's legitimate interests in protecting its customer relationships and goodwill.

The court also declined to revise the scope of the covenant because Lawn Doctor had not presented any testimony explaining how a more limited covenant could reasonably protect its legitimate interests. In reaching its decision, the court observed that the franchisee had voluntarily agreed to five restraints that the court believed might be sufficient to protect Lawn Doctor's legitimate interests in its trade secrets and confidential information without enforcement of the restrictive covenant. Those voluntary restraints included fully de-identifying and refraining from the use of Lawn Doctor's trade dress or signage, refraining from the use of its trademarks or similar marks in marketing or promoting lawn care services (including telephone listings), as well as turning over client files and returning all trade secret and proprietary information.

***Lift Truck Lease & Serv., Inc. v. Nissan Forklift Corp.,* No. 4:12-CV-153, Bus. Franchise Guide (CCH) ¶ 14,892 (E.D. Mo. Sept. 7, 2012)**

Three weeks before the February 1, 2012 expiration of the parties' two-year dealership agreement, Nissan Forklift Corporation, North America sent one of its franchisees (ADL) a notice of its intent not to renew the agreement based upon ADL's alleged failure to meet certain performance obligations and sales goals. ADL maintained that the notice was the first time in the parties' two-year relationship that Nissan had indicated that ADL's sales performance was deficient. The notice, which also purported to terminate a separate dealer sales agreement between the parties for the sale of Barrett Industrial Trucks products, stated that it was a "90-day notice of non-renewal and termination" for both agreements and represented that ADL would no longer be a Nissan or Barrett Dealer "as of 4/15/12." The notice further stated that if ADL were to "cure the default" by achieving specific target goals within sixty days of the date of the letter, the nonrenewal and termination would not go into effect and Nissan would offer ADL a new twelve-month agreement. According to ADL, shortly after issuing the nonrenewal notice, Nissan contacted ADL's customers to inform them that ADL would no longer be an authorized Nissan/Barrett dealer or servicer after April 15, and that another entity would take over those functions in St. Louis.

On January 27, 2012, before expiration of the dealership agreement, ADL sued Nissan under both the franchise and power equipment dealer provisions of the Missouri Merchandising Practices Act (MMPA), as well as under the Illinois Franchise Disclosure Act (IFDA). ADL also filed a claim for tortious interference with business expectancy and sought preliminary and permanent injunctive relief.

Nissan moved to dismiss the MMPA claims, arguing that: (1) ADL's claims under the franchise provisions of the MMPA must fail, because, as a power equipment dealer, its rights are governed exclusively by the power equipment provisions of the MMPA, and because ADL had not established the existence of a franchise relationship with Nissan; (2) ADL had failed to allege that Nissan lacked good cause to terminate the agreements, given that the termination letter detailed ADL's lack of compliance with performance obligations and sales goals; (3) Nissan had provided the statutorily required ninety days' notice of termination; and (4) the claim was premature, because ADL had filed suit in the middle of the "cure period."

The court disagreed, finding that (1) nothing in the MMPA indicates that the franchise and power equipment provisions of the MMPA are mutually exclusive, and the parties' agreements reflected an arrangement "pursuant to which Nissan granted ADL a license to use its trade and service marks, and the existence of a community of interest in the marketing of goods and services;" (2) it could reasonably be inferred that Nissan did not have good cause to terminate its relationship with ADL, given ADL's allegations that it had satisfied its obligations under the agreements and that Nissan had never previously expressed concerns about ADL's performance; (3) although the effective date of the termination referenced in the notice was unclear, the notice was sent twenty-two, rather than ninety, days prior to the February 1, 2012, expiration date referenced in the dealership agreement; and (4) at the time the court decided the motion to dismiss, Nissan's "self-selected termination date of April 15, 2012" had passed, and thus ADL's MMPA franchise claims were not premature.

The court also denied Nissan's motion to dismiss the tortious interference claim, finding that ADL had asserted a facially plausible claim that Nissan had communicated misrepresentations of fact to ADL's customers through communications that were wrongful because at the time they were made, ADL had complied with the parties' agreements and the stated cure period had not yet expired. The court noted that ADL's business expectancy at issue included customers who had preexisted ADL's relationship with Nissan. ADL had been in business for approximately thirty-three years when it signed the dealership agreement with Nissan.

The court granted Nissan's motion to dismiss ADL's claims under the IFDA, however, finding that, leaving aside the question of whether the IFDA was intended to apply to an out-of-state dealer whose territory includes certain areas of Illinois, ADL had failed to allege that it paid Nissan a franchise fee in excess of $500 or that any inventory or service purchase requirements constituting an indirect franchise fee had been imposed.

***Midas Int'l Corp. v. Chesley,* No. 11-cv-8933, Bus. Franchise Guide (CCH) ¶ 14,853 (N.D. Ill. June 26, 2012)**

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

***Stuller, Inc. v. Steak N Shake Enters., Inc.*, No. 11-2656, Bus. Franchise Guide (CCH) ¶ 14,898 (7th Cir. Aug. 24, 2012)**

Stuller, a Steak N Shake franchisee since 1939, operates five restaurants in Illinois. Stuller sued Steak N Shake (SNS) after SNS adopted a new policy in 2010 requiring its franchisees to follow SNS's pricing and promotion policies. Stuller sought a preliminary injunction to halt implementation of the policy. The Central District of Illinois granted the injunction, determining that without an injunction Stuller's franchises would be terminated, which provided the irreparable harm required to obtain an injunction. The court also determined Stuller had no adequate legal remedy. In its interlocutory appeal, SNS argued that the harm to Stuller would be self-inflected, and Stuller was not entitled to an injunction. The Seventh Circuit rejected this argument and affirmed the decision of the district court.

SNS argued that Stuller could avoid termination of its franchises by complying with the policy, so Stuller was inflicting on itself the harm of termination of the franchises. SNS cited *Second City Music, Inc. v. City of Chicago*, 333 F.3d 846 (7th Cir. 2003), in which a company's failure to obtain a license required to sell audio and video equipment constituted self-inflicted harm, as there was no detriment to the company in obtaining this license. The Seventh Circuit said that *Second City* did not create a categorical rule that self-inflicted injury cannot be irreparable harm. The court said whether injury is avoidable and therefore self-inflicted depends on the circumstances of the case.

Stuller and SNS made competing arguments to the Seventh Circuit regarding the impact of adopting the policy on Stuller's business. The Seventh Circuit stated that the district court did not analyze these competing claims, but should have done so. Finding sufficient evidence in the record to enable it to make this analysis, the court determined that Stuller would suffer irreparable injury if forced to implement the policy. The court noted that Stuller presented evidence that the policy would negatively affect its revenues, possibly considerably. In addition, the court noted that if Stuller implemented the policy and then prevailed on the merits, it would be difficult for Stuller to reestablish its prior business model. The court held that Stuller had established the requisite irreparable harm and that nothing in the district court's balancing of the harms constituted abuse of discretion.

***Tri-County Wholesale Distribs., Inc. v. Wine Group, Inc.*, No. 10-4202, Bus. Franchise Guide (CCH) ¶ 14,857 (6th Cir. June 29, 2012) (unpublished)**

In a two-to-one decision, the Sixth Circuit affirmed on an interlocutory basis a grant of a preliminary injunction enjoining a national wine supplier (TWG) from terminating two Ohio distributors, finding that the terminations would violate the Ohio Alcoholic Beverages Franchise Act (OABFA). The decision was largely shaped by the legislative scheme in Ohio regulating the distribution of alcoholic beverages. In particular, Ohio's three-tier distribution system, which is common to many states, creates localized monopolies over specific products, because manufacturers are required to contract with distributors through a franchise agreement by which distributors are granted exclusive rights to distribute specific brands to retailers within their territories. In addition, Ohio has a mandatory mark-up pricing system that requires distributors to mark up their products by no less than thirty-three percent, thereby guaranteeing hefty profit margins to distributors. As described by the dissent, the Ohio legislature thus created a "legislative solicitude" for distributors such as the plaintiffs, having enacted and regularly reinforced "a protectionist distribution statute, guaranteeing healthy profit margins and nearly irrevocable local monopolies to in-state distributors."

For several decades TWG had distributed some of its wine products under exclusive franchise agreements for various Ohio counties with the distributors, and distributed other wine products through other distributors in the same counties. The distributors, in turn, were free to distribute wines and other alcoholic beverages from manufacturers other than TWG, and did so. TWG's wines constituted twenty-seven percent and seven percent of the respective wine sales made by the distributors. In mid-2010, TWG sent two-month termination notices to the plaintiffs and other distributors, explaining that as part of an ongoing nationwide reorganization plan, TWG had concluded that its best interests would be served by consolidating all of its brands with a single distributor in Ohio, a distributor that was better positioned to increase sales of TWG products, thus reducing distribution redundancies.

The Southern District of Ohio found, however, that TWG's stated reason for termination violated the OABFA, which prohibits termination of a franchise for reasons unrelated to a breach of the franchise agreement or a statutory violation. After rejecting TWG's argument that the OABFA, which contemplates suits for "damages or other relief," prohibits a court from issuing a preliminary injunction for the violation of its terms, the district court awarded injunctive relief on the basis that the distributors had (1) shown a likelihood of success on their claim that the supplier lacked "just cause" for terminating their franchises; (2) demonstrated irreparable injury based on a loss of goodwill; (3) shown that no party would be in a worse position by maintaining the status quo; and (4) satisfied the public interest factor, given that the OABFA represented the Ohio legislature's judgment that enforcement of the statute was in the public interest.

The Sixth Circuit found that the distributors had a "near certainty" of success on the merits under the OABFA, which prohibits TWG and other manufacturers from terminating distributors "for other than just cause." The court observed that although the statute does not define "just cause," and the Ohio Supreme Court had not squarely answered the question, the Ohio Court of Appeals had recently reached the merits of this very question in a case between TWG and another recipient of TWG's termination notice. In that case, the court held that "reasonable minds can only conclude that TWG's business reasons for terminating the franchise were not just cause" under the OABFA. The Sixth Circuit found no persuasive reasons why the Ohio Supreme Court would reach a different result, noting that the plain language of the OABFA states that "just cause" may not be constituted by a "unilateral alteration of the franchise by a manufacturer for a reason unrelated to any breach of the franchise" or a statutory violation. The court concluded that the distributors had a strong likelihood of success on the merits because the notices did not suggest any breach or statutory violation but rather appeared to involve "precisely the type of conduct" prohibited by the OABFA.

The court found that the injunction was in the public interest, noting that Ohio courts had recognized that the OABFA was directly intended to create the very results that TWG claimed to be against the public interest. The Ohio legislature had considered the possibility of a manufacturer getting "locked into an unprofitable situation" and determined that this was "a business risk which must be assumed by all manufacturers of alcoholic beverages which avail themselves of the rights and privileges of marketing their wares in Ohio." The court stated that it would not second-guess the Ohio legislature because TWG made no argument that the OABFA is unconstitutional or undermines the public interest. The court also found no abuse of discretion in the district court's additional holding that an injunction would maintain the status quo and would not place TWG or any other party in a worse position.

The majority and the dissent differed, however, over the question of whether the distributors would likely suffer an irreparable injury in the absence of an injunction. While the majority found that this element had been satisfied on the basis that a loss of a unique product can cause a drop in customer goodwill, the dissent opined that the distributors had failed to carry their burden on this issue. The dissent reasoned that the distributors' affidavits on this point were vague and conclusory, and that the distributors had failed to offer specific evidence (1) that particular TWG products were unique in ways that would affect the sale of the distributors' other products, and that the associated lost sales of other products were unquantifiable and would cause irreparable injury pending trial unless the franchise relationship was frozen, or (2) that they had imbued the franchised products with goodwill that would be forfeited to successor distributors to the plaintiffs' irreparable detriment.

JURISDICTION

***A Love of Food, LLC v. Maoz Vegetarian USA, Inc.*, No. 10-cv-02352, Bus. Franchise Guide (CCH) ¶ 14,861 (D. Md. June 28, 2012)**

The District of Maryland held that it lacked personal jurisdiction over a national quick-service vegetarian restaurant franchisor (Maoz) concerning the claims of a Washington, D.C., franchisee for violations of the Maryland Franchise Registration and Disclosure Law and the New York Franchise Sales Act.

In September 2011 the court dismissed the franchisee's claims against individual representatives of Maoz but denied Maoz's motion to dismiss for lack of personal jurisdiction. Maoz, which is a Delaware corporation with its principal place of business in New York, contended that it had no contacts with Maryland and only transacted business there unwittingly. Moaz contended that (1) it did not initiate contact, advertise, or otherwise solicit or pursue the plaintiff (ALOF) in Maryland; (2) ALOF aggressively pursued Maoz for the purpose of opening a Maoz restaurant in the District of Columbia; (3) ALOF's principal member had a D.C. area code and engaged a D.C.-based lawyer; (4) the parties' face-to-face meetings took place in D.C., (5) the subject franchise was always intended to operate solely in D.C.; and (6) at no time did Maoz ever intend to derive any sales or revenue from Maryland. The court disagreed, finding instead that Maoz had "transacted business" in Maryland through the acts of mailing its UFOC and the final franchise agreement to plaintiff's Maryland address and listing the Maryland address in the franchise agreement that Maoz prepared. The court also found it highly relevant that negotiations related to the franchise agreement involved phone calls from Maoz's New York office to the franchisee's Maryland office, as well as the general idea that the franchisee had a "Maryland office" with which Maoz had communicated over a period of months in offering its franchise for sale.

Following discovery, however, the court arrived at the opposite conclusion in June 2012 and granted Maoz's motion for summary judgment for lack of personal jurisdiction. With the benefit of additional facts that "shed light on the overall circumstances surrounding the parties' negotiation and finalization of the franchise agreement," the court found that the exercise of personal jurisdiction over Maoz would be "highly tenuous" and that it would "likely violate traditional notions of fair play and justice" to conclude otherwise. In reaching this determination, the court was persuaded by the following facts: (1) although ALOF listed its principal place of business on the franchise agreement as Chevy Chase, Maryland the actual negotiations for the D.C.-based franchise occurred almost entirely in D.C. through ALOF's D.C.-based counsel; (2) during negotiations, Maoz was "largely if not wholly unaware" that ALOF was a Maryland resident; (3) ALOF was unable to prove that Maoz had mailed the UFOC or the franchise agreement to a Maryland address; (4) Maoz never directed any conduct into Maryland other than the mailing of some marketing materials to a Maryland address that Maoz subsequently discovered belonged to one of ALOF's principals, who later chose to list his address as ALOF's principal office; (5) there was little evidence of phone calls by Maoz to any number with a Maryland area code; and (6) Maoz had a "singular focus" on granting rights for a D.C.-based franchise. The court also observed that it appeared that neither the alleged injury nor the injury-causing acts had occurred in Maryland.

Having determined that it lacked personal jurisdiction over Maoz, the court considered whether to dismiss the action or transfer it to another district. The court concluded that, given the potential statute of limitations concerns that would be implicated by dismissal, the interests of justice weighed in favor of transfer. The court accordingly transferred the case to the District of Columbia, which the parties stipulated would have jurisdiction, noting that District of Columbia was where the parties met, negotiated, and finalized the franchise agreement, and where the subject franchise was based.

NONCOMPETE AGREEMENTS

***Hamden v. Total Car Franchising Corp.*, No. 7:12-CV-00003, Bus. Franchise Guide (CCH) ¶ 14,879 (W.D. Va. Aug. 7, 2012)**

A franchisor learned to its detriment that the distinction between termination and expiration of a franchise agreement may make a huge difference in enforcing post-term noncompete, nonsolicitation, and confidentiality provisions when the Western District of Virginia refused to enforce such provisions against a former franchisee whose franchise agreement had expired.

Devin Hamden entered into a limited rights franchise agreement with Total Car Franchising Corp., effective May 9, 1996. Total offered both paint and paint-less repair and restoration services, but Hamden provided paint-less services only. A post-term noncompete provision in the franchise agreement prohibited Hamden from engaging in certain specified competitive activities for two years after termination of the agreement. A separate noncompetition agreement contained what the court described as "a more detailed version of the covenant not to compete" and was effective if "the Franchise Agreement [was] terminated before its expiration date."

By its terms, the franchise agreement expired on May 9, 2011. Hamden, however, continued to operate his business, not realizing that the term had expired. On October 12, 2011, Total sent Hamden an e-mail reminding him to renew his franchise agreement. On November 30, 2011, Hamden notified Total that he would not renew his franchise agreement, and he ceased operating his business the next day. Hamden filed a declaratory judgment action seeking an adjudication of his rights and obligations under both the franchise and the noncompetition agreements, and the parties agreed to a one-day bench trial. At trial, Hamden testified and Total's representative did not disagree that he had committed no acts or omissions that could have resulted in early termination of the franchise agreement.

To determine whether the noncompete provisions applied to Hamden, the court noted that it had to determine whether the terms "termination" and "expiration" have different meanings in the relevant agreements. Hamden presented two arguments: (1) that the restrictive covenants in the franchise agreement applied only if the franchisee terminated the agreement, which he did not do; and (2) that they applied only to franchisees that did paint restoration work.

Total argued that expiration was only one form of termination and that the noncompete provisions applied to both expirations and terminations. The court rejected Total's argument as to the franchise agreement, pointing to language that the provisions applied for two years following termination of the franchise agreement. Similarly, the court distinguished cases cited by Total for the principle that the word "termination" includes or is interchangeable with expiration, noting that contract interpretation varies with the language in the agreements. The court also said that the Total franchise agreement did more than use the terms "termination" and "expiration" interchangeably by referencing a "list of conditions under which the Agreement terminates automatically and a provision for the franchisee to terminate the franchise agreement voluntarily." Thus, the court concluded the terms had different meanings in the franchise agreement. Consequently, the court determined that the franchise agreement expired rather than was terminated and the post-term noncompete did not apply to Hamden.

The franchise agreement's noncompete provision also stated that the franchisee could not engage in a paint restoration business. The court concluded that the franchise agreement's noncompete applied only to paint restoration businesses and not to Hamden's paint-less business, despite Total's argument that the term "appearance technology" in the auto industry includes both paint and paint-less businesses. Total asserted that because it used that term in the recitals of the franchise agreement, the restrictive covenant included both types of businesses. The court said that even assuming that Total's argument is correct, it would rely on the more specific language in the noncompete section over the more general language in the recitals of the franchise agreement.

Total did not fare any better under the noncompetition agreement. The court observed that Total's argument, i.e., that termination encompasses expiration, was even less plausible in the noncompetition agreement, where the language referred to the franchise agreement being terminated before its expiration date. The court said that by giving meaning to each word, the terms termination and expiration necessarily had different meanings. The court also found that Hamden was not bound by language in the noncompetition agreement prohibiting him from soliciting customers because that language stated that it applied for two years after termination of the franchise agreement. Finally, the court declined to enforce the language in the noncompetition agreement prohibiting the disclosure of confidential information and trade secrets because that language also said it applied if there is a termination of the agreement.

This case illustrates the importance of careful drafting, particularly with respect to noncompete provisions and provides at least one example of how a court may see a clear differentiation between termination and expiration. The enforcement of post-termination covenants not to compete can be difficult in the best of circumstances, and franchisors should review their agreements to see that they have sufficiently explained and differentiated the meanings of these terms.

***Lawn Doctor, Inc. v. Rizzo,* No. CIV.A. 12-1430 PGS, Bus. Franchise Guide (CCH) ¶ 14,858 (D.N.J. June 27, 2012)**

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

***Stoner v. Salon Lofts, LLC*, No. 11AP-838, Bus. Franchise Guide (CCH) ¶ 14,871 (Ohio Ct. App. July 19, 2012)**

Sean Stoner served as general counsel and vice president of investor relations from 2007 to 2010 for Salon Lofts, LLC, which leased space to hair stylists and beauticians. During that time, Stoner assisted in the development of a company to franchise the concept (Salon Lofts Franchising). Stoner and a business partner became the first franchisees, entering into an "agreement of owner of franchises," i.e., the franchise agreement, to develop locations in Charlotte, North

Carolina. At the time of the lawsuit, Stoner had negotiated leases for three locations in the Charlotte area for other businesses similar to Salon Lofts.

Stoner filed suit against Salon Lofts in the Franklin County, Ohio, Court of Common Pleas after Salon Lofts terminated his employment in 2010. Salon Lofts counterclaimed, alleging that Stoner was violating the provisions of a noncompete agreement and was using its trade secrets. The trial court granted a preliminary injunction to Salon Lofts, and Stoner appealed claiming the injunction was too broad, that the contract between Stoner and Salon Lofts Franchising was unenforceable, and that Salon Lofts had not proven that Stoner had disclosed its trade secrets.

The franchise agreement contained a noncompete clause that was effective during the term of the agreement and two years following the date on which the franchisee owned any stores or had the right to develop stores. The noncompete prohibited Stoner's participation in businesses offering the services of beauty enhancement professionals within a twenty-mile radius of any stores the franchisee owned, operated, or had any interest in, or any location where he had the right to develop stores. Stoner had also signed an employment agreement that contained post-termination noncompete provisions. However, the trial court based its decision to grant the injunction on the franchise agreement alone.

The Ohio Court of Appeals examined Stoner's first assertion, finding that the length and geographic scope of the post-term restrictions were not overly broad. The court reasoned that the trial court did nothing but enforce the agreement signed by Stoner to block him from opening competing businesses in nine counties in North Carolina and two counties in South Carolina. Stoner further argued that the injunction imposed restrictions on him beyond what the parties agreed to in the franchise agreement, specifically that the restrictions prevented him only from competing with Salon Lofts Franchising, not Salon Lofts. The court also rejected this argument, finding as a practical matter that the two entities could not be separated. Salon Lofts owned and operated Salon Lofts Franchising, so whether Salon Lofts opened a corporate store or a franchise, Stoner would be in direct competition for store locations against the Salon Lofts business model "and all it entails."

The court also noted that conflicting testimony had been presented as to whether Salon Lofts had abandoned franchising efforts in Charlotte. The owner of Salon Lofts testified that he had not given up on the idea of franchising, that he continued to meet and go on trips with potential franchisees, and that he planned to open locations in the Charlotte area that could either be company owned or franchised.

The court then rejected Stoner's argument that Salon Lofts breached the franchise agreement by failing to provide him with an operations manual and required training. The court rejected this argument by noting that, as general counsel for Salon Lofts, Stoner had complete access to the company's documents, which included the operations manual. Additionally, as general counsel, he conducted a significant portion of the required training, at least with respect to real estate matters and leases. Stoner's business partner had previously notified company personnel that all communication with respect to franchising was to be put on hold; therefore, the fact that Stoner did not receive training would not relieve him of the obligation to refrain from competing with Salon Lofts and Salon Lofts Franchising.

Finally, Stoner contended that even if the noncompetition agreement was enforceable, Salon Lofts Franchising failed to establish actual or threatened irreparable harm because it was not proven that Stoner had revealed its trade secrets. However, Stoner had already negotiated three leases for sites in Charlotte that were "Salon Lofts type facilities" and would be in direct competition with the businesses. The court found that, as former general counsel to Salon Lofts, Stoner was privy to all the confidences and secrets of the business, so barring him from revealing those confidences was "certainly a reasonable precaution for the trial court to take."

STATE DISCLOSURE/REGISTRATION LAWS

Brockman v. Am. Suzuki Motor Corp. **No. 6:11-3381-TMC, Bus. Franchise Guide (CCH) ¶ 14,885 (D.S.C. Aug. 10, 2012)**

A former franchisee brought claims against franchisor (Suzuki) under a South Carolina statute governing manufacturers, distributors, and dealers, and common law claims for negligence, unjust enrichment, and breach of contract for allegedly encouraging another franchisee (Gibson) to engage in fraudulent promotional activities that led to a highly publicized investigation by the South Carolina Attorney General's Office, thereby allegedly tarnishing the brand in the South Carolina market. Although plaintiff eventually became a dealer when it signed a franchise agreement in February 2010, the Gibson advertising scheme occurred from 2007–08, during which time plaintiff had only signed letters of intent.

As a matter of first impression, the court held that the South Carolina dealer statute grants standing to "any person" injured by anything forbidden in the statute. Further, plaintiff was not precluded from bringing claims under the statute for conduct that occurred when it was only a prospective franchisee. However, the court found that many of the specific claims that Brockman brought under the statute required plaintiffs to be franchisees at the time of the alleged conduct. For example, plaintiff's price discrimination claims based on Suzuki's conduct related to the Gibson advertising scheme were dismissed because protection under that section was available only to existing and not prospective dealers.

Plaintiff's other claims under the dealer statute faced similar deficiencies. Suzuki argued that claims for arbitrary, bad faith, and unconscionable conduct related to the Gibson scheme had to be dismissed because it was implausible that Suzuki would act in a manner that would adversely affect its own franchisees. The court disagreed, noting that under Suzuki's reasoning, there would never be any false or deceptive advertising. However, the court still found plaintiff's claim implausible because it alleged that it could not open its dealership or obtain a line of credit after the scheme poisoned the South Carolina market in 2009, although its own pleadings stated that it did in fact open a dealership and obtain a line of credit.

The court was similarly confused by plaintiff's claims for improper termination and restrictions on transfers. The pleadings stated that after plaintiff signed the franchise agreement, it sold and then unsuccessfully attempted to repurchase the franchise from a third party. Suzuki would not approve the transfer back to plaintiff because Suzuki had raised its minimum line of credit requirement and plaintiff could not obtain the additional financing. The court held that plaintiff could not allege claims for improper termination because it ceased to become a franchisee when it sold the franchise. The statute is "meant to protect a current franchisee who is unable to sell a franchise because the franchisor unreasonably refuses to approve the transfer." Consequently, those claims were dismissed. Lastly, the court dismissed plaintiff's unfair competition claims based on the Gibson promotional scheme because plaintiff failed to plead that that Suzuki owned, operated, or controlled the Gibson dealership as required under the statute.

Plaintiff's common law claim for unjust enrichment was also dismissed because its allegations that the Gibson scheme conferred a benefit on Suzuki failed to establish how that benefit came from plaintiff. Further, the court dismissed plaintiff's breach of contract claims because Suzuki's alleged conduct of (1) participating in the Gibson advertising scheme occurred before plaintiff signed the franchise agreement, and (2) increasing the minimum line of credit requirement occurred after plaintiff ended the agreement by transferring its store. The court added that under South Carolina law, letters of intent do not amount to a contract and cannot support claims for breach of contract.

***Massey, Inc. v. Moe's Southwest Grill, LLC*, No. 1:07-CV-741-RWS, Bus Franchise Guide (CCH) ¶ 14,886 (N.D. Ga. Apr. 17, 2012)**

A group of franchisees alleged that their franchisor (Moe's) failed to disclose in its disclosure documents and also misrepresented to them that Moe's CEO Martin Sprock received "kickbacks" as part owner of an approved supplier of food brokerage services (SOS). The issue was whether certain plaintiffs' claims were time barred by the franchise agreement provision that required claims to be brought within one year from the date of their discovery. Also relevant was the fact that defendants had agreed to waive the one-year restriction for any plaintiffs whose claims were not barred before August 16, 2006. The court's key ruling was that those plaintiffs who received the April 2005 disclosure document, which accurately described the relationship between Sprock and SOS, had knowledge of Sprock's ownership by virtue of receiving the document.

Franchisees argued that they could not have had knowledge absent a duty to read the disclosure document. Drawing from securities law, the court held that the relevant inquiry was whether a reasonably diligent franchisee would have read the disclosure document. Similarly, in rejecting franchisees' argument that knowledge of Sprock's ownership differed from knowledge that he was receiving kickbacks, the court held that franchisees' knowledge of his ownership interest provided them with inquiry notice of the kickback scheme. Consequently, claims brought by plaintiffs who received an April 2005 disclosure document before August 15, 2005, were dismissed as time barred, regardless of whether they had actually read the disclosure document.

The court denied defendants' motion to dismiss the remaining plaintiffs' claims of fraud, negligent misrepresentation, and claims under the Racketeering Influence and Corrupt Organizations Act (RICO). Addressing the claims of fraud, the court found that Sprock's intent was an issue for trial. Defendants had evidence that Sprock thought he had to disclose his relationship with SOS only when he actually started receiving distributions from SOS, but plaintiffs had evidence that the federal guidelines required him to disclose any revenues "to be received," which included his arrangement before he actually received any distributions. Similarly, for their RICO claims, plaintiffs had created an issue as to whether Sprock committed the predicate act of theft by deception by failing to disclose his interest in SOS. Moreover, evidence existed that franchisees had suffered damages because at least one food supplier testified that its prices would have been cheaper but for the rebates it had to pay SOS.

STATUTORY CLAIMS

***Beverage Distribs., Inc. v. Miller Brewing Co.*, No. 11-3484, 690 F.3d 788, Bus. Franchise Guide (CCH) ¶ 14,899 (6th Cir. Aug. 16, 2012)**

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

***Colonial Chevrolet Co., Inc. v. United States*, No. 10-6476, Bus. Franchise Guide (CCH) ¶ 14,900 (Fed. Cl. Aug. 20, 2012); *Alley's of Kingsport, Inc. v. United States*, No. 12-CV-204-WMC, Bus. Franchise Guide (CCH) ¶ 14,901 (Fed. Cl. Aug. 20, 2012)**

These two decisions, issued the same day by the U.S. Court of Federal Claims, deal with issues arising out of the restructuring of the automobile industry. The United States, defendant in each of these actions, sought interlocutory appellate review of two questions: (1) whether the takings claims by plaintiff auto dealers could proceed when their legal theory did not have support in the Federal Circuit's takings jurisprudence, but their allegations and arguments have "the prima facie feel of a takings case," and (2) whether decisions by the bankruptcy court in cases involving these same parties have preclusive effect in the current cases. The court issued substantially similar opinions in both cases.

The court noted that 28 U.S.C. § 1292(d)(2) permits an interlocutory appeal where "a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and . . . an immediate appeal from that order may materially advance the ultimate termination of the litigation." The court concluded that the issue regarding the requirements for a takings theory is a controlling question of law. The court noted that if the Federal Circuit ruled that the dealers' theories must fit within existing takings jurisprudence, and they had not yet pled a theory meeting that requirement, the dealers will not have stated a claim. The court hinted that U.S. Supreme Court decisions in this area may cause the Federal Circuit not to reject a takings theory that is reasonable on its face. Because the court's decision on these issues could determine whether the cases moved forward, this issue was a controlling question of law.

The court rejected the United States' contention that the second issue for which it sought interlocutory review was a controlling question of law. The dealers alleged that the United States facilitated Chrysler and General Motors in rejecting the dealers' automobile franchise agreements. The court noted that the bankruptcy court had to find that the United States did not control Chrysler and General Motors before approving rescission of the franchise agreements. The United States argued that these findings by the bankruptcy court should be given preclusive effect in the court of claims cases. The court said that preclusive effect of the bankruptcy court findings was not a controlling question of law. The court reasoned that the dealers may be able to prove their takings claims without proving the United States controlled the Chrysler and General Motors bankruptcy cases.

The United States also sought to consolidate these two cases, but the court refused to do so. The court noted that (1) one case involved both General Motors and Chrysler dealerships, while the other involved only a Chrysler dealership; (2) plaintiffs had different legal theories related to their takings claim; and (3) one plaintiff wanted the court to certify this case as a class action, while the other plaintiff thought potentially cumbersome discovery issues could be handled through case management orders.

TERMINATION AND NONRENEWAL

***Alboyacian v. BP Prods. N. Am., Inc.*, No. 9-5143, Bus. Franchise Guide (CCH) ¶ 14,894 (D.N.J. Sept. 5, 2012)**

This case is discussed under the topic heading "Attorney Fees."

***Beverage Distribs., Inc. v. Miller Brewing Co.*, No. 11-3484, 690 F.3d 788, Bus. Franchise Guide (CCH) ¶ 14,899 (6th Cir. Aug. 16, 2012)**

The Sixth Circuit rejected an attempt by MillerCoors, LLC and related entities to terminate certain beer distributorships in Ohio under the successor manufacturer provisions of the Ohio Alcoholic Beverage Franchise Act. MillerCoors was a joint venture formed as a Delaware limited liability company in April 2008 to enhance the manufacturers' ability to compete with Anheuser-Busch, the largest beer manufacturer in the United States. Miller Brewing Co. and Coors Brewing Co. contributed most of their U.S. assets to MillerCoors and assigned to MillerCoors the distribution agreements at issue in this case. Miller and Coors each had a 50 percent voting interest in MillerCoors, and each had the right to appoint five directors to its ten-member board of directors. Miller had a 58 percent economic interest in MillerCoors while Coors had 42 percent.

The Act forbids the termination of franchises without good cause and at least sixty days' notice. The statute contained an exception permitting a "successor manufacturer" to terminate distributorships without just cause or consent by sending notice within ninety days after completion of a "merger, acquisition, purchase, or assignment." Acting under this provision, MillerCoors notified the distributors that were plaintiffs in this case of its intention to terminate their distribution rights. Plaintiffs filed suit seeking declaratory and injunctive relief, arguing that MillerCoors lacked good cause or any other basis for termination.

The Act does not define the term "successor manufacturer." However, § 1333.85(B)(4) of the Act provides that "a manufacturer's sale, assignment, or other transfer of the manufacturer's product or brand to another manufacturer over which it exercises control" does not provide just cause to terminate. Relying on this language, the Southern District of Ohio determined that Miller and Coors exercised control over MillerCoors so that joint venture was not a successor manufacturer under the Act. The court granted the distributors' motion for summary judgment and the manufacturers appealed. The manufacturers argued that by acquiring substantially all the stock or assets of Miller and Coors, MillerCoors was a successor manufacturer and that Miller and Coors should be permitted to terminate the distributorships by providing notice and paying certain compensation as required by the Act.

The distributors argued that because § 1333.85(B)(4) provides that transferring assets to a manufacturer over which the transferor exercises control does not constitute just cause, such a transfer cannot qualify for the "less-restrictive termination process" in § 1333.85(D) for successor manufacturers. The distributors argued that to hold otherwise would render the language in § 1333.85(B)(4) meaningless since manufacturers could restructure, retain some control, and terminate distributorships under the successor manufacturer provisions. On the other hand, MillerCoors argued that §§ 1333.85(B) and (D) are to be read independently with subsection (B) governing the rights of nonsuccessor manufacturers and subsection (D) governing the rights of successor manufacturers.

Faced with the contradictory statutory interpretations advocated by the parties, the Sixth Circuit looked at the Act's legislative intent. The court stated that the legislature intended to prevent manufacturers from using corporate reorganizations or shifting of brands among entities under common control as a basis to terminate franchises. The court then turned to the question of whether Miller and Coors exercised control over MillerCoors. Noting that the district court had determined that Miller and Coors controlled MillerCoors because each had 50 percent control and "equal control is a form of control," the Sixth Circuit observed that Miller and Coors each had a veto over operating decisions under the structure of MillerCoors. Finding that factor to be sufficient for control, the court concluded that MillerCoors was not a successor manufacturer under the Act.

***Brockman v. Am. Suzuki Motor Corp.* No. 6:11-3381-TMC, 2012 U.S. Dist LEXIS 112424, Bus. Franchise Guide ¶ 14,885 (D.S.C. Aug. 10, 2012).**

This case is discussed under the topic heading "State Disclosure/Registration Laws."

***Century 21 Real Estate, LLC v. All Prof'l Realty, Inc.*, Nos. CIV. 2:10-cv-2751 WBS GGH; 2:10-2846 WBS GGH; 2:11-2497 WBS GGH, Bus. Franchise Guide ¶ 14,884 (E.D. Cal. Aug. 8, 2012)**

Century 21 terminated its franchise agreements with defendant franchisee that operated three offices in California and one office in Hawaii for failing to pay royalties and other payments for all of the stores and abandoning one of the California stores. Century 21, after successfully obtaining a preliminary injunction forcing franchisee to de-identify its offices, sued for breach of contract for outstanding fees and lost future profits, as well as violation of the Lanham Act. Defendant countered that its failure to pay under the franchise agreements was excused because Century 21 breached the contract by, among other reasons, failing to prevent other franchisees from hiring its sales associates. Defendant also claimed that Century 21 violated the California Franchise Relationship Act (CFRA) for improperly terminating the franchise agreements.

The court first analyzed whether it should apply New Jersey law, as required by the franchise agreements. After finding a "substantial relationship" between the chosen law and the parties because Century 21 maintains its headquarters in New Jersey, the court focused on whether application of New Jersey law "would be contrary to a fundamental policy of California." Franchisee argued that, because the New Jersey Franchise Act protects only those franchisees that maintain a franchise location in the state, applying New Jersey law would preclude them from bringing statutory wrongful termination claims. Franchisee also contended that, in violation of the CFRA's antiwaiver provision, application of New Jersey law essentially would result in the waiver of those claims that would have been available under California law. Interestingly, the court noted that the CFRA's requirements of good cause and a reasonable opportunity to cure before termination were incorporated into the termination provisions of the franchise agreements. In enforcing the New Jersey law provision, the court held that its decision was not contrary to California policy because any claims franchisee may have had under the CFRA could be brought as claims for breach of contract under the franchise agreement.

The court further disagreed with franchisee's core theory of the case, i.e., that Century 21 had a duty to prevent franchise offices from recruiting another franchisee's agents. Franchisee could only point to general language in the Century 21 Code of Conduct, which said that franchisees should avoid recruiting. However, that wording could not overcome the express language of the franchise agreements stating that Century 21 had "no right to regulate or participate in the recruitment" of sales associates or employees. The court also rejected franchisee's argument that Century 21 breached the franchise agreements by failing to pursue causes of action against competitors operating under similar names. The court held that the franchise agreements granted Century 21 the right to approve public uses of the trademarks "[a]t our sole option" and provided the franchisor with sufficient discretion to decide when to take action against infringers. The court also rejected franchisee's tautological argument that Century 21 failed to provide sufficient "tools and systems" under the franchise agreements because if it had, franchisee would have been profitable.

Franchisee next argued that Century 21 terminated the agreements improperly by preventing franchisee from curing defaults and terminating in bad faith. The court rejected the prevention argument, which was based on the fact that franchisee was in negotiations with Century 21 for payment of back fees, holding that those discussions "did not relieve [franchisee] of its obligation to pay its default in full by the cure date." The court noted that franchisee wrongly assumed that the CFRA's requirement for "good cause" termination imposed a "good faith, as opposed to bad faith, requirement." In fact, all that was needed to meet the CFRA's good cause requirement was to identify a proper reason for termination and provide the sufficient cure period. The court added that as long as the terminations were properly conducted under the franchise agreements, Century 21's motive was irrelevant. The court granted summary judgment for Century 21.

Another key issue was whether Century 21 was entitled to lost future royalties and could collect on liquidated damage provisions under the franchise agreement. New Jersey law examines the reasonableness of the liquidated damage provision at the time of the breach, as opposed to when the parties entered the contract. The burden, however, was on defendant to show that the provision was disproportionate to Century 21's actual losses. The court held that the evidence, which consisted of two e-mails suggesting that Century 21 could replace the lost production from the areas serviced by franchisee's offices, was insufficient. The court also rejected franchisee's argument that under *Postal Instant Press, Inc. v. Sealy*, 43 Cal. App. 4th 1704 (1996), Century 21 was not entitled to lost future royalties because it terminated the franchise agreements. The court held that *Sealy* has been "persuasively challenged" and, absent compelling New Jersey authority, applied New Jersey's presumption in favor of liquidated damage provisions.

The court also granted summary judgment on claims brought by Century 21 under the Lanham Act. Because the court had already decided that the agreements were properly terminated, the only issue was whether Century 21 had shown a likelihood of confusion. The court held that actual confusion was not necessary; franchisee clearly continued to use Century 21's trademarks after its franchise agreements were properly terminated. Moreover, the court held that "[t]here is no recognized exception to the Lanham Act that allows infringers to continue using a mark during a legal dispute." Finding the infringement willful, the court said it was obligated to award treble damages and agreed with Century 21 that actual damages should be calculated by multiplying the minimum monthly franchisee fee by the number of months franchisee continued to use the trademarks.

***Compass Motors, Inc. v. Volkswagen Group of Am., Inc.*, No. 8087/2009, Bus. Franchise Guide (CCH) ¶ 14,832 (N.Y. Sup. Ct. May 8, 2012)**

Plaintiff car dealer filed a motion for summary judgment as to one count of its complaint, seeking a declaration that the defendant car manufacturer's attempt to terminate its dealership agreement was null and void because it failed to provide 180 days' notice.

The car dealer argued that, pursuant to § 463(2)(e)(3) of the New York Franchised Motor Vehicle Dealer Act, defendant was required to provide 180 days' notice before terminating the dealership agreement. However, the court found the plain meaning of that section applied only to notices to correct "dealer sales and service performance deficiencies or breaches." Defendant's notice of termination was based on the car dealer's failure to renovate its facilities as required under a facility renovation agreement between the parties. Thus, the ninety days' notice provision mandated by § 463(2)(d)(1) applied instead of the 180 days required under § 463(2)(e)(3). Finding no dispute that defendant had provided the requisite ninety days' notice, the court denied the summary judgment motion. However, the court also denied defendant's cross-motion for summary judgment on this particular count because the car dealer alleged other bases, over which a factual dispute remained, for invalidating the notice of termination.

***Joseph v. Sasafrasnet, LLC*, No. 11-2065, 689 F. 3d 683, Bus. Franchise Guide (CCH) ¶ 14,873 (7th Cir. July 26, 2012)**

Emmanuel Joseph, a service station franchisee, appealed the denial by the Northern District of Illinois of his motion for preliminary injunction seeking to prevent the termination of a dealer lease and supply agreement (DLSA) with Sasafrasnet. The court concluded that late payments are a per se reasonable basis to terminate a franchise under the Petroleum Marketing Practices Act (PMPA). However, the court found that the balance of hardships favored Joseph, who stood to lose his $400,000 investment. Therefore, the court entered an injunction pending appeal, provided that he posted a $100,000 appeal bond and increased his fuel security deposit to $40,000. Joseph continued to operate the station during the appeal.

Under the DLSA, Joseph agreed to pay for fuel purchases by electronic funds transfer (EFT), and Sasafrasnet had the right to terminate the franchise if his EFT draft was returned for nonsufficient funds (NSF) more than once within a twelve-month period. Four EFTs were returned in June 2009. He then paid in a timely manner until March 2010, when three more EFTs were returned for NSF, at which point Sasafrasnet required him to pay for fuel before delivery. In May 2010, Joseph was allowed to resume EFT payments with a $2,500 penalty for any future NSF returns. Two months later, he changed bank accounts, and three NSFs followed. He admitted that one NSF resulted from his failure to notify Sasafrasnet of the change and contended that one NSF resulted from a "mutual mistake" of both. The court characterized the third NSF as Sasafrasnet's fault, because it had accessed the wrong account.

On July 30, 2010, after a total of ten NSFs, Sasafrasnet gave Joseph ninety days' notice of termination. However, after determining that the notice did not comply with PMPA, Sasafrasnet withdrew it and reissued proper notice in November 2010. Referring to the July 2010 NSFs and failing scores from a mystery shopper, Sasafrasnet wrote that it was terminating the franchise for failure to pay in a timely manner. Sasafrasnet indicated its decision rested in part on 15 U.S.C. § 2802(b)(2)(C), which authorizes termination based upon "an event which is relevant to the franchise relationship and as a result of which termination of the franchise relationship . . . is reasonable." Sasafrasnet also cited 15 U.S.C. § 2802(c)(8), which provides that events relevant to the franchise relationship include failure to pay the franchisor in a timely manner.

Sasafrasnet argued that § 2802(c) of PMPA provides a basis for termination that satisfies the reasonableness requirements of § 2802(b)(2)(C) as a matter of law. Joseph responded that § 2802(b)(2)(C) requires an independent judicial determination of the reasonableness of a termination decision. The Seventh Circuit sided with a majority of its sister circuits and ruled that "the occurrence of an event listed in § 2802(c) justifies, as a matter of law, a franchisor's decision."

Having concluded that the events listed in § 2802(c) constitute per se reasonable bases for a franchisor to terminate a franchise, the Seventh Circuit turned to the specific facts of the case to determine whether the district court abused its discretion in concluding that Joseph's NSFs satisfied § 2802(c). The court noted that this section raises issues both as to whether there was a failure to pay and whether the payment was not made in a timely manner. Additionally, the court noted that § 2801(13) incorporates a specific, limited reasonableness requirement into the analysis. Although Joseph did not cite this section, he may have argued facts sufficient to support the position that the failure was "only technical or unimportant to the franchise relationship." The court stated that the district court did not make any findings regarding whether the statutory definition of failure was satisfied and therefore directed the district court on remand to address the elements of the term "failure" in § 2803(13). Specifically, the Seventh Circuit instructed the district court to consider which of the July 2010 NSFs were Joseph's fault, and whether those within his control were only "technical or unimportant to the franchise relationship" for PMPA purposes.

The court additionally considered what constitutes payment in a "timely manner," evaluating the issue in view of prevailing industry trade practices. The court held that the record made it "abundantly clear" that, for a franchisee with Joseph's payment record, the July 2010 NSFs constituted "untimely payments" within the meaning of § 2802(c)(8). Further, he could not claim that he lacked notice that timely payment would be required in the future: after the November 2010 letter, "he had been on notice that his past practices of late payments would not be condoned."

***Forrester Lincoln Mercury, Inc. v. Ford Motor Co.*, Bus. Franchise Guide (CCH) ¶ 14,827 (M.D. Pa. May 10, 2012)**

This case arose when the defendant auto manufacturer (Ford) notified the plaintiff auto dealer (Forrester) that, as a result of its decision to discontinue the Mercury line of vehicles, it was terminating the franchise agreement with Forrester. Forrester initiated the instant action alleging that Ford violated the Pennsylvania Board of Vehicles Act (BVA). A magistrate judge issued a report and recommendation (R&R) that the motion be granted for three counts and denied for one. The Middle District of Pennsylvania adopted the magistrate judge's R&R in part and rejected it in part.

The BVA provides that it is a violation of the Act to unfairly terminate the franchise of any vehicle dealer without just cause (§ 818.13(a)) and that, if a franchisee challenges a termination, the franchisor has the burden of proof (§ 818.13(e)). Separately, the statute provides that it is a violation of the Act to terminate a franchise in connection with a change of control of the franchisor (§ 818.14(a)) and that discontinuation of a line of vehicles is deemed a termination for purposes of this provision (§ 818.14(b)). The BVA connects these two provisions in §818.13(e), which states that "any termination subject to *section* 14 shall not be subject to this *subsection*" (emphasis added). After reading the provisions together, the magistrate judge determined that the use of "section" and "subsection" were inconsistent but reasoned that a fair reading of the statute indicated that if a termination was the result of a discontinued line under § 818.14, the additional showing of just cause would not be required under § 818.13(a). The district court disagreed with the magistrate judge's interpretation, holding that the plain meanings of "section" and "subsection" preclude them from being treated as interchangeable. The court held that the plain meaning of the BVA was that § 818.13(e) created an exception only to § 818.13(e) and did not relieve the just cause requirements of § 818.13.

The BVA also contains a provision stating that, in the event of a termination, except for a termination under § 818.14, the manufacturer must also reimburse the dealer for rental costs. The court held that a reimbursement claim could not be dismissed until the applicability of § 818.14 was determined and that claims under both sections were therefore allowed as alternative pleadings. The court next analyzed the applicability of § 818.14, which applies only when the termination is part of a change of control, merger, or transfer of assets. Forrester contended that the transfer of assets from the Mercury line to Ford's remaining lines constituted a transfer. However, the court disagreed, finding that a merger is not just a reallocation of funds within an existing company and a reallocation does not constitute a change of control.

***H & R Block Tax Servs. LLC v. Franklin,* No. 11-3690, Bus. Franchise Guide (CCH) ¶ 14,893 (8th Cir. Sept. 7, 2012)**
This case is discussed under the topic heading "Contract Issues."

***Int'l House of Pancakes, LLC v. Parsippany Pancake House, Inc.,* No. 12-3307, Bus. Franchise Guide (CCH) ¶ 14,856 (D.N.J. Sept. 25, 2012)**
This case is discussed under the topic heading "Injunctive Relief."

***Ironson v. Ameriprise Fin. Servs. Inc.,* No. 3:11cv899, Bus. Franchise Guide (CCH) ¶ 14,891 (D. Conn. Sept. 10, 2012)**
This case is discussed under the topic heading "Arbitration."

***Lift Truck Lease & Serv., Inc. v. Nissan Forklift Corp.,* No. 4:12-CV-153, Bus. Franchise Guide (CCH) ¶ 14,892 (E.D. Mo. Sept. 7, 2012)**
This case is discussed under the topic heading "Injunctive Relief."

***Midas Int'l Corp. v. Chesley,* No. 11-cv-8933, Bus. Franchise Guide (CCH) ¶ 14,853 (N.D. Ill. June 26, 2012)**
This case is discussed under the topic heading "Contract Issues."

***Ohio Learning Ctrs., LLC v. Sylvan Learning, Inc.*, No. RDB-10-1932, Bus. Franchise Guide (CCH) ¶ 14,878 (D. Md. July 24, 2012)**
This opinion is the latest installment in an ongoing struggle between Sylvan Learning and a former Ohio franchisee. Previously, the District of Maryland ruled in favor of Sylvan on most of its counterclaims against Ohio Learning Centers (OLC) and its owner. In its latest opinion, the court rejected Sylvan's motion to strike OLC's demand for a jury trial, denied OLC's motion for summary judgment, and granted in part and denied in part Sylvan's motion to dismiss.

The disputes in this case arose after Janet Tomaskovich formed OLC to become a Sylvan franchisee and purchased the Sylvan Learning Center she operated in Westlake, Ohio. Shortly after the purchase, OLC's expenses began exceeding its revenues. Although OLC continued to pay franchise fees and advertising payments for some time, it stopped making payments under the promissory notes that Sylvan had carried back from OLC. Sylvan terminated the franchise agreement effective December 28, 2010, but OLC continued to operate as a Sylvan Learning Center.

OLC sued various Sylvan entities in Ohio state court on April 16, 2010. Sylvan removed the case to federal court and it was transferred to the District of Maryland. At its latest hearing, the court considered OLC's motion for summary judgment. Based on the failure by two Sylvan entities to make timely payment of certain taxes, causing forfeiture of their corporate charters, the motion contended that litigation filings made during the time that defendants were not in good standing could not be considered. The court rejected this argument, finding that the statutory bar prohibiting unregistered corporations from maintaining legal actions in Maryland did not prevent defendants from defending and filing counterclaims arising out of the subject matter of actions filed against them. The court denied the motion for summary judgment as being moot because the corporations had restored their good standing in Maryland.

The court next rejected Sylvan's argument that OLC had waived the right to a jury trial, because the asset purchase agreement and two promissory notes contained jury trial waivers. The court noted that the franchise agreement, which it characterized as the primary document in the dispute, did not have a jury trial waiver but had an integration clause indicating that it terminated and superseded prior agreements. The court held that Sylvan had not provided a satisfactory explanation as to how the jury trial waivers in the other documents could survive the integration clause in the franchise agreement.

The court spent the remainder of its opinion discussing Sylvan's motion to dismiss OLC's claims. The court granted the motion with respect to OLC's breach of contract claims, holding that OLC breached its contractual obligations by failing to make payments in a timely manner. Conversely, the court rejected Sylvan's attempts to dismiss OLC's fraud and misrepresentation claims. Furthermore, the court dispatched Sylvan's arguments that (1) Sylvan had no duty to disclose the information described by OLC, and (2) the integration clause in the franchise agreement precluded OLC's fraud and misrepresentation claims. Section 14-229 of the Maryland Franchise Registration and Disclosure Law (FRDL), which prohibits the making of false or misleading statements in the sale of a franchise as a basis for the duty to disclose, proved instructive to the court's decision. Unlike the FRDL's registration requirements, § 14-229 has no exemption for sales to out-of-state franchisees. In rejecting Sylvan's integration clause argument, the court noted that the materiality of any alleged misrepresentations and reasonable reliance by OLC are fact issues that could not be resolved on a motion to dismiss.

Next, the court summarily rejected OLC's claim for breach of the covenant of good faith and fair dealing as an independent action, determining that under Ohio law the duty of good faith cannot be asserted independent of an underlying breach of contract action. Similarly, the court gave short shrift to OLC's defamation claim, which was based on generalized statements by Sylvan executives and comments from defense counsel made after a previous hearing, as "nonspecific expressions of opinion" that are not actionable under Ohio law. Additionally, the court ruled that a claim for an unconscionable sales act violation under an Ohio statute was barred by a two-year statute of limitations.

OLC fared better on a claim for violation of the Ohio Business Opportunity Plan Act (OBOPA). The court found that OLC had sufficiently alleged that Sylvan violated the statute by "failing to provide the required disclosures and engaging in deceptive or unconscionable acts or practices." The court concluded by rejecting OLC's federal and state antitrust law and state civil conspiracy claims, all of which alleged an unlawful conspiracy between Sylvan and another nearby franchisee. The court determined, however, that OLC's antitrust allegations failed to satisfy the plausibility standards established by *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and dismissed the antitrust claims. The court then dismissed the conspiracy claim, finding that its sole allegation was based on the antitrust claims.

***Red Roof Franchising, LLC v. Patel,* No. CIV.A. 10-4065 NLH, Bus. Franchise Guide (CCH) ¶ 14,859 (D.N.J. June 28, 2012); *Red Roof Franchising, LLC v. AA Hospitality Northshore, LLC*, CIV.A. No. 10-4120 NLH, Bus. Franchise Guide (CCH) ¶ 14,860 (D.N.J. June 28, 2012)**

These cases stemmed from the termination of two Red Roof Franchising, LLC (RRF) franchises in Minnesota and New Jersey for abandonment and non-payment of royalties, respectively. RRF alleged that in the wake of the terminations, the defendants had continued to use RRF's franchise system and marks in both locations, while operating the Minnesota location as an "America's Best Value Inn" and operating the New Jersey location as an RRF franchise. Defendants filed and then withdrew various counterclaims, leaving only their counterclaims for RRF's breach of contract in both cases, its breach of the covenant of good faith and fair dealing, and violations of the Minnesota Franchise Act (MFA) and the New Jersey Franchise Practices Act (NJFPA). The court granted RRF's motions for summary judgment and dismissed the franchisee's counterclaims with respect to the New Jersey franchisee, which had continued to operate under the Red Roof Inn brand post-termination. The court partially granted RRF's motion and dismissed most of the franchisee's counterclaims with respect to the Minnesota franchisee, whose change of name to "America's Best Value Inn" had precipitated RRF's termination based on abandonment, leaving intact only the issues of RRF's right to recover fees post-termination. The calculation of RRF's damages and attorney fees was left for future determination in both cases.

In reaching its decisions, the court disregarded the Texas choice-of-law provision in the franchise agreements and instead applied New Jersey law to the claims at issue other than the MFA counterclaim. The court observed that (1) the NJFPA governed claims relating to the New Jersey franchise agreement and guarantee, notwithstanding the Texas choice-of-law provision; (2) there was no actual conflict between New Jersey law and Texas law; and (3) although Minnesota had a substantial interest in having its law applied to the claims for breach of the Minnesota franchise agreement, there was no actual conflict between New Jersey and Minnesota contract law. The court also concluded that the MFA would apply to the Minnesota agreement because, although the guarantors were New Jersey residents, the franchise was a Minnesota entity.

Although the defendants did not dispute that they owed certain fees to RRF under the franchise agreements, they maintained (1) that they were excused from performance under the agreements and the guarantees because of RRF's breach, and (2) that the amount of fees owed had not been properly documented by RRF. The court rejected the first defense with respect to the New Jersey agreement and with respect to fees incurred under the Minnesota agreement until the time the defendants ceased doing business as an RRF franchisee, explaining that under established franchise law, a non-breaching party cannot stop performance while continuing to take advantage of the contract's benefits. The court further observed that most of RRF's alleged breaches merely reflected the defendants' "dissatisfaction" with RRF and did not violate its contractual obligations. The court found that RRF was entitled to its reasonable attorney fees and costs pursuant to provisions contained in the franchise agreements and guarantees, provisions that the defendants did not dispute.

The court denied RRF's motion with respect to its claim for post-abandonment fees in Minnesota, however, reasoning that upon their conversion to a different hotel, the defendants were no longer receiving the benefits of the agreement. The court similarly denied RRF's motion with respect to its claim that the defendants were using RRF's marks in the Minnesota location, finding that a genuine dispute of material fact existed as to how the defendants could operate as a different hotel while continuing to use the RRF system and marks. The court also directed RRF to provide a full and complete accounting of its damages as to both locations, including a breakdown by type of fee charged and history of the defendants' payments.

For the same reasons that it found the defendants' defenses to RRF's breach of contract claims to be unpersuasive, the court dismissed the defendants' counterclaims for breach of contract with respect to the New Jersey location but denied RFF's motion without prejudice with respect to the Minnesota location, finding that it was unclear from the record whether RRH was seeking post-abandonment fees under the Minnesota franchise agreement, fees to which RRF was not clearly entitled. Although noting that two of RRF's alleged breaches—that it had not efficiently operated its advertising and marketing programs, and that its reservation system failed eight to nine times and for up to a day and a half at a time—could be construed as breaches, the court held that the defendants legally had the option of either terminating the contract and ceasing to perform, or continuing to perform and suing for damages, but did neither. The court likewise dismissed the defendants' implied covenant of good faith and fair dealing counterclaim, finding no evidence that RRF had done anything that had the effect of destroying or injuring the defendants' right to receive the "fruits of the contract."

The court rejected the defendants' claims that they had been terminated without "good cause" and without proper notice in violation of the NJFPA and MFA, finding instead that RRF had good cause to terminate the franchise agreements based upon the defendants' non-payment of royalties in New Jersey and their voluntary abandonment of the Minnesota location, which were defaults under the franchise agreements that constituted a failure to substantially comply with the requirements imposed by the franchises.

***Bellas Co. v. Pabst Brewing Co.*, No. 11-3417, Bus. Franchise Guide (CCH) ¶ 14,868 (6th Cir. July 11, 2012) (unpublished)**
Is a beer manufacturer required to comply with the notice period requirements in franchise agreements when terminating the franchise agreements, as permitted under the successor manufacturer provisions of the Ohio Alcoholic Beverage Franchise Act (OABFA)? In ruling on cross motions for summary judgment, the Southern District of Ohio properly decided that Pabst Brewing Co. breached the franchise agreements. The Sixth Circuit affirmed that decision in a not for publication opinion.

Plaintiffs were four distributors with exclusive rights to distribute Pabst products within defined territories in Ohio. The distributors' franchise agreements permitted termination by the manufacturer for specified reasons, including the right to terminate provided by applicable state or federal law. The franchise agreements required the manufacturer to give the distributors sixty days' notice.

Pabst's right to terminate the franchise agreement arose from the "successor manufacturer" provision of the Ohio statute. This provision allows a successor manufacturer to unilaterally terminate a franchise agreement after acquiring most of the stock of another manufacturer. The statute was triggered by the sale of Pabst stock to Pabst Holdings, Inc. in 2010. Pabst sent letters to each plaintiff on September 15, 2010, stating Pabst had terminated the franchise agreement. Pabst believed that as a successor manufacturer, it was freed from providing the sixty days' notice required by the franchise agreements. While the distributors contested whether Pabst was a successor manufacturer, both the district court and the Sixth Circuit assumed Pabst was a successor manufacturer.

Pabst argued that its status as a successor manufacturer meant that it did not have to comply with the sixty days' notice provisions because the requirement conflicts with the unilateral termination rights granted to manufacturers under the statute. In rejecting this argument, the Sixth Circuit characterized the notion that the sixty-day notice provision conflicted with OABFA as defendant's "weak link." The court noted that the statute was designed to protect against the lack of equal bargaining power between distributors and manufacturers. The sixty-day notice provision gives more power to the distributors than the OABFA does. In reaching this conclusion, the Sixth Circuit rejected what it labeled as Pabst's "breathtaking proposition" that the statute precludes private parties from contracting for greater protection than that provided by the statute. The Sixth Circuit concluded that the franchise agreement, presumably drafted by Pabst, gave the manufacturer certain unilateral termination rights that were applicable in this case, but did not excuse Pabst from complying with the sixty-day notice requirement.

Pabst made an additional argument that it had not raised before the district court, i.e., the termination was not effective until the distributors were required to return the brand to the manufacturer after the parties or a court had determined the diminished value of the distributorship, as required by the statute. Pabst thus contended that the sixty-day notice period should apply after the determination of diminished value. The Sixth Circuit determined that this argument failed, even if it had not been waived, because OABFA contemplated that a notice of termination be given before the negotiation of diminished value.

***Tri-County Wholesale Distribs., Inc. v. Wine Group, Inc.*, No. 10-4202, Bus. Franchise Guide (CCH) ¶ 14,857 (6th Cir. June 29, 2012) (unpublished)**
This case is discussed under the topic heading "Injunctive Relief."

TORTIOUS INTERFERENCE

Hawk Enters., Inc. v. Cash Am. Int'l, Inc., 282 P.3d 786, Bus. Franchise Guide (CCH) ¶ 14,876 (Okla. Civ. App. July 9, 2012)

The primary issue in this case was whether Cash America could be held liable for tortious interference with a franchise agreement entered into by its affiliate, Mr. Payroll Corp., as the franchisor, with Hawk Enterprises, as the franchisee. Under the franchise agreement, Hawk obtained exclusive rights to operate a check cashing business in Oklahoma City under the name Mr. Payroll. Hawk brought this action in the District Court of Oklahoma County against Cash America and certain other entities for tortious interference and breach of contract, alleging that Cash America had begun operating check-cashing facilities in its exclusive area. Hawk later dismissed its breach of contract claims and a claim for an accounting, leaving only the tortious interference claim. The trial court granted defendants' motion for summary judgment, and the Oklahoma Court of Civil Appeals reversed that decision.

The court noted that the relationship between Mr. Payroll and Cash America had not been fully explained in the record, but it appeared that Cash America had purchased the stock of Mr. Payroll before Mr. Payroll entered into the franchise agreement with Hawk, and Cash America guaranteed Mr. Payroll's performance under the franchise agreement. After reviewing the elements of a tortious interference claim under Oklahoma law, the court stated that Hawk would need to "show that Cash America induced Mr. Payroll to breach the franchise agreement by failing to enforce the exclusive territory provision." The court noted that the dispositive issue was whether Mr. Payroll and Cash America were distinct entities for tortious interference purposes, so that an action could be brought against Cash America as an affiliate of Mr. Payroll, or whether Cash America was a stranger to the franchise agreement.

The court treated Cash America and Mr. Payroll as having a parent-subsidiary relationship. The court noted that Oklahoma law had not decided whether a parent company can interfere with the contracts of a subsidiary and that cases from other jurisdictions were divided on this issue. The court concluded that the liability of a parent company for tortious interference with the contract of a subsidiary must be determined on a case-by-case basis, using the factors set forth in the Restatement (Second) of Torts § 767. These factors include: "(a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties."

Cash America further argued that, as a guarantor of the franchise agreement, it could not tortiously interfere with that agreement. The court rejected this argument, emphasizing that Cash America's obligation as a guarantor was independent of Mr. Payroll's obligations under the franchise agreement and separately enforceable against Cash America. The court concluded that the disputed issues in this case were material, precluding the granting of summary judgment for Cash America.

The result in *Hawk* is important for companies with subsidiaries that enter into franchise agreements as franchisors, particularly when the parent company guarantees the obligations of the subsidiary franchisor. The split in authority among jurisdictions on the liability of a parent for interfering with the contract of a subsidiary should lead parent companies to be cautious in engaging in activities that may be considered interference with the franchise relationship of their subsidiaries. The parent company should pay special attention to the factors listed in the Restatement (Second) of Torts § 767.

***Lift Truck Lease & Serv., Inc. v. Nissan Forklift Corp.*, No. 4:12-CV-153, Bus. Franchise Guide (CCH) ¶ 14,892 (E.D. Mo. Sept. 7, 2012)**

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

TRADE SECRETS

***Little Caesar Enters., Inc. v. Sioux Falls Pizza Co., Inc.*, No. CIV-12-4111-KES, Bus. Franchise Guide (CCH) ¶ 14,880 (D.S.D. Aug. 3, 2012)**

Little Caesar Enterprises, Inc. (LCE) failed to obtain a temporary restraining order or preliminary injunction in the District of South Dakota against a former franchisee, Sioux Falls Pizza Co., Inc. (SFPC), and its owner, James Fischer. LCE alleged that SFPC misappropriated LCE's trade secrets by using its Hot-N-Ready system of preparing and selling ready-for-pickup pizzas. LCE also claimed that SFPC infringed on LCE's trade dress, alleging that SFPC did not take sufficient steps to differentiate its new business from LCE.

LCE and SFPC have had a long and difficult history, punctuated by two earlier trips to the courthouse, including a 2004 battle over ownership of the Hot-N-Ready system and, more recently, SFPC's attempt to obtain a declaratory judgment that it was entitled to renew its franchise agreements or, in the alternative, relieved from observing its covenant not to compete. Although LCE prevailed on most of the issues in the recent litigation, the court did not enforce the noncompete after LCE failed to oppose a summary judgment motion by SFPC arguing that it was unenforceable. The day after the Little Caesar's restaurant closed, SFPC opened a pizza restaurant at the same location under the name Pizza Patrol.

The Hot-N-Ready system includes actions that LCE requires its franchisees to take in order to have sufficient supplies of ready-for-pickup pizzas available for sale during the franchise's hours of operation. LCE alleged that the system, which is intended to increase efficiency and lower the amount of waste, specifies what products its operators need to prepare following a daily and hourly schedule as well as information on how to best prepare the products.

In examining LCE's likelihood of succeeding on the merits, the court noted that there must be a "proven trade secret" before misappropriation can be found. To determine whether the system was a trade secret, the court had to decide whether (1) the system derived independent economic value from not being generally known, and (2) LCE used reasonable efforts to protect the secrecy of the information in the system. The court found that LCE had provided "minimal proof" that the system could be the type of information that constitutes a trade secret, and further stated that LCE had not "distinguished . . . how that system has brought them specific economic value above and beyond the generic knowledge of how to run a restaurant that provides ready-made pizza." Observing that that LCE presented no evidence of unique software or any other trade secrets, the court concluded that plaintiff's evidence was too general to prove a trade secret at the preliminary injunction phase of the dispute.

The court also determined that LCE could not demonstrate it had taken reasonable efforts to maintain the secrecy of the system. In so holding, the court said LCE had taken some steps to protect its proprietary information by requiring franchisees to sign confidentiality agreements. However, the court expressed concern that the persons with the most detailed knowledge of the system, i.e., the restaurant employees, are not required to sign confidentiality agreements. As a result, the court said the dispute was not at a point where LCE could show that it had taken efforts that were reasonable to maintain the system's secrecy. Having determined that the system did not meet the definition of a trade secret, the court declined to consider LCE's misappropriation claim.

Turning to LCE's trade dress claim, the court recounted actions taken by SFPC, including removal of LCE's signs and related materials and completing certain interior and exterior remodeling intended to alter the look of the store. The court rejected LCE's argument that the similarity in look and feel of some features of the current restaurant to when it was a Little Caesar's was sufficient to show trade dress infringement.

After reviewing the evidence presented, the court concluded that LCE was unlikely to succeed on the merits. The court then briefly considered other factors, including the threat of irreparable harm, that are used to determine preliminary injunctive relief in the Eighth Circuit. The court determined that a threat of injury to customer goodwill and relationships constitutes irreparable harm and that this factor weighed in LCE's favor. Attempting to balance the harms, the court determined that the harm to each party could be substantial. However, the balance factor weighed slightly in SFPC's favor since SFPC had only one unit, compared to the LCE system and its more than 3,000 locations. SFPC contended that it would likely be forced to close its business if enjoined from selling the products involved in the case. As to the public interest, a factor that weighs the interests of protecting a company's trade dress and trade secrets against the benefits of unrestricted competition, the court ultimately found the balance to tip slightly in favor of competition and toward SFPC.

TRANSFERS

***Tacoma Auto Mall, Inc. v. Nissan N. Am., Inc.*, No. 41356-6-II, 279 P.3d 487, Bus. Franchise Guide (CCH) ¶ 14,867 (Wash. Ct. App. June 26, 2012)**

The refusal of Nissan North America (NNA) to approve the transfer of a Nissan franchise to Tacoma Auto Mall (TAM) led the disappointed suitor to file this action. The Washington Court of Appeals affirmed the summary judgment entered by the trial court finding that TAM lacked standing to pursue a claim against NNA under the Washington Manufacturers' and Dealers' Franchise Agreements Act (the Franchise Act). The court also affirmed a summary judgment granted to NNA rejecting most of the common law claims brought by TAM. NNA cross-appealed the trial court's refusal to dismiss TAM's tortious interference and lost profit claims on NNA's summary judgment and the trial court's rejection of NNA's contention that the Franchise Act precluded TAM's common law claims. The court reversed the denial of NNA's motion for summary judgment on TAM's tortious interference and lost profit claims and remanded the case to the lower court for dismissal, but upheld the lower court in rejecting the argument that the Franchise Act precluded all of TAM's common law claims.

The Franchise Act provides that a manufacturer cannot unreasonably withhold its consent to the sale or transfer of a dealership. NNA argued that this statute gives rights only to current dealers and not prospective dealers such as TAM. The court noted that Washington law follows a two-part test to determine standing. First, the court must determine "whether the interest asserted is within the zone of interests the statute . . . protects." Second, the court must determine if the claimant has suffered an injury in fact. After reviewing the purposes and operation of the Franchise Act, the court concluded that TAM was not within the zone of interest protected by the statute and affirmed the trial court's determination that TAM lacked standing. Rejecting NNA's argument that the Franchise Act provided the exclusive remedy, precluding TAM from pursuing common law claims, the court found that TAM could not pursue a common law claim based on a violation of the Franchise Act, but could pursue other common law claims.

The court next rejected each of TAM's common law claims. The court determined that TAM's promissory estoppel claim was based on the contention that NNA made an implicit promise to act in good faith in accepting or rejecting TAM's application. The court rejected the notion that a promissory estoppel claim could be based on an implicit promise. The court believed that TAM had confused the promise required to establish a promissory estoppel claim with the covenant of good faith and fair dealing implicit in all contracts. In the absence of a contract between NNA and TAM, the court found there was no covenant of good faith and fair dealing on which TAM could rely.

TAM argued that it had a unilateral contract with NNA. The court noted that unilateral contracts differ from bilateral contracts in that a unilateral contract is accepted by performance. TAM contended that NNA entered into a unilateral contract in which it agreed to approve the sale of existing dealerships to qualified buyers, and TAM performed by providing to NNA extensive documentation in connection with its application. The court noted that NNA expressly disavowed any promise of approval when NNA sought this information and rejected this claim. The court also rejected TAM's contention it was a third party beneficiary to the current dealer's contract with NNA. The court determined that the parties did not intend to create any third-party beneficiary rights and that the agreement specifically disavowed creation of any such rights.

The court concluded by reversing the trial court's decision denying NNA's motion for summary judgment on TAM's tortious interference and loss profit claims. The court noted that under Washington law a party's exercise of its legal interests in good faith is not improper interference. In reaching its conclusion, the court noted that the franchise agreement specifically required NNA's approval for a transfer and that the asset purchase agreement acknowledged the approval of NNA was required for a transfer.

Turning to TAM's lost profits claim, the court noted that the lost profits must be the proximate result of a party's breach of an agreement. In this case, NNA exercised a contract right that all parties acknowledged it had; nothing suggested that it exercised the right with any bad motive or wrongful purpose.

UNFAIR COMPETITION/UNFAIR AND DECEPTIVE PRACTICES

***Depianti v. Jan-Pro Franchising Int'l, Inc.*, No. 08-10663-MLW, Bus. Franchise Guide (CCH) ¶ 14,897 (D. Mass. Aug. 31, 2012)**

In yet another skirmish between franchisors of commercial cleaning services and their unit franchisees, the District of Massachusetts certified three questions of law for determination by the Supreme Judicial Court of Massachusetts. This case involved a putative national class action in which plaintiffs, purchasers of Jan-Pro unit franchises, filed a six count complaint.

Plaintiffs alleged that Jan-Pro Franchising International (JPI) deceived them regarding the income they could earn and misclassified plaintiffs as independent contractors. The complaint included counts for unfair and deceptive business practices, misrepresentation, misclassification and wage law violations, quantum meruit, and unjust enrichment. The parties agreed to file motions for summary judgment before the court decided on class certification. In considering a motion for summary judgment by JPI and a motion for partial summary judgment by plaintiffs, the court determined that these motions raised issues not previously decided by the Supreme Judicial Court. The court the decided to certify three questions for review.

JPI operated under a three-tiered structure in which JPI, as the master franchisor, sold franchises to master franchisees, which in turn sold unit franchises. The first certified question was whether the master franchisees can be deemed to be acting as JPI's agents when they allegedly made false promises to the unit franchisees. The court said that it would need to determine whether JPI can be held vicariously liable for actions of its master franchisees. The court noted that some states had "adopted a special test for agency in the franchisor-franchisee context," but that no Massachusetts appellate court had determined whether a special standard existed in this context.

The court then discussed claims under the Massachusetts Independent Contractor statute. Plaintiffs argued they should be treated as employees of JPI rather than independent contractors. The court believed that the independent contractor test of the Massachusetts statute assumed there was a contract between the putative employee and putative employer. No such contractual relationship existed here, so the second question certified by the court was whether JPI can be held liable for employee misclassifications when it had no direct contractual relationship with the putative employees.

The court then considered whether the named plaintiff had exhausted his administrative remedies as required for raising his misclassification claim. The court determined that defendants had waived this claim by raising it only in a footnote in an earlier brief and not pursuing it until a hearing in April 2012. Nonetheless, the court said its independent obligation to ensure it had jurisdiction caused it to certify the third question, which was whether a failure to exhaust administrative remedies deprives the court of jurisdiction over any unexhausted claims.

Readers of cases involving the classification of franchisees as employees are aware that the courts in Massachusetts had been a popular forum for this litigation and will want to stay tuned to determine how the Supreme Judicial Court answers the certified questions.

VICARIOUS LIABILITY

***Ford v. Palmden Restaurants, LLC*, No. E 053195, Bus. Franchise Guide (CCH) ¶ 14,877 (Cal. Ct. App. July 31, 2012)**

A late night visit by Terrelle Ford to a franchised Denny's restaurant ended with his being severely beaten by members of the Gateway Posse Crips gang. Gateway members assembled at the restaurant every Saturday night around 2 a.m., and their behavior often caused other patrons to leave. In March 2003, Gateway members started a brawl at the restaurant, resulting in several injuries and the arrest of several gang members. In April 2004, in another fight that started at the restaurant, Gateway members beat Ford leaving him with permanent cognitive damage.

Ford sued Palmden, the franchisee of the restaurant, and the franchisor and its related entities asserting causes of action for negligence, premises liability, wanton and willful misconduct, false imprisonment, and fraudulent conveyance. The trial court granted summary judgment for Palmden and all of the Denny's entities, concluding that Ford could not show that the alleged negligence of any of defendants caused his injuries. Ford appealed and the California Court of Appeal reversed in an unpublished opinion. The court stated that Palmden was not an insurer of the safety of its customers but that in view of the prior fights at the restaurant, "Palmden had a duty to do *something* to protect them." (Emphasis in original).

The court's analysis thus first focused on the issue of causation. The court discussed measures suggested by Ford's expert to quell violence, such as using surveillance cameras, hiring security guards, calling police officers whenever certain gang violence occurred, and seeking protective orders against certain gang members. If other measures failed, Ford's expert indicated that a reasonable approach would have been to close the restaurant during certain overnight hours on Friday and Saturday nights. In rejecting the trial court's conclusion that as a matter of law there was no causation, the court reasoned that Palmden could have attempted some of the less restrictive measures first. If those actions failed, Palmden could have closed for certain hours.

Palmden also argued that Ford's attempt to show causation failed because he left a locked restaurant to join the fight, in effect, arguing that his own conduct was a superseding cause of his injury. In rejecting the argument, the court applied California's comparative negligence principles and stated that an intervening act is not a superseding cause if it was reasonably foreseeable. The court held that it was foreseeable that gang members allowed to congregate at the restaurant would commit acts of violence, and that customers would go to the aid of family and friends when such acts occurred.

In determining whether Palmden had a duty to protect Ford, an essential part of the court's analysis involved whether the negligent conduct is sufficiently likely to result in the type of harm that plaintiff experienced. This involved a three-step process under which the court must (1) "determine[d] the specific measures the plaintiff asserts the [business proprietor] should have taken to prevent the harm;" (2) "analyze[d] how financially and socially burdensome these proposed measures would be to a [proprietor];" and (3) "identif[ied] the nature of the third party conduct that the plaintiff claims could have been prevented had the [proprietor] taken the proposed measures and assess[ed] how foreseeable it was this conduct would occur."

The court concluded it was clearly foreseeable that customers would be crime victims, and that the occurrence of a previous violent event at the restaurant placed a heavy burden on Palmden to prevent another incident. Furthermore, the court reasoned that none of the security measures suggested by Ford "were particularly burdensome," and that, if they were ineffective, Palmden could close the restaurant for certain hours. Consequently, the court concluded that fact questions did exist as to whether Palmden had a duty to Ford.

Lastly, the court reviewed the potential liability of the various Denny's entities. One entity was the franchisor, another subleased the restaurant property to Palmden, and three others may have been treated as alter egos of the other entities. The court reviewed their potential liability under ostensible agency principles, noting that three elements are required to hold against a principal for the act of its ostensible agent: (1) the person dealing with the agent must have a reasonable belief in the agent's authority; (2) the belief must be based on the act or neglect of the principal; and (3) the person acting on the agent's authority must not have committed negligence. The court noted that Denny's had not even argued whether ostensible agency applied in this case, instead making a policy argument that franchisors held liable in these situations would either quit franchising or charge higher fees. Rejecting this argument, the court remanded the issue of the liability of the Denny's entities to the trial court.

***Patterson v. Domino's Pizza, LLC*, No. B235099, Bus. Franchise Guide (CCH) ¶ 14,855 (Cal. Ct. App. June 27, 2012) (unpublished)**

A division of the California Court of Appeal reversed a grant of summary judgment to the franchisor of Domino's pizza and its two related entities with respect to the claims of a former teenage employee of a Domino's franchisee resulting from alleged sexual assault and harassment by the assistant manager at that franchise location. The case stemmed from claims by a former teenage employee of Domino's concerning alleged sexual assault and harassment by the assistant manager.

The trial court concluded that Domino's was not vicariously liable because the franchisee was an independent contractor and the manager was not Domino's employee or agent. In particular, the trial court found that (1) the responsibility for supervising and compensating the franchisee's employees belonged to the franchisee, as set forth in the franchise agreement; (2) Domino's had no role in the franchisee's employment decisions; and (3) plaintiff could not prevail, even if Domino's were considered to be the manager's employer, because there were no prior incidents of sexual harassment at the restaurant, and no showing that Domino's otherwise had notice of, ratified, or condoned his conduct.

In reversing the trial court's award of summary judgment, the appellate court focused primarily upon the degree of control that Domino's actually exercised over the franchisee as well as certain provisions of the franchise agreement that vest substantial control in the franchisor. Domino's maintained that the franchise agreement recited that the franchisee would be "solely responsible for recruiting, hiring, training, scheduling for work, supervising and paying the persons who work in the Store," and that such persons would be the franchisee's employees and not Domino's agents or employees.

The court disagreed, citing numerous requirements in the Domino's franchise agreement and related manuals that raised reasonable inferences that the franchisee was not an independent contractor. Some of those requirements pertain directly to the franchisee's employees, notably: (1) Domino's establishes the qualifications and hiring requirements for the franchisee's employees and specifies "the documents that must be included in their personnel files;" (2) Domino's franchisees are required to install either a Domino's computer program or other software specifically approved by the franchisor for training employees; (3) Domino's maintains standards for the employees' "demeanor," covering hair, facial hair, jewelry, tattoos, body piercings, fingernails, clothing, undershirts, and shoes; and (4) Domino's requires franchisees to disclose the identities of their employees to the franchisor. The court also noted many other aspects of the agreement gave Domino's a significant degree of control over the general operation of the franchisee's business that was not limited to food preparation standards. In analyzing the Domino's franchise materials, the appellate court noted the previous findings of a panel of the Florida Court of Appeals in 1993 that had observed that various provisions in the Domino's franchise agreement gave Domino's control over "every conceivable facet of the business" and described the Domino's franchise manual as "a veritable bible for overseeing a Domino's operation."

Noting that California courts look beyond the provisions of the franchise agreement to the totality of the circumstances to determine which party actually exercises ultimate control, the court found that the plaintiff had established a triable issue as to the control that had actually been exercised by Domino's over the franchisee with respect to the manager and other employees. Significantly, the franchisee testified that after the incident, a Domino's area leader had instructed him to fire manager. According to the franchisee, when he signed the franchise agreement, Domino's told him "in no uncertain terms, that if [he] did not play ball the way they wanted [him] to play ball, that [his franchise] would be in jeopardy." The franchisee felt that he had to comply with the instructions of Domino's area leaders because "[i]f you didn't, you were out of business very quickly." The franchisee further testified that a Domino's area leader had instructed him to fire another employee because of his performance in handling bags. The court found that these facts supported reasonable inferences that Domino's oversight of the franchisee's business was extensive.

The court also found that the trial court had erred by applying a negligence standard in citing the absence of any prior incidents of sexual harassment involving the manager, rather than considering the issue of an employer's strict liability for a supervisor's sexual harassment of a minor employee. The court explained that the California Fair Employment and Housing Act renders an employer strictly liable for all acts of sexual harassment by supervisors such as the manager, and thus while one sexually offensive act by an employee against another usually is not sufficient to establish employer liability, a single sexual assault by a supervisor may be sufficiently severe so as to alter the conditions of employment and give rise to a hostile work environment claim.