Franchising (& Distribution) Currents

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ANTITRUST

Mr. Towle

Ms. Treadwell

Mr. Binford

***Marjam Supply Co. v. Firestone Bldg. Prod. Co., LLC*, Bus. Franchise Guide (CCH) ¶ 15,422, 2014 WL 5798383 (D.N.J. Nov. 6, 2014)**

Marjam Supply Co., a former distributor of commercial roofing products manufactured by Firestone Building Products Co. and related entities, had thirty-five sales and warehouse facilities throughout the Northeast and Southeast. Its sales of Firestone products increased dramatically between 1997 and 2007, but decreased significantly thereafter. Firestone subsequently terminated Marjam's distributorship. Marjam sued in the U.S. District Court for the District of New Jersey asserting claims for violation of the Robinson–Patman Act. Marjam contended that its sales of Firestone's products decreased because other distributors (ABC defendants and New Castle) were able to offer lower prices to its customers as a result of receiving significantly more favorable rebates and incentives.

The ABC defendants filed a Rule 12(b)(6) motion to dismiss, arguing that Marjam did not have antitrust standing because their actions had not resulted in antitrust injury. Noting that the requisite causation element is not "unduly rigorous," the court found that Marjam's allegation that the loss of its Firestone distributorship would reduce competition among Firestone distributors was a sufficient allegation of interbrand antitrust injury.

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The ABC defendants and New Castle also sought to dismiss Marjam's cause of action for violations of Section 13(f) of the Robinson-Patman Act, which prohibits any person engaged in commerce from knowingly inducing or receiving "a discrimination in price which is prohibited by this section." The court noted, however, that Section 13(f) does not prohibit all "discriminatory" prices; the discrimination must be illegal. For purposes of Section 13(f), a plaintiff must allege that the defendant buyer knew that it was receiving a lower price than a competitor and that the seller would have "little likelihood of a defense" for offering such price. Knowledge may be either actual or constructive. With respect to the seller's likelihood of a defense, the plaintiff must, at a minimum, allege that "a price differential favoring the defendant buyer exceeded any cost savings the seller may have enjoyed in sales to the favored buyer."

The court reviewed the allegations in Marjam's complaint and found there was no allegation that ABC defendants and Newcastle had any knowledge about the prices Firestone charged Marjam. The court further found no allegation they had any reason to know the discounts they received were "unjustifiably low." The court rejected Marjam's reliance on pre-*Twombly* and *Iqbal* decisions, which suggested a lesser pleading standard. The court also found that cases cited by Marjam were distinguishable in that there was some factual allegation regarding the buyers, in addition to their size and sophistication, supporting an inference that the buyers knew the prices they received were improper. Thus, the court granted the defendants' motion to dismiss the Section 13(f) claim.

ARBITRATION

***DXP Enters., Inc. v. Goulds Pumps, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,395, 2014 WL 5682465 (S.D. Tex. Nov. 4, 2014)**

In this case, a federal court considered whether a claim for a permanent injunction could be pursued in court, notwithstanding an arbitration provision in the parties' distributor agreement. Goulds Pumps, Inc. and DXP Enterprises, Inc. entered into an agreement pursuant to which DXP was granted the right to sell Goulds' products. The agreement included a broad arbitration clause, as well as a provision providing that "[n]otwithstanding the foregoing, [Goulds] or [DXP] may apply to a court of competent jurisdiction for the imposition of an equitable remedy (such as a Restraining Order or an Injunction) upon a showing of the elements necessary to sustain such a remedy."

A dispute arose and Goulds initiated an arbitration seeking a declaration that it was entitled to terminate the distributor agreement. In response, DXP sued Goulds in state court seeking a temporary restraining order, as well as a preliminary and permanent injunction, prohibiting Goulds from terminating the parties' agreement. The state court denied DXP's request, finding no threat of irreparable harm because Goulds had agreed not to terminate the distributor agreement until the arbitration had concluded. Goulds removed the case to the U.S. District Court for the Southern District of Texas, which denied DXP's motion for preliminary injunction for the same reason.

Goulds moved to dismiss or alternatively stay DXP's claim for a permanent injunction on the ground that the claim was subject to arbitration. The court framed the issue as whether a "provision allowing the parties to pursue an injunction permits DXP to avoid arbitrating its claim for a permanent injunction covering the same issues that Goulds seeks to arbitrate—whether DXP properly terminated the parties' agreement." DXP argued that the term "notwithstanding" in the arbitration provision meant that any claim seeking an injunction remedy was excluded from the arbitration requirement.

The court first analyzed a number of cases in which other courts had considered whether the specific language of an arbitration clause permitted a claim for injunctive relief to be pursued in court. The court found that the arbitration provision in the distributor agreement did not "'clearly evidence an intent' to allow litigation of claims subject to arbitration by asserting them as claims for permanent injunctive relief." In reaching this decision, the court concluded that permitting DXP to litigate the appropriateness of the pending termination would require the court to decide the merits of the dispute that was subject to the valid arbitration clause and pending before an arbitrator. The court further concluded that an order from the court would necessarily moot the pending arbitration and deprive Goulds of its rights to have the matter resolved by arbitration. Accordingly, the court found that DXP's claims for a permanent injunction must also be resolved in arbitration.

***Doctor's Assocs., Inc. v. Patel*, Bus. Franchise Guide (CCH) ¶ 15,379, 2014 WL 4388588 (D.N.J. Sept. 5, 2014)**

Doctor's Associates entered into three franchise agreements with the defendant, an individual franchisee, for the operation of three Subway sandwich shops. When the franchisee failed to operate the sandwich shops in accordance with the franchise agreement, the franchisor filed two arbitration proceedings against the franchisee and won arbitration awards in both. Doctor's Associates then filed a complaint in the U.S. District Court for the District of New Jersey, seeking to confirm the arbitration awards against both the individual franchisee and an alleged alter ego corporate entity that was not a party to the arbitrations. When the franchisee and his associated corporate entity failed to timely answer the complaint, the court eventually permitted Doctor's Associates to move for default judgment.

The court noted that a default judgment was generally inappropriate to confirm an arbitration award against a nonparty to the arbitration, despite the alter ego allegation. However, the court held that rule did not apply because the defendants had failed to appear in the case. Instead, the court found that Doctor's Associates could pierce the corporate veil based on evidence that the franchisee had created the corporation for the sole purpose of operating the Subway franchises and that the individual franchisee was hiding behind the corporate entity to avoid paying the arbitration award and judgment. In a footnote, the court also found that enforcement of the arbitration award against the corporate entity would have been appropriate in any event pursuant to the franchise agreements' corporate assignation provision. Thus, the court pierced the corporate veil and confirmed the arbitration awards as to both defendants.

***G.W. Van Keppel Co. v. Dobbs Imports, LLC, d/b/a Heli Americas*, Bus. Franchise Guide (CCH) ¶ 15,409, 2014 WL 5302974 (D. Kan. Oct. 15, 2014)**

The plaintiff dealer and the defendant manufacturer entered into a dealer agreement granting the plaintiff a nonexclusive right to sell and market the defendant's forklifts in a certain geographic territory. Following the alleged termination of the agreement, the dealer demanded that the manufacturer repurchase certain equipment pursuant to the agreement and various state laws. The manufacturer refused, and the dealer filed a lawsuit in the U.S. District Court for the District of Kansas. The manufacturer moved to compel arbitration pursuant to an arbitration provision in the dealer agreement.

The plaintiff argued that "the liberal federal policy favoring arbitration raises a presumption of arbitrability only when evaluating the scope of an arbitration agreement—not when determining whether a valid arbitration agreement exists in the first place." The court agreed and did not presume a valid arbitration agreement existed, making that determination under Tennessee law instead. In concluding that a valid arbitration agreement existed under Tennessee law, the court analyzed whether the forum-selection clause created a conflict with the purportedly mandatory arbitration clause by referencing proceedings that are brought in Shelby County, Tennessee, or the Western District of Tennessee. The court held that this provision did not present a conflict because it could be harmonized with the arbitration clause. Citing decisions from the Second, Third, Fourth, and Fifth Circuits, the court found that the forum-selection clause language refers to the power of a federal court to enforce an arbitration award or hear any disputes not subject to the arbitration clause and does not preclude arbitration. Finally, the court held that the dealer's claims fell within the scope of the valid arbitration agreement. As a result, the court compelled arbitration.

***RISO, Inc. v. Witt Co.*, Bus. Franchise Guide (CCH) ¶ 15,375, 2014 WL 4627267 (C.D. Cal. Sept. 16, 2014)**

RISO, Inc. was a manufacturer and distributor of printing and duplicating hardware and supplies, and Witt Co. was an authorized dealer of RISO's products. In 2011, RISO and Witt entered into an asset purchase agreement, which included an arbitration clause, under which Witt acquired seven of RISO's markets in California and Arizona. A dispute later arose regarding

RISO's alleged obligations to continue to do business with Witt for a certain period of time. Witt sued RISO in the U.S. District Court for the District of Oregon alleging breach of the agreement and breach of the duty of good faith and fair dealing (the Oregon Action). Witt sought to enjoin RISO from terminating Witt's authorized dealer status and damages. RISO filed a motion to dismiss Witt's claims with prejudice, which the Oregon court granted.

Thereafter, Witt filed a demand for arbitration before the American Arbitration Association asserting claims against RISO for breach of the agreement. RISO responded by filing a complaint in the U.S. District Court for the Central District of California seeking a declaratory judgment that Witt waived its right to arbitrate by filing the Oregon Action. The California court construed RISO's action as a motion to compel arbitration.

The court first addressed whether the waiver issue should be decided by the court or the arbitrator. The court, citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 72 (2002), held that waiver remained an issue for the court to determine.

The court then turned to the issue of whether Witt had waived its right to arbitration. A party seeking to demonstrate waiver must show: (1) knowledge of the existing right to compel arbitration, (2) facts inconsistent with that existing right, and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts. Witt acknowledged that it knew about the arbitration clause, but argued that its actions were not inconsistent because the clause permitted a party to seek injunctive relief. Witt argued that it was primarily seeking injunctive relief in the Oregon Action and that the damages sought in that action were merely "incidental." The court disagreed, noting that Witt had sought millions of dollars of damages in the Oregon Action and characterizing Witt's actions as an attempt to "take two bites at the apple." The court concluded that RISO was prejudiced by Witt's approach because RISO was forced to spend time and money defeating Witt in the Oregon Action and then required to spend more time and money in the current action litigating the issue of whether the arbitration provision was enforceable. The court therefore concluded that Witt had waived its right to compel arbitration.

***Everett v. Paul Davis Restoration, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,399, 771 F.3d 380 (7th Cir. 2014)**

Matthew Everett and EA Green Bay, LLC (EAGB) entered into a franchise agreement with franchisor Paul Davis Restoration, Inc. (PDRI) for the operation of a furniture restoration franchise. Pursuant to PDRI's requirements, EAGB was formed solely to operate the franchise. Everett signed the franchise agreement as 100 percent owner of EAGB. However, at some point later, his wife became a fifty percent owner of EAGB at some point. The franchise agreement required PDRI's consent before transfer of any ownership and also required owners to sign the agreement in their personal capacity. The Everetts knew of this requirement, but did not make PDRI aware of Mrs. Everett's ownership interest and she never signed the franchise agreement.

In 2010, PDRI terminated the franchise agreement for cause. The agreement contained a noncompete provision restricting EAGB and its principals from competing with PDRI for two years. Mr. Everett thereafter assigned forty-five percent of his fifty percent interest in EAGB to his wife. Mrs. Everett continued to operate EAGB in competition with PDRI, including using a PDRI marketing list to send out e-mails. PDRI initiated arbitration under the terms of the franchise agreement. Mrs. Everett filed suit in the U.S. District Court for the Eastern District of Wisconsin seeking a declaratory judgment that, as a nonsignator to the franchise agreement, she was not required to arbitrate. The district court denied the motion, finding "abundant evidence" that she was bound under the direct benefits doctrine. The arbitration panel ultimately entered an award against Mrs. Everett. PDRI returned to the district court and requested confirmation of the arbitration award. The district court thereafter reversed its prior reasoning and vacated the arbitration award on the grounds that the benefits to Mrs. Everett were indirect because they flowed through her ownership interest in EAGB rather than directly from the franchise agreement. PDRI appealed to the Seventh Circuit.

The Seventh Circuit noted the "relative dearth of precedent regarding direct benefits estoppel" but went on to find that the district court's ruling with respect to the direct benefits doctrine was too narrow. The Seventh Circuit found that EAGB existed solely because of the franchise agreement; that Mrs. Everett through her ownership interest received all the benefits accorded under the franchise agreement; and that if the district court's analysis was followed to its logical end, direct benefits estoppel would never be available when at least one signatory existed with an ownership interest. The Seventh Circuit also quickly disposed of her other arguments, including that the arbitration clause was unconscionable, her due process rights were violated, and the arbitration panel was biased, finding that they were unsupported by law. Thus, the Seventh Circuit reversed the judgment of the district court and remanded the case.

BANKRUPTCY

G6 Hosp. Franchising, LLC v. Zaver (In re Zaver), Bus. Franchise Guide (CCH) ¶ 15,411, 520 B.R. 159 (Bankr. M.D. Pa. Oct. 15, 2014)

Navnitlal Zaver had a long history of owning and operating hotels through various business entities, including ownership of a business that was a franchisee of G6 Hospitality Franchising LLC (G6), pursuant to which Zaver operated a Motel 6 location in Pennsylvania. Zaver was a guarantor under the franchise agreement. G6 filed suit against the business entity and Zaver in the U.S. District Court for the Middle District of Pennsylvania, alleging breach of the franchise agreement and violations of the Lanham Act for the unauthorized use of the Motel 6 trademark.

On the morning that the matter was scheduled to go to trial, Zaver filed a Chapter 13 bankruptcy petition in the Bankruptcy Court for the Middle District of Pennsylvania. Thus, the automatic stay imposed by the bankruptcy filing enjoined the district court case from going forward. G6 responded by filing a motion in the bankruptcy court to lift the automatic stay to allow the district court case to proceed. The bankruptcy court entered an order to lift the stay. Although the district court case moved forward, Zaver filed his Chapter 13 plan in the bankruptcy case. G6 objected to the plan and sought an order dismissing the bankruptcy case on the grounds that it was filed in bad faith. G6 argued that Zaver had acted in bad faith by filing the bankruptcy case simply to stop the district court case from proceeding, as opposed to having a true need to reorganize his debts, and by filing schedules in the bankruptcy case that significantly overestimated the actual value of certain assets. In addition, G6 argued that Zaver had no actual intent or ability to reorganize his debts in the bankruptcy process.

Acknowledging that filing a case merely to stop litigation can be a sign of bad faith, the bankruptcy court found that Zaver had timed his bankruptcy filing to prevent the district court case from proceeding. Although this weighed in favor of a bad faith filing, the bankruptcy court went on to analyze G6's other arguments. As to the valuation issues, the court noted that neither party submitted valuation evidence with respect to the assets at issue and, therefore, there was inadequate evidence to support a finding that Zaver purposefully misrepresented the values. As to Zaver's intent to misuse the bankruptcy process, the bankruptcy court found that the substance of Zaver's proposed Chapter 13 plan showed a true desire to reorganize his debts with a number of different parties. The court therefore concluded that, on balance, the case was not filed in bad faith and denied G6's motion.

CHOICE OF FORUM

Applied Energy of AR-LA-MS, Inc. v. Pall Corp., Bus. Franchise Guide (CCH) ¶ 15,412, 2014 WL 7011093 (E.D. Ark. Dec. 10, 2014)

A supplier of filtration and purification products entered a distribution agreement with an equipment and supplies distributor, which contained a forum-selection clause identifying New York State or federal courts as the exclusive forum. The distributor sued the supplier in the U.S. District Court for the Eastern District of Arkansas, alleging that the supplier violated the Arkansas Franchise Practices Act (AFPA) by terminating the franchise without sufficient notice. The supplier moved to transfer the case to the U.S. District Court for the Eastern District of New York. The distributor argued that its claims arose out of the AFPA rather than the agreement and, therefore, were not subject to the forum-selection clause. The court disagreed, noting that the action arose, either directly or indirectly, from the distributorship and granted the motion to transfer.

***Black Hills Truck & Trailer, Inc. v. MAC Trailer Mfg., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,397, 2014 WL 5782452 (D.S.D. Nov. 6, 2014)**
The plaintiff, a commercial truck dealer, sued the defendant, a commercial truck manufacturer, in the U.S. District Court for the District of South Dakota, alleging state law claims and violations of the Robinson–Patman Act. The manufacturer moved to dismiss the case for improper venue or to transfer the matter to federal court in Ohio pursuant to the choice-of-law provision and forum-selection clause in the parties' agreement. Prior to the court's decision on the motion to dismiss or transfer, the U.S. Supreme Court issued its decision in *Atlantic Marine Construction Co. v. U.S. District Court for the Western District of Texas*, 134 S. Ct. 568 (2013), clarifying the proper procedural mechanism for enforcing a forum-selection clause and holding that courts should give such clauses controlling weight in most situations. The court denied the manufacturer's motion, and the manufacturer then moved for reconsideration in light of *Atlantic Marine*.

The court denied the motion for reconsideration, reasoning that despite the holding in *Atlantic Marine*, it had a responsibility to determine whether a particular forum-selection clause was valid before deciding whether to transfer pursuant to 28 U.S.C. § 1404(a). The court determined that, contrary to the forum-selection clause in *Atlantic Marine*, the forum-selection clause here was unenforceable in light of the strong public policy of South Dakota. The court did, however, grant permission for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

***IB Agric., Inc. v. Monty's Plant Food Co.*, Bus. Franchise Guide (CCH) ¶ 15,391, 2014 WL 4851774 (W.D. Ky. Sept. 26, 2014)**
IB Agriculture, a distributor of agricultural products, sued Monty's Plant Food Co., alleging that Monty's committed fraud and negligence and breached the parties' agreement by conducting direct sales in the distributor's territory and raising prices during the term of the agreement. Monty's moved for summary judgment on IB Agriculture's claims. In granting the motion for summary judgment, the court found that there was no exclusive distribution agreement between the parties. Furthermore, the court found that the distributorship more closely resembled a UCC Article 2 sale of goods contract than a services contract because there was no evidence of a commission-based relationship and the supplementary services did not predominate over the sale-of-goods portion of the contract. As a result, the court found that, although the parties' course of dealings could supplement or explain the contract terms under Kentucky's UCC, the course of dealings could not add an exclusive distributorship as a term of the contract. The

court also concluded that there was no evidence of a price increase in violation of any agreement.

IB Agriculture alleged that Monty's committed actual and constructive fraud by selling to customers within the distributor's territory, but the court found no evidence to support that Monty's agreed to an exclusive distributorship that would create material misrepresentation. Nor did IB Agriculture identify any breach of legal duty to support a constructive fraud claim, which also doomed its negligence and negligent misrepresentation claims. Finally, IB Agriculture's claim for tortious interference with a prospective business advantage also failed because no evidence existed of an intentional and improper or impermissible motive. The court ultimately dismissed the complaint with prejudice.

***KFC Corp. v. Kazi*, Bus. Franchise Guide (CCH) ¶ 15,385, 2014 WL 4914427 (W.D. Ky. Sept. 30, 2014)**

Four franchisee entities operated 142 KFC restaurants across various states. The defendant guarantor Kazi guaranteed each of the restaurants' obligations. When the four franchisees filed bankruptcy, they sold virtually all of their assets pursuant to the Bankruptcy Code. KFC received none of the sale proceeds and filed a lawsuit against Kazi as guarantor. Kazi asserted four affirmative defenses on behalf of the franchisees and sought discovery. In an earlier order, the U.S. District Court for the Western District of Kentucky had found that the guaranties were enforceable. The court then addressed Kazi's affirmative defenses. The court dismissed the first two affirmative defenses, which inappropriately challenged KFC's business judgment decision to push "Kentucky Grilled Chicken" and focus on the China market at the expense of U.S. franchisees. The court held it must presume that the company made business decisions on an informed basis, in good faith, and under the belief that those actions were in the best interests of the company. In his third defense, the guarantor alleged that KFC conspired against the franchisee entities and engaged in anticompetitive business practices. In his fourth defense, the guarantor asserted that KFC forced certain restaurants to undergo unreasonable remodeling, thus forcing them into bankruptcy. The court determined that res judicata barred these two affirmative defenses because Kazi could have and should have raised these defenses during the bankruptcy proceedings.

***Benjamin Franklin Franchising, LLC v. On Time Plumbers, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,369, 2014 WL 4683271 (M.D. Fla. Sept. 19, 2014)**

Benjamin Franklin Franchising, LLC (BFF) was a franchisor in the business of licensing plumbing business systems. On Time Plumbers, Inc. (OTP) entered into a franchise agreement with BFF for a location in Las Vegas (the Nevada franchise), which OTP never actually opened.

George Donaldson was the president of OTP, and Clockwork, Inc. was the parent company of BFF. Several other businesses owned by Donaldson were franchisees of Clockwork entities. In October 2013, Clockwork and Donaldson entered into a letter of intent (LOI) to end their franchisor/franchisee relationship for certain locations in Arizona and California. The LOI proposed that Clockwork would purchase the Arizona and California franchises and further provided that the LOI could be terminated if the parties did not enter into a purchase agreement by December 16, 2013. The LOI also provided that certain provisions would remain binding after termination of the LOI, including a provision that Clockwork and Donaldson would "work together" to transfer the Nevada franchise territory. In December 2013, Clockwork advised Donaldson that it did not intend to enter into a purchase agreement. Donaldson responded by de-branding his Arizona and California businesses and began operating them in competition with Clockwork franchises.

Donaldson sued Clockwork in the U.S. District Court for the Central District of California (the California action) seeking a declaratory judgment that his businesses were not in violation of the LOI's noncompetition clauses. In the meantime, Clockwork and OTP were in negotiations regarding the transfer of the Nevada franchise. BFF subsequently filed an action against OTP in the U.S. District Court for the Middle District of Florida (the Florida action), alleging breaches of the franchise agreement by OTP. Donaldson responded by filing an amended complaint in the California action adding OTP as a plaintiff and BFF as a defendant. OTP then moved to dismiss the Florida action, arguing that the matters in the Florida action should proceed in the California action based on the "first-to-file" rule or on grounds of improper venue.

The court noted that the franchise agreement contained a forum selection clause mandating that actions must be commenced in the U.S. District Court for the Middle District of Florida, which was BFF's principal place of business. The court concluded that the franchise agreement was controlling over the LOI because neither BFF nor OTP were parties to the LOI and also because the franchise agreement required any change to be: (1) in writing, (2) identified as an amendment to the agreement, and (3) signed by the parties.

The court also noted that the forum selection clauses were presumptively valid and would be enforced unless a plaintiff made a strong showing that enforcement would be unfair or unreasonable under the circumstances. OTP argued that the clause should not be enforced because litigating in California would preserve judicial resources and proceeding in Florida would be expensive and inconvenient. The court held that these reasons were not sufficient to rebut the presumption of validity. The court next analyzed whether it could exercise personal jurisdiction over OTP, concluding that if a forum selection clause is freely negotiated and is not unreasonable and unjust, the minimum contact standard for personal jurisdiction is met. The court held that under that analysis, it could exercise personal jurisdiction over OTP.

Turning to OTP's first-to-file argument, the court considered: (1) the chronology of the two actions, (2) the similarity of the parties, and (3) the similarity of the issues. The court concluded that the two actions were separate and distinct because neither OTP nor BFF were parties to the LOI and it was clear that the LOI was intended to be a separate agreement from the franchise agreement. The court further concluded that there was no overlap between the two actions that would compel enforcement of the first-to-file rule.

Finally, the court considered OTP's forum non conveniens argument. The court held that because there was an enforceable forum selection clause, OTP's forum non conveniens argument would only be considered on public policy grounds such as: (1) the administrative difficulties flowing from court congestion, (2) the local interest in having localized controversies decided at home, and (3) the interest in having the trial of a diversity case in a forum that is at home with the law. The court further noted that, according to U.S. Supreme Court precedent, the factors must demonstrate "unusual" or "extraordinary" circumstances supporting the position that maintaining the action in Florida would constitute a burden on the court system. Thus, the court denied OTP's motion to dismiss the Florida action.

***Frango Grille USA, Inc. v. Pepe's Franchising, Ltd.*, Bus. Franchise Guide (CCH) ¶ 15,390, 2014 WL 7892164 (C.D. Cal. July 21, 2014)**

Pepe's Franchising, Ltd. and Frango Grille USA, Inc. entered into a master franchise agreement granting Frango the right to operate Pepe's restaurants in California and recruit additional California franchisees. Pepe's was both incorporated in and had its principal place of business in the United Kingdom. The agreement contained a forum selection clause stating that proceedings arising out of or in connection with the agreement must be brought in any court of competent jurisdiction in London. However, the franchise disclosure document contained a "California addendum" stating that the forum selection clause may not be enforceable under California law.

Although Frango made preparations to open a Pepe's restaurant, the restaurant never opened and Frango later sought to rescind the agreement. Frango filed suit against Pepe's in the U.S. District Court for the Central District of California, alleging various state law claims. Pepe's filed a motion to dismiss based on the forum selection clause or on forum non conveniens. Frango argued that the forum selection clause was invalidated by the California Franchise Relations Act (CFRA), which provides that a "provision in a franchise agreement restricting venue to a forum outside [California] is void with respect to any claim arising or relating to a franchise agreement involving a franchise business operating within [California]."

Pepe's argued that the CFRA did not apply. First, Pepe's argued that Frango was not "operating" a franchise in California because the restaurant never actually opened. The court rejected this argument on the grounds that the CFRA is to be interpreted broadly and that the provision is designed to apply to all franchise agreements concerning the operation of a franchise business within California. According to the court, the agreement clearly pertained to the operation of a California franchise, even if the restaurant never opened. Pepe's further argued that the CFRA did not apply because none of Frango's claims were brought under that statute. The court disagreed again, holding that the CFRA applies to any claim arising under or relating to a franchise agreement involving a franchise business within California. Pepe's also argued that the CFRA provision should only be applied to forum selection clauses deemed "unfair." The court rejected this argument on the grounds that it was not supported by the text of the CFRA provision, which makes no mention of fairness.

Pepe's next argued that the court was required to apply federal law in determining whether a forum selection clause is enforceable based on the Supreme Court's decision in *Atlantic Marine Construction Co., Inc. v. U.S. District Court for Western District of Texas*. Although the court acknowledged that it is required to analyze the factors in 28 U.S.C. § 1404 in deciding whether to enforce a forum selection clause, it noted that the analysis applied only to valid forum selection clauses and that the CFRA made the applicable forum selection clause invalid based on California public policy. Therefore, the court found that an analysis of the 28 U.S.C. § 1404 factors was not required.

Finally, the court analyzed the forum non conveniens factors without taking into account the forum selection clause. The court noted that agreement negotiations mainly took place in England, but that Pepe's sought to do business in California; registered its business there; and, based on the California addendum, clearly knew that the forum selection clause was likely unenforceable. The court therefore concluded that, on balance, the forum non conveniens factors were not met to a degree requiring transfer of the venue.

CLASS ACTIONS

Torres v. CleanNet, U.S.A., Inc., Bus. Franchise Guide (CCH) ¶ 15,393, 2014 WL 5591037 (E.D. Pa. Nov. 4, 2014)

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

CONTRACT ISSUES

Phillips 66 Co. v. Gish Oil Co., Bus. Franchise Guide (CCH) ¶ 15,377, 2014 WL 4457287 (M.D. Ga. Sept. 10, 2014)

Gish Oil Company was a longtime petroleum marketer for Phillips Petroleum and its successor, Phillips 66 Co., in Georgia. Raymon and Helen Gish executed a guaranty for all of Gish Oil's obligations to Phillips. In 1998, Gish Oil and Phillips entered into an agreement (the NCIP agreement) pursuant to which Gish Oil agreed to make certain improvements to a convenience store selling Phillips gasoline (Baytree Convenience

Store) in exchange for an incentive payment for every gallon of Phillips-branded gasoline sold at the convenience store for the first thirty-six months after entering into the agreement (the NCIP program). The NCIP agreement required Gish Oil to reimburse Phillips for some or all of the incentive payments under certain conditions, including if the convenience store was no longer branded as a Phillips gas station. The amount that would need to be reimbursed was dependent on when any of the conditions occurred. To fulfill its obligations to improve the Baytree Convenience Store, Gish Oil razed the existing structures and constructed a new building. Phillips ultimately paid $162,000 in incentive payments to Gish Oil under the NCIP agreement.

In October 2004, Phillips and Gish Oil entered into a separate branded marketer agreement (the 2004 agreement) pursuant to which Gish Oil was required to purchase 5 million gallons of gasoline and distillate from Phillips annually. Gish Oil's annual sales fell below this minimum threshold in 2005 and 2006. In 2007, Phillips informed Gish Oil that it was going to end its marketing agreements with marketers that were not meeting the company's sales goals. As a result, Gish Oil decided to end its relationship with Phillips and removed the Phillips brand from the Baytree Convenience Store, which was the ninth year that the store had been in the NCIP program. Phillips 66, which by that time had acquired the rights under the NCIP agreement and guaranty, sought to recover some of the incentive payments paid to Gish Oil pursuant to the agreement. Gish Oil refused to pay, and Phillips 66 filed suit in the U.S. District Court for the Middle District of Georgia. After considering the parties' cross-motions for summary judgment, the court granted Phillips 66's motion and denied the defendants' motion.

The court quickly concluded that Gish Oil had breached the NCIP agreement by not repaying some of the incentive payments and then addressed Gish Oil's affirmative defenses. The defendants argued that the requirement that it repay some or all of the incentive payments was a penalty "in the guise of liquidated damages." The court disagreed, finding that the provision requiring the reimbursement of the incentive payments was not a liquidated damages provision because (1) the NCIP agreement did not prohibit Gish Oil from removing the Phillips brand, and (2) Gish Oil was obligated to repay the incentive payments even if Phillips had caused at least one of the conditions to occur. The district court also rejected the defendants' argument that the 2004 agreement had superseded the NCIP agreement, finding that they dealt with different subject matters.

The court then turned to the defendants' arguments that there were disputed issues of material fact that warranted denying Phillips 66's motion. The court rejected the defendants' claim that Phillips 66 had not established that it had suffered damages from the breach of the agreement or the amount of damages, concluding that Phillips 66 was not required to show that it or its predecessor had actually lost sales as a result of Gish Oil's breaches. The court was similarly unpersuaded by the defendants' claim that there was a genuine factual dispute as to whether the NCIP agreement failed for a lack of consideration, finding that the parties had initially performed as agreed. The court also found no evidence to support the defendants' claim that Phillips had either waived its rights or that it had repudiated the agreement such that Gish Oil's performance was excused.

***Saletech, LLC v. East Balt, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,401, 20 N.E.3d 796 (Ill. Ct. App. Oct. 29, 2014)**

Saletech, LLC, a Ukrainian company, entered into a distribution agreement with East Balt Ukraine (EB Ukraine), also a Ukrainian company, to be the exclusive distributor of bakery products. East Balt, Inc. (EB Inc.) is a Delaware corporation and the parent company of East Balt of Eastern Europe, LLC (EB Europe), an Illinois limited liability company that owns EB Ukraine. Saletech alleged that shortly after entering into the distribution agreement, EB Ukraine breached the agreement. Saletech filed a series of complaints against the defendants, all of which were dismissed with leave to amend. In its third amended complaint, Saletech asserted claims for (1) breach of contract against EB Ukraine, (2) breach of contract by ratification against EB Inc. and EB Europe, (3) breach of contract by actual or apparent agency against EB Inc., (4) breach of contract against EB Europe as the alter ego of EB Ukraine, (5) a promissory estoppel claim against EB Inc., and (6) unjust enrichment against EB Inc. and EB Europe. Saletech did not serve the third amended complaint on EB Ukraine, and the other defendants moved to dismiss.

The court first considered Saletech's claim for breach of contract against EB Inc. based on an agency theory. The court found that Saletech had failed to allege that EB Inc. gave EB Ukraine authority to enter into the distribution agreement on its behalf and that there was no other evidence that its words or acts (rather than those of EB Ukraine) established the alleged actual authority. The court also found that Saletech had failed to plead any apparent authority showing that (1) EB Inc. had consented to or otherwise knew that EB Ukraine had entered into the agreement on its behalf, (2) that Saletech had a good faith belief that EB Ukraine had authority to bind EB Inc., or (3) that EB Inc. had relied on EB Ukraine's authority to its detriment.

The court then considered Saletech's claims against EB Inc. and EB Europe for breach of contract based on the theory that they had ratified the agreement by allegedly telling Saletech that if it assisted in the investigation of claimed improprieties by EB Ukraine's management, the distribution agreement would be honored. The court first noted that there was no evidence that EB Ukraine was acting as an agent for either EB Inc. or EB Europe. The court then found that there were no allegations in the third amended complaint that would support the conclusion that EB Inc. and EB Europe retained any benefits under the distribution agreement or took any steps to be bound by it.

The court also dismissed Saletech's claim for breach of contract against EB Europe on an alter ego theory. The court held that, although Saletech alleged the parties had commingled funds as a means for defrauding creditors and had a unity of interest and the same address, the complaint lacked any factual support for the allegation that the funds had been commingled as a means of defrauding the creditors.

The court rejected with Saletech's promissory estoppel theory, holding that such a claim only applies in the absence of a contract. Finally, the court dismissed Saletech's unjust enrichment claim, finding that Saletech had failed to explain what benefit the defendants had obtained that was to Saletech's detriment.

***G.L.M. Sec. & Sound, Inc. v. LoJack Corp.*, Bus. Franchise Guide (CCH) ¶ 15,392, 2014 WL 4675854 (E.D.N.Y. Sept. 19, 2014)**

G.L.M. Security & Sound, Inc. brought suit in the U.S. District Court for the Eastern District of New York against LoJack Corp., asserting claims arising from the termination of an agreement to distribute car security systems. In response, LoJack filed a counterclaim. The parties subsequently filed cross-motions for summary judgment.

Pursuant to the parties' distribution agreement, GLM agreed to purchase stolen vehicle recovery units (SVRUs) from LoJack in order to resell and install them. LoJack had the right to terminate the distribution agreement if GLM breached any of the provisions in the agreement and either party could terminate the agreement for no cause upon written notice. In the event that the distribution agreement was terminated without cause, LoJack agreed to credit GLM the price of any uninstalled SVRUs and pay a fee for any units sold by LoJack to a dealer in GLM's market for a period of 180 days. The distribution agreement included standard waiver, integration, and no modification-without-a-writing clauses.

At some point, either before or after the parties entered into the distribution agreement, the parties discussed GLM being guaranteed LoJack's "best price" for the SVRUs. For purposes of considering the parties' motions for summary judgment, the court assumed that the discussions occurred after the agreement was entered. GLM also claimed that a third party, George Wafer, president of Vehicle Manufacturer Services (VMS), told GLM's president that GLM would receive the best price from LoJack and that GLM would be paid $2 for each LoJack unit purchased by a distributor that GLM helped VMS to recruit. Wafer entered into a separate agreement with LoJack regarding VMS's obligation to recruit distributors of LoJack products in exchange for compensation.

When GLM fell behind in its payments, LoJack issued a notice of default. In response, GLM sent a letter to LoJack giving notice of its intent to terminate the distribution agreement for no cause. Thereafter, LoJack sent a letter terminating the distribution agreement as a result of GLM's failure to pay the outstanding arrearages. GLM filed suit asserting a variety of claims, including breach of contract, breach of the duty of good faith and fair dealing, and a statutory claim under Massachusetts law. LoJack asserted counterclaims based on GLM's failure to pay for goods and services.

The court first addressed LoJack's motion for summary judgment on GLM's claims, which were all based on GLM's allegation that it was promised the best price on LoJack's products. Although the distribution agreement included a provision requiring that any amendment or modification of the agreement be in writing, the court noted that such provisions do not automatically bar an oral modification of the agreement. The court further noted, however, that the presence of such a provision does increase a party's burden of establishing an oral modification. After considering GLM's evidence, the court found that it was not "sufficiently clear and convincing" to overcome the "deference" to which a provision requiring all modifications be in writing was entitled. Among other things, the court found that the evidence did not support GLM's claim that Wafer had the authority to bind LoJack to a best price promise and there was no evidence that LoJack acted in any manner which supported that an oral modification had occurred. The court similarly found that there was no evidence to support GLM's claim that LoJack, rather than Wafer, had agreed to pay a commission to GLM for SVRUs sold by distributors that GLM had helped to recruit.

The court then turned to GLM's claims that LoJack had breached the distribution agreement by (1) requiring that GLM pay for products in advance, (2) not crediting GLM's account for returned products, (3) not paying GLM for units sold to dealers in its territory, and (4) not crediting GLM for unclaimed incentive payments. With respect to the first claim, the court found that there was no provision prohibiting LoJack from requiring prepayment. The court found that GLM's claim that it was entitled to various post-termination payments failed because LoJack had terminated the distribution agreement for cause and, therefore, was under no obligation to make such payments. Finally, the court found that GLM's claim that it was owed prepaid incentive monies was contrary to LoJack's written policy, and GLM had acknowledged the policy.

The district court then addressed GLM's breach of duty and good faith and fair dealing claim, finding that such a claim may not "be invoked to create rights and duties that were not otherwise provided for in the existing contractual relationship" and that the distribution agreement had not been orally modified to require LoJack to provide GLM with its best price. GLM's unfair competition claim, also based on the alleged best price agreement, fared no better because the court had found that there was no such agreement. Moreover, the court concluded that even if LoJack had hidden the fact that it was offering better prices to other dealers and misled GLM, LoJack's conduct did not rise to the level necessary to sustain an unfair competition claim under Massachusetts law.

The court then turned to LoJack's counterclaims for breach of contract and breach of good faith and fair dealing. The court quickly found that

GLM had breached the distribution agreement by failing to pay amounts owed and granted summary judgment in favor of LoJack on this claim. However, the court denied LoJack's claim for breach of good faith and fair dealing, which was based on two theories. The court rejected the first theory, finding that it was duplicative of LoJack's breach of contract claim that GLM had failed to pay for goods and services. The court found that the second theory—that the best price issue was contrived and only intended to improve GLM's negotiating position with respect to the outstanding balance—was unsupported by any evidence of GLM's motive.

***LeCompte v. AFC Enters., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,386, 149 So. 3d 366 (La. Ct. App. Oct. 1, 2014)**

John LeCompte was the principal and sole shareholder of an entity that operated two Popeyes restaurants in Louisiana pursuant to two franchise agreements entered into with AFC Enterprises, Inc. In response to the plaintiffs' efforts to acquire additional Popeyes franchises in Louisiana, AFC advised them that "it did not want to grow with LeCompte with a new store." Subsequently, another Popeyes franchisee offered to sell his Popeyes franchises to the plaintiffs. AFC again told LeCompte that it was not interested in "growing" with the plaintiffs.

The plaintiffs filed a lawsuit in Louisiana state court against AFC and the franchisee who offered to sell his franchises to the plaintiffs, alleging violations of Louisiana's Unfair Trade Practices Act (LUTPA) and a violation of the abusive rights doctrine. In response, AFC filed an exception of no right of action and a motion for summary judgment. The trial court granted AFC's motions and the plaintiffs appealed. The appellate court affirmed the judgment.

The court first considered the defendants' exception of no right of action. The court found there was no evidence to support the plaintiffs' theory that they were a party to the contract between AFC and the selling franchisee and, thus, had no standing to assert a claim that AFC had unreasonably refused to approve the sale.

The court next addressed AFC's motion for summary judgment. The plaintiffs' unfair trade practices claim was based upon AFC's purported "intentional retribution" due to prior litigation between the parties. AFC asserted that because there was no development agreement with the plaintiffs, AFC was under no obligation to permit the plaintiffs to acquire additional franchises. In order to prevail on a LUTPA claim, a plaintiff must provide evidence of fraud, misrepresentation, deception, or unethical conduct. The court found that the plaintiffs' evidence failed to rise to this level.

The court found that the plaintiffs' abuse of rights claim was similarly deficient. Abuse of rights claims under Louisiana law are "invoked sparingly" and applied only when either "(1) the predominant motive for exercise of the right was to cause harm; (2) there was no serious or legitimate motive for exercise of the right; (3) the exercise of the right violates moral rules, good faith, or elementary fairness; or (4) the exercise of the right was for a purpose other than that for which it was granted." The court held that the plaintiffs had presented no evidence that AFC's unwillingness to grow with them was a result of any motivation to cause harm to the plaintiffs, illegitimate, or in bad faith.

***Westgate Ford Truck Sales v. Ford Motor Co.*, Bus. Franchise Guide (CCH) ¶ 15,424, 2014 WL 6983309 (Ohio Ct. App. Dec. 11, 2014)**

Plaintiff Westgate Ford Truck Sales, a Ford medium- and heavy-duty truck dealer, brought a class action against Ford Motor Co., alleging that Ford's competitive price assistance program (CPA) violated the standard franchise agreement between Ford and its dealers. The CPA permitted dealers to petition Ford for competitive, individual discounts off wholesale prices. Westgate complained that Ford did not inform other dealers of the discounts given to individual dealers that petition for relief under the CPA. It argued that this violated a provision of the franchising agreement stating that sales would be made according to published price schedules.

The trial court originally granted summary judgment in Westgate's favor and entered a jury verdict for class-wide damages totaling nearly $2 billion. Ford appealed the summary judgment decision and verdict, and the Ohio Court of Appeals reversed, holding that the relevant language in the agreement was ambiguous, and that Ford's interpretation was reasonable. On remand, the trial court conducted a second jury trial on Westgate's breach of contract claim, which resulted in a complete defense verdict for Ford. Westgate then moved for judgment notwithstanding the verdict, which the trial court granted. The trial court entered a judgment in Westgate's favor on liability but based on a breach unrelated to the relevant language in the franchise agreement previously found ambiguous.

Ford again appealed to the Ohio Court of Appeals, arguing that the trial court's grant of Westgate's motion for judgment notwithstanding the verdict contradicted the law of the case because the only provision at issue was the one determined, as a matter of law, to be ambiguous. The appellate court agreed, holding that the trial court erred in determining that Ford breached the contract and, thus, the appellate court reversed the judgment and reinstated the jury verdict in Ford's favor.

***Gen. Motors, LLC v. Englewood Auto Grp., LLC*, Bus. Franchise Guide (CCH) ¶ 15,378, 2014 WL 4441769 (D. N.J. Sept. 9, 2014)**

Englewood Auto Group, LLC (EAG) was an authorized dealer of Chevrolets and Buicks in New Jersey pursuant to dealer agreements between EAG and General Motors Corp. EAG sublet the Buick dealership facility from Argonaut Holdings, Inc., a GM Corp. affiliate.

In 2002, in conjunction with EAG becoming a Buick dealer, EAG and GM Corp. entered into a "business plan agreement" providing that, among other things, EAG had the right at some point in the future to operate a Pontiac franchise at its Buick dealership facility. The business plan agreement also required GM Corp. to pay EAG a subsidy for rent at EAG's Buick facility (the Pontiac rent subsidy) until GM Corp. appointed EAG as a Pontiac franchisee.

In 2004, GM Corp. appointed EAG as a Pontiac franchisee and the parties amended the business plan agreement such that the Pontiac rent subsidy would end on December 31, 2004. In 2009, GM Corp. filed Chapter 11 bankruptcy. As part of the bankruptcy, GM Corp. discontinued the Pontiac and Saturn brands. General Motors, LLC (GM) was the entity that emerged from the bankruptcy case. Following the bankruptcy case, GM granted certain dealerships the opportunity to perform Saturn warranty work going forward. EAG was not granted this right.

GM and EAG entered into "participation agreements" allowing EAG to continue as a Chevrolet and Buick dealer following the bankruptcy case. The participation agreements included a sale performance metric called the retail sales index. GM alleged that EAG did not meet the required retail sales index for several years. In 2013, GM filed a complaint in the U.S. District Court for the District of New Jersey seeking a declaratory judgment that GM could terminate its contractual relationship with EAG. EAG responded by filing counterclaims against GM and Argonaut. GM filed a motion to dismiss EAG's counterclaims, which the court granted.

The first set of counterclaims involved EAG's allegation that GM breached the dealer agreements by failing to prevent other dealers from engaging in brokered sales of cars to end users and also by failing to grant EAG the opportunity to perform Saturn warranty work. The court found that EAG had not identified any specific contractual obligation by GM to prevent the brokered sales. The language that EAG pointed to was merely "general and aspirational" and did not impose any actual obligations. EAG also alleged that it was a third party beneficiary of GM's agreements with other dealers and that GM owed a duty to EAG to police its dealership networks and prevent brokered sales. The court again pointed to the fact that GM was not contractually obligated to preclude such sales. The court also noted that the dealer agreements with EAG and the other dealers specifically precluded the enforcement of third party beneficiary obligations asserted by EAG. As to the Saturn warranty work, the court determined that the dealer agreements did not obligate GM to name EAG as a Saturn warranty center.

The court next addressed EAG's claim that GM was obligated to reinstate the Pontiac rent subsidy once it became clear that the Pontiac brand would be discontinued as part of the bankruptcy. EAG alleged that GM was unjustly enriched by the higher rent payments made by EAG following the discontinuing of the Pontiac brand. The court determined that nothing in the relevant agreements indicated that EAG was entitled to receive rent subsidies in the event the Pontiac brand was discontinued. The court also noted that unjust enrichment was appropriate only in the absence of a valid and binding contract between the parties. Because the parties had a contract, the court ruled that EAG could not bring an unjust enrichment claim.

EAG also claimed that Argonaut breached the sublease by failing to agree to a modification of the rent after the Pontiac brand was discontinued. The court ruled that Argonaut had no such obligation under the sublease. EAG also alleged that the sublease should be "reformed" to provide for a rent subsidy or rent reduction. The court noted that under New Jersey law, an agreement can be reformed only upon a showing of mutual mistake or unilateral mistake accompanied by fraud or unconscionable conduct. The court held that the sublease specifically contemplated the possibility of EAG losing its right to distribute a particular brand and that, therefore, there was no mutual or unilateral mistake and no fraud or unconscionable conduct.

Finally, EAG asserted that GM breached the covenant of good faith and fair dealing by failing to prevent brokered sales and denying EAG's right to perform Saturn warranty service. The court determined that under Michigan law, the duty of good faith and fair dealing arises only in connection with specific contractual obligations. Because GM had no such obligations, EAG had no claim.

***Richard I. Spiece Sales Co., Inc. v. Levi Strauss NA*, Bus. Franchise Guide (CCH) ¶ 15,405, 19 N.E.3d 345 (Ind. Ct. App. 2014)**

Tom Spiece, through his company Richard I. Spiece Sales Co., Inc., became an authorized retailer of Levi's jeans in 1978. Throughout the 1980s and 1990s, Spiece worked closely with Levi's to grow his business and promote the brand. The jeans were purchased by Spiece on a purchase order and acceptance basis. The purchase orders included Levi's terms of sale. In 2000, Spiece sought and was granted permission to sell Levi's on his company's website. Levi's provided Spiece with its written Internet sales policy, which stated that it would periodically be amended. In 2008, Levi's amended the policy to prohibit the practice of "key word stuffing," which is adding words and phrases in an attempt to manipulate Internet search engines so that the website is more prominently featured in web searches. Levi's knew that Google disapproved of this practice and often punished businesses engaged in it. In 2008, Levi's discovered that Spiece's website was using key word stuffing and other practices prohibited under the policy. Levi's sent Spiece a letter demanding that he come into compliance with the policy. Over the next few years, Spiece addressed some, but not all, of Levi's concerns. In 2011, Levi's revoked Spiece's right to sell Levi's jeans on his website. Spiece had made a large 2010 year-end purchase, and Levi's made a one-time offer to repurchase that inventory. Spiece refused to return the inventory and refused to pay for the inventory in full.

Levi's subsequently filed a lawsuit in Indiana state court seeking to collect $321,778 owed for the inventory. Spiece filed a counterclaim, alleging breach of contract and violations of the Indiana Deceptive Franchise Practices Act. The trial court ruled in Levi's favor and Spiece appealed.

As to the breach of contract issue, Spiece argued that the letters from Levi's authorizing Spiece to sell Levi's products were enforceable contracts. Levi's responded that there was never a contract between the parties and that the products were always sold pursuant to purchase orders. The appellate court affirmed the trial's courts holding that there was no contract. Rather, the purchaser orders provided that Levi's acceptance of each of Specie's purchase orders was conditioned on his agreeing to comply with Levi's policies. The court found that this conditional acceptance in a purchase order did not give rise to any contractual obligation on Levi's part.

Spiece also argued that his business was a franchisee under the Act because he was granted the right to sell Levi's branded products and was subject to Levi's policies. The trial court held that Spiece's business was not a franchisee because (1) there was no contract between the parties, (2) Levi's had no control over who Spiece hired or what he sold to customers, and (3) Levi's did not require Spiece to purchase new product to sell to customers. On appeal, the court affirmed this decision, noting that Spiece provided no evidence suggesting that the trial court's ruling was in error.

CORPORATE VEIL PIERCING

***Doctor's Assocs., Inc. v. Patel*, Bus. Franchise Guide (CCH) ¶ 15,379, 2014 WL 4388588 (D.N.J. Sept. 5, 2014)**

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

DAMAGES

***Jackson Hewitt Inc. v. Larson & Savage, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,401, 2014 WL 5511389 (D.N.J. Oct. 31, 2014)**

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

***Gutter Topper Ltd. v. Sigman*, Bus. Franchise Guide (CCH) ¶ 15,419, 2014 WL 6473407 (S.D. Ohio Nov. 18, 2014)**

Plaintiff Gutter Topper Ltd. (GTL) is a manufacturer of gutter covers for personal residences throughout the United States. Defendant Sigman & Sigman Gutters, Inc. (SSGI) entered into a series of dealer agreements with GTL pursuant to which it was granted the right to sell Gutter Topper covers in portions of the United States. The agreements were guaranteed by William Sigman, the president and owner of SSGI. The dealer agreements prohibited SSGI from distributing, promoting, or designing any competitive products; restricted SSGI's rights to use the Gutter Topper trademark; and gave GTL the right to terminate the agreements if SSGI failed to pay the required royalties.

GTL ultimately terminated the dealer agreements due to SSGI's failure to pay royalties. Unbeknown to GTL, prior to the termination of the parties' agreements, SSGI developed and offered for sale a competitive gutter cover product. Notwithstanding the termination, SSGI continued to advertise GTL's product and use its trademark for at least six weeks after the termination.

GTL filed a complaint in the U.S. District Court for the Southern District of Ohio, asserting claims under the Lanham Act and seeking injunctive relief and damages. GTL successfully moved for summary judgment on the issue of liability with respect to several of its claims. A trial was set on damages issues, but was vacated when SSGI and Sigman filed for bankruptcy. The case was ultimately reopened as to Sigman only and GTL moved forward with its damages case. In lieu of a trial, the parties agreed to resolve the matter on written briefs. GTL requested that the court issue findings that Sigman had willfully engaged in infringement and unfair competition and also sought a finding that Sigman's conduct was committed "willfully and maliciously to cause injury."

After considering the evidence submitted by GTL, the court concluded that Sigman's infringing use of the Gutter Topper trademark was "willful, deliberate, and fraudulent." In reaching its decision, the court found that Sigman understood he was not permitted to use the Gutter Topper trademark to promote any product other than Gutter Topper because he said as much in a letter to the company, but nonetheless developed and sold a competitive product. The court also noted that Sigman falsely told GTL that his product was only for the commercial/industrial marketplace. Additionally, the court noted that SSGI sales representatives offered the competitive product to consumers as an alternative to and usually at a cheaper price than the Gutter Topper product. The court further found that Sigman had taken no steps to remove the Gutter Topper trademark from SSGI's website for several months after the agreements were terminated and continued to affirmatively use the trademark, even after the lawsuit was filed, in invoices and agreements suggesting that SSGI was installing a Gutter Topper system. Based on this evidence, the court also found that Sigman intended to injure GTL or at least should have known that injury was "substantially certain." Thus, the court also found that Sigman had acted with the intent to cause willful and malicious injury.

***Legacy Acad., Inc. v. JLK, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,418, 765 S.E.2d 472 (Ga. Ct. App. Nov. 20, 2014)**

A child care center franchisee indicated its intent to end its franchise relationship with the franchisor Legacy Academy, effective January 1, 2011, approximately eight and one-half years into the agreed upon twenty-year term. The franchisee continued to use the name and trademarks through December 31, 2010, but ceased paying royalties in the last three months. Legacy terminated the agreement based on the franchisee's breach of the franchise agreement. Legacy then sued the franchisee, alleging breach of contract and seeking to collect royalties and advertising fees through December 31, 2010, as well as future lost profits. The trial court granted summary judgment to Legacy, but, following a bench trial on damages, the trial court awarded damages only for accrued royalty fees during the two months prior to de-identification, with no royalty fees awarded for the balance of the franchise agreement's term.

On appeal, the Georgia Court of Appeals reversed and, under traditional contract principles, held Legacy was entitled to lost future royalty payments through the end of the franchise agreement term, but only if it could prove those lost profits. On the record from the trial court, the appellate court did not find definite, certain, and reasonable data to ascertain Legacy's anticipated profits.

DEFINITION OF FRANCHISE

***Kinsley Grp., Inc. v. MWM Energy Sys.*, Bus. Franchise Guide (CCH) ¶ 15,389, 2014 WL 4740577 (D. Conn. Sept. 23, 2014)**

Kinsley Group, Inc. entered into a distribution agreement with a German company (MWM) that manufactured power generators under the MWM brand. Pursuant to this agreement, Kinsley Group was granted the exclusive right to market, sell, install, and provide repair and maintenance services for power generators manufactured by MWM in the Northeast and Mid-Atlantic regions in the United States. The agreement prohibited Kinsley Group from marketing, selling, purchasing, or distributing any products that competed with MWM's products while the agreement was in effect and for a twelve-month period thereafter. However, the agreement permitted Kinsley Group to market and distribute products for Kohler, whose products did not compete with MWM. The distribution agreement expressly disclaimed a franchise relationship and included a standard integration clause.

After the parties entered into the distribution agreement, Kinsley Group formed Kinsley Energy Systems, LLC (KES) for purposes of selling and supporting the MWM products. Although a draft assignment of the agreement to KES was prepared, it was never finalized or signed. Several years after the parties entered into the distribution agreement, MWM and its affiliates were acquired by Caterpillar, which has its own distribution network in the United States. The plaintiffs claim that as a result of this acquisition, MWM "began to find alleged fault with Kinsley's performance." MWM subsequently terminated the distribution agreement, and Kinsley Group and KES filed suit in the U.S. District Court for the District of Connecticut. MWM and the other defendants filed a motion for judgment on the pleadings that the court analyzed under summary judgment standards.

The central issue in the motion was whether Kinsley Group was a franchisee subject to the protections of the CFA. In order to be a franchisee under the CFA, a party must establish that (1) there was an oral or written franchise agreement, (2) it was "substantially associated" with the claimed franchisor and its trademark, and (3) the claimed franchisor "substantially prescribed" the putative franchisee's business pursuant to a marketing plan or system. After considering the evidence, the district court concluded that the plaintiffs were not a franchisee and granted the defendants' motion for judgment on the pleadings.

The court first addressed whether there was an oral or written franchise agreement by analyzing "whether the parties' conduct in addition to their words, constitutes an agreement or arrangement." The court found that although the express no-franchise disclaimer in the agreement was not dispositive given the remedial nature of the CFA, it did "cut against the finding of a franchise relationship."

The court then turned to the "substantially associated" factor. The defendants argued that Kinsley Group was not substantially associated with MWM or its trademark because less than 10 percent of its revenues came from the sale of MWM products. The court noted that other courts had applied a "most or all" standard and required that at least 50 percent of a claimed franchisee's business be derived from its relationship with the claimed franchisor. The plaintiffs argued that a "substantial portion of its business was dedicated to work being performed" under the agreement and that all of KES's revenues came from sales and services under the agreement. The plaintiffs further argued that they had made a substantial investment in the MWM business as part of a long-term strategy. The court was not persuaded by this argument, noting that the plaintiffs cited no cases in which a court has relied upon investment rather than sales and revenue to find a substantial association. The court then considered the limited connection between the plaintiffs' business and the MWM trademark, noting that this factor is "considered in combination with" the sales. The court then found that only a small portion of Kinsley Group's revenue was derived from the MWM business, the parties' relationship was relatively short-lived, Kinsley Group made minimal use of MWM's trademarks, and the majority of its sales were derived from the sale of Kohler products. Accordingly, the court found that the plaintiffs had not established that Kinsley Group was substantially associated with MWM.

Although not required to, the court also considered whether the plaintiffs were operating under a marketing plan or system "prescribed in substantial part" by MWM. The Connecticut Supreme Court has identified a number of factors relevant to making this determination, one of the most significant of which is whether the putative franchisor "possesses power over pricing." Here, MWM had no involvement in the prices that Kinsley Group and KES charged their customers. Although MWM unilaterally set the "wholesale prices" at which they sold the MWM product to the plaintiffs, the court agreed with other cases holding that this fact does not support a finding of substantial control.

Kinsley Group also attempted to establish control based on the requirement that it submit a business plan to MWM and meet certain benchmarks. The court found that although a business plan in which the manufacturer was involved in setting sales targets evidences some control, it did not demonstrate the "requisite degree of control" because the plaintiffs had not shown that the business plan prevented them from "exercising independent judgment over their business." Finally, Kinsley Group argued that MWM exercised undue control because the plaintiffs were required to hire somebody to service a preexisting MWM customer and their personnel had to undergo training in MWM products. The court held that while this may evidence some form of control, it did not amount to a "usurpation" of the claimed franchisee's independent judgment. The court further noted that MWM did not dictate the level of training and that Kinsley rejected MWM's initial proposal for the amount of training that was required.

***Watchung Spring Water Co., Inc. v. Nestle Waters N. Am. Inc.*, Bus. Franchise Guide (CCH) ¶ 15,406, 2014 WL 5392065 (D.N.J. Oct. 23, 2014)**
Plaintiff Watchung Spring Water Co., a bottled water distributor, and defendant Nestle Waters North America Inc., a bottled water manufacturer, entered an exclusive distributorship agreement in 1994 for a territory in New Jersey. In 2014, Nestle sent a termination notice and later proposed a nonexclusive distributorship agreement in the same geographic area. In response, Watchung sued Nestle in the U.S. District Court for the District of New Jersey, seeking a declaratory judgment and injunctive relief and alleging violations of the New Jersey Franchise Practices Act (NJFPA), breach of contract, breach of the implied covenant of good faith and fair dealing, and tortious interference with economic advantage.

On Watchung's motion for a preliminary injunction, the court considered its likelihood of success on the merits of its claims. Watchung argued that it had a high likelihood of success on its claims because the distributorship agreement created a franchise, thereby triggering the application of the NJFPA, which precluded termination of the agreement without sufficient cause. The court held that it was not clear whether a "franchise" existed under the NJFPA. To show that a franchise exists, a plaintiff must establish, among other things, that the plaintiff maintains a "place of business" in New Jersey. The court noted that significant outstanding factual issues existed about whether Watchung's facility constituted a "place of business" under the NJFPA, considering the facility operated predominantly as a warehouse. For this reason, the court could not agree that the distributor had a high likelihood of success and thus declined to grant the preliminary injunction.

At the same time, the court considered Nestle's motion to dismiss. The court concluded without further explanation that the allegations with respect to the NJFPA, breach of contract, breach of the implied covenant of good faith and fair dealing, injunctive relief, and damages were sufficiently well-pled to withstand a motion to dismiss. The court held, however, that Watchung's claim for tortious interference with business advantage failed to allege any conduct corroborating or suggesting malice. Moreover, the court found that granting leave to amend this deficiency would be futile.

***Volvo Trucks N. Am. v. Andy Mohr Truck Ctr.*, Bus. Franchise Guide (CCH) ¶ 15,387, 2014 WL 4794185 (S.D. Ind. Sept. 25, 2014)**

Volvo Trucks North America and Andy Mohr entered into a Volvo dealer sales and service agreement. Mohr alleged that during their negotiations, Volvo represented that if Mohr entered into the dealer agreement, Volvo would grant a Mack Truck dealership to Mohr as soon as Volvo was able to terminate an agreement with a local Mack Truck dealer that had fallen out of favor with Volvo. Mohr later learned that Volvo did not have the right to terminate the dealership agreement with the other dealer. Volvo advised Mohr that in order to become a Mack Truck dealer, he would have to purchase the dealership from the other dealer. The other dealer ultimately later sold the Mack Truck dealership to someone else.

Volvo asserted that Mohr did not perform under the dealer agreement, causing Volvo to lose market presence, and filed suit against Mohr in the U.S. District Court for the Southern District of Indiana. Mohr separately sued Volvo, alleging that Volvo misrepresented the Mack Truck dealership issue and that Volvo failed to provide him with sufficient support as a Volvo dealer. The two cases were consolidated.

The court took up several motions, including: (1) Mohr's motion to file an amended complaint, (2) Volvo's motion for reconsideration of a prior ruling by the court, (3) motions for summary judgment filed by Volvo, and (4) Volvo's motion to limit certain expert testimony.

Volvo argued that Mohr's motion to file an amended complaint should be denied because the amended complaint included a claim for price discrimination under the Indiana Unfair Practices Act (IUPA) and the Indiana Deceptive Franchise Practices Act (IDFPA) and Volvo asserted that Mohr had failed to include such a claim in his original complaint. The court ruled that Mohr was not required to plead every legal theory in his complaint and that the original complaint was broad enough to include price discrimination claims. Volvo also sought to prevent Mohr from adding a bad faith termination claim under the Automobile Dealers Day in Court Act, the IUPA, and the IDFPA. Mohr argued that the claim should be permitted because of newly discovered evidence from the deposition of Volvo's CEO. The court denied this aspect of Mohr's motion to amend his complaint on the grounds that the deposition testimony relied upon by Mohr was taken out of context and did not support the requested amendment.

The motion to reconsider dealt with the court's prior decision finding that Mohr's business entity (Mohr Truck) was a franchise under the Indiana Franchise Act. The issue came down to the "experienced franchise exclusion" under Indiana law, which excludes an entity from the definition of a franchise if the entity has been in the same or similar business as the franchised business for two years prior to entering into the franchise agreement. The court held that this exclusion did not apply under the IDFPA definition of franchise and, therefore, denied Volvo's motion to reconsider.

As to the summary judgment motions, Volvo argued that it was entitled to a declaratory judgment that good cause existed to terminate the dealer agreement. Although Volvo relied on the Indiana Declaratory Judgment Act, the court determined that the federal Declaratory Judgment Act applied. Volvo argued that Mohr's failure to build a new facility was a good faith basis for termination. The court found, however, that the dealer agreement did not include such an obligation, and the integration clause prohibited the court from looking outside the terms of the agreement.

Volvo also argued that it was entitled to summary judgment on Mohr's deceptive practices claim under the IUPA and the IDFPA that were based on Volvo's alleged misrepresentations to Mohr. The court granted Volvo's motion as to these claims, finding that the alleged misrepresentations occurred prior to the formation of the franchise relationship.

Volvo further sought to dispose of Mohr's claim under the Crime Victims Act (CVA), which was based on Mohr's allegation that Volvo's alleged misrepresentation was an unauthorized exercise of control over Mohr's property. The court dismissed Mohr's CVA claim on the grounds that the CVA was not intended to cover breach of contract disputes.

Finally, the court addressed Volvo's motion to exclude the testimony of Mohr's expert. The expert issued a report on the damages related to the alleged misrepresentation and further reserved the right to opine on matters that remained subject to ongoing discovery. Volvo argued that the expert should be precluded from testifying beyond what was in the report. The court denied Volvo's motion, stating that Volvo was essentially seeking an advisory opinion on what the expert might say in a further report and that Volvo was not entitled to such a ruling.

***Richard I. Spiece Sales Co., Inc. v. Levi Strauss NA*, Bus. Franchise Guide (CCH) ¶ 15,405, 19 N.E.3d 345 (Ind. Ct. App. 2014)**

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

FRAUD

***Boese v. Nissan N. Am., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,398, 2014 WL 5765438 (Cal. Ct. App. Nov. 6, 2014)**

In this case, the California Court of Appeal affirmed a trial court's grant of summary judgment in favor of Nissan North America, Inc. on a dealer's claims. Leo Boese entered into an agreement to purchase a Nissan dealership in southern California from another dealer. At the same time, an entity that Boese apparently owned or controlled entered into a dealership agreement with Nissan for the location. Shortly after the transactions closed, Nissan received the preliminary results of a market study recommending that the dealership be relocated. Nissan subsequently adopted the market study and notified Boese of the results, including the recommendation that the dealership be relocated. Nissan did not, however, tell Boese that he was required to move the dealership.

Boese and related entities filed an action in California Superior Court against Nissan and others alleging intentional and negligent misrepresentation, concealment, negligence, and unfair business practices. Nissan filed a motion for summary judgment, which the trial court granted. The plaintiffs appealed.

The plaintiffs' causes of action for intentional and negligent misrepresentation alleged that Nissan falsely represented that the dealership's facilities met or exceeded all of Nissan's requirements and that the dealership had been unprofitable because of "poor management." The plaintiffs' concealment claim alleged that Nissan had disclosed these "facts," but did not disclose that there were prior market studies concluding the dealership location was not "appropriate" and that there was a pending market study. The plaintiffs' negligence claim alleged that Nissan breached a duty of care to the plaintiffs when it sent a letter to the seller of the dealership (prior to the plaintiffs' purchase) advising that the market study was being conducted. The plaintiffs alleged that the notice was defective or had not been properly sent to the seller. The plaintiffs' cause of action for unfair business practices was derivative of their misrepresentation and concealment claims.

With respect to the plaintiffs' misrepresentation claims, Nissan argued that there were no triable issues of material fact whether the representations were false. The plaintiffs argued that an addendum to the dealership agreement addressed the appropriateness of the dealer location and was false. The court disagreed, finding that the addendum dealt only with Nissan's square footage guidelines, not whether the location was appropriate for a dealership, and there was no evidence that it was false. The court also found that the evidence was undisputed, and Boese agreed, that the prior operation of the dealership was subpar. Given this, the court held that an isolated report showing a temporary increase in the prior dealer's sales did not disprove the representation that the dealership was unprofitable due to prior management, noting that there was considerable other evidence establishing that the dealer had sustained net losses.

Under California law, a concealment claim requires a fiduciary duty or other duty to disclose. Nissan argued that it did not have a contractual relationship with the plaintiffs prior to entering into the distributor agreement and that it owed no duty to disclose. The court assumed that there was no fiduciary duty relationship between the parties and analyzed whether the plaintiffs had established a triable issue of fact whether Nissan had a duty to disclose because it had exclusive knowledge of material facts unknown to the plaintiffs, had actively concealed those facts, and had made partial representations but suppressed other material facts. The court found that there was no evidence supporting any of these circumstances and, therefore, there was no duty to disclose.

The court then turned to the plaintiffs' negligence claim. The court found that the plaintiffs had failed to allege a duty of care and that the only duty the plaintiff had actually alleged was a duty to disclose, which the court had rejected. Thus, the court also upheld summary judgment on this claim.

Finally, the court disposed of the plaintiffs' unfair business practice claim on the ground that it was predicated on the plaintiffs' other causes of action, all of which the court had found were barred.

***IB Agric., Inc. v. Monty's Plant Food Co.*, Bus. Franchise Guide (CCH) ¶ 15,391, 2014 WL 4851774 (W.D. Ky. Sept. 26, 2014)**

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

***Fresno Motors, LLC v. Mercedes Benz USA, LLC*, Bus. Franchise Guide (CCH) ¶ 15,396, 771 F.3d 1119 (9th Cir. 2014)**

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

***Schwartzco Enters. LLC v. TMH Mgmt., LLC*, Bus. Franchise Guide (CCH) ¶ 15,420, 2014 WL 6390299 (E.D.N.Y. Nov. 17, 2014)**

Meat House Franchising, LLC (MHF) was established for the purpose of selling franchises for high-end butcheries. Thomas Brown was an officer and managing member of MHF and a co-founder of related entities. Cary Tober was a low-level employee in the Meat House franchise organization. Arnold Schwartz was a surgeon and Tober's uncle. In 2010, Brown and other MHF personnel allegedly leveraged their relationship with Tober to encourage Schwartz to purchase MHF franchise and area developer rights. After a series of communications with Schwartz and an in-person meeting discussing the MHF franchise opportunity, MHF forwarded a franchise disclosure document to Schwartz, who ultimately invested more than $2 million. The only Meat House location that Schwartz's entity opened was in Roslyn, New York, which closed less than ten months after opening.

Schwartz and his related entities first invoked the alternative dispute provisions in the related MHF agreements by sending letters to MHF, Brown, and other MHF-related officers and entities. None of the defendants complied with the provisions. The plaintiffs then filed suit against the defendants in the U.S. District Court for the Eastern District of New York. All of the defendants defaulted, with the exception of Brown, who filed a motion to dismiss the plaintiffs' complaint under Federal Rule of Civil Procedure 9(b) for failure to plead with the requisite particularity. The plaintiffs responded by filing a motion seeking to amend the complaint. The complaint, as amended, alleged twenty-one causes of action, none of which were directed solely against Brown. Rather, the allegations were made against all of the defendants as a "group pleading."

In considering the motion to dismiss, the court first found that the plaintiffs were required to plead causes of action involving fraud with particularity under Rule 9(b), although the other causes of action could be pled more broadly under Rule 8(a). The court also noted that group pleading is permitted under Rule 9(b), but not under Rule 8(a). The court then analyzed each of the causes of action alleged against Brown.

The plaintiffs asserted causes of action for fraud and fraudulent inducement under New York state law. The court found that the plaintiffs' allegations addressed the "who, what, and when" of the alleged scheme, but did not address the "how" or the "why." The court held that the plaintiffs' "kitchen sink" pleading did not "explain the ways [the financial] figures touted by defendants were inflated or distorted" to a degree that met the particularity standard of Rule 9(b). The court further noted that the allegations were primarily made "upon information and belief." The court recognized that a plaintiff often does have access to certain information prior to discovery, but that "this inevitability in fraud cases does not relieve a plaintiff from complying with the heightened *pleading* requirements of Rule 9(b)." The court therefore dismissed the fraud and fraudulent inducement causes of action.

The court next turned to the negligent misrepresentation claim. The court noted that courts in other jurisdictions disagree on whether to apply the Rule 9(b) standard to such a claim, but that the issue was settled in the Second Circuit in favor of Rule 9(b) scrutiny. The court further noted that a negligent misrepresentation claim requires a special relationship between the parties and that such a relationship is more likely to exist if the misrepresented facts were peculiarly within the defendant's knowledge. The court held that that was the case with respect to Brown's knowledge and therefore denied the motion to dismiss the negligent misrepresentation claim.

The court also applied the Rule 9(b) standard to the plaintiffs' breach of fiduciary duty claim because it sounded in fraud. The court noted that Brown was not a signatory to any of the written agreements at issue and that there was no authority that a non-signatory to a contract may be liable for breach of a fiduciary duty arising out of the contract. The court further held that a fiduciary duty is a higher standard than the special relationship discussed above. The court therefore dismissed the breach of fiduciary duty claim. The court also dismissed the plaintiffs' civil conspiracy/fraud claim because they failed to adequately plead the underlying fraud cause of action. The court dismissed the plaintiffs' breach of duty of care claim on the grounds that the plaintiffs were unable to show a duty of care by a non-signatory to the agreement such as Brown. The court also dismissed the plaintiffs' breach of duty of good faith and fair dealing claim on the basis that Brown, a non-signatory, was not in privity with any of the plaintiffs.

The court next analyzed and dismissed the plaintiffs' gross negligence claim on the ground that it failed to sufficiently allege facts against Brown supporting the claim. Specifically, unlike causes of action based on fraud subject to the heightened pleading standard of Rule 9(b), a gross negligence claim is subject to the general pleading standard under Rule 8(a). For this reason, the court held, the plaintiffs were not permitted to rely on "group" pleading.

The court next analyzed the plaintiffs' claims under the New York Franchise Sales Act (NYFSA). Under the pleading standard set forth in either Rule 9(b) or 8(a), the court found that the plaintiffs had adequately pled a claim against Brown under NYFSA Section 683 for failure to make proper disclosures. The court also held that the plaintiffs' allegations stated a claim under NYFSA Section 687 for making false or materially misleading oral and written misrepresentations. The court noted that the law was unclear whether group pleading was permitted to state a claim under the NYFSA, but did not rule on that specific issue.

The court then analyzed the plaintiffs' claim that Brown's acts or practices were materially misleading under the New York Consumer Protection Act. The court held that the Rule 8(a) general pleading standard applied. However, the court found that the plaintiffs had failed to state a claim because they had not shown that Brown's alleged bad acts injured the public generally, rather than simply caused the plaintiffs' injury in a private contract dispute.

Finally, the court analyzed the plaintiffs' claim that Brown's actions were unfair or deceptive under the New Hampshire Consumer Protection Act (NHCPA). The court dismissed the claim on the grounds that the false and misleading actions alleged against Brown were not the specific types of actions giving rise to a claim under the NHCPA.

***Prof'l Shredding of Wis., Inc. v. ProShred Franchising Corp.*, Bus. Franchise Guide (CCH) ¶ 15,423, 2013 WL 9981203 (S.D.N.Y. Sept. 5, 2013)**

James and Teresa Klemes entered into a franchise agreement with franchisor ProShred Franchising Corp. to operate a paper shredding business in North Carolina. The business was unsuccessful, and the Klemes filed a complaint against ProShred in the U.S. District Court for the Southern District of New York alleging fraudulent and negligent misrepresentation, violations of the North Carolina Business Opportunities Sales Act, violations of the North Carolina Deceptive Trade Practices Act, breach of contract, and breach of implied covenant of good faith and fair dealing. The claims were based on various statements made by a ProShred representative prior to the execution of the franchise agreement. These statements included representations on how many franchises the program would have in the future; that ProShred would provide sufficient financing to its franchisees; that ProShred franchisees could expect positive return on their investment in eighteen months; that the ProShred system was "proven and perfected"; that ProShred imposed a minimum performance level on franchisees, which the Klemes in this case interpreted to mean that that level was attainable; that the Klemes would be debt-free in forty-eight months; and that the Klemes could expect to have thirty sales a month per salesperson.

The court analyzed each of these statements and concluded that none of them supported a claim under any of the causes of action alleged by the Klemes. The court held that the statements were either predictions of the future or "puffery." As to the predictions, the court found that future predictions could not form the basis for either fraudulent or negligent misrepresentation claims that could arise from future predictions. Rather, such claims had to be based on the misrepresentation of current or past facts. The court held that because the common law claims were not viable, the North Carolina statutory claims also were not supported by the facts alleged.

GOOD FAITH AND FAIR DEALING

***Volvo Constr. Equip. N. Am., LLC v. Clyde/West, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,415, 2014 WL 6886679 (W.D. Wash. Dec. 3, 2014)**
This case is discussed under the topic heading "Termination and Nonrenewal."

***G.L.M. Sec. & Sound, Inc. v. LoJack Corp.*, Bus. Franchise Guide (CCH) ¶ 15,392, 2014 WL 4675854 (E.D.N.Y. Sept. 19, 2014)**
This case is discussed under the topic heading "Contract Issues."

INJUNCTIVE RELIEF

***DXP Enters., Inc. v. Goulds Pumps, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,395, 2014 WL 5682465 (S.D. Tex. Nov. 4, 2014)**
This case is discussed under the topic heading "Arbitration."

***JTH Tax, Inc. d/b/a Liberty Tax Serv. v. Geraci*, Bus. Franchise Guide (CCH) ¶ 15,382, 2014 WL 4955373 (E.D. Va. Oct. 2, 2014)**
Liberty Tax Service sent a termination notice to a franchisee for insolvency and failure to pay certain amounts owed. The franchisee defaulted on its promissory notes, and Liberty initiated a lawsuit, alleging three counts of breach of contract and seeking (1) certain advertising and royalty fees, (2) an injunction prohibiting the franchisee from using Liberty's marks, (3) enforcement of a noncompete clause, (4) damages in the amount currently due on the unpaid promissory notes and accounts receivable, and (5) attorney fees. The franchisee failed to timely answer or respond to the franchisor's complaint or motion for default judgment. Thus, the court granted default judgment, the requested damages (with the exception of attorney fees, on which the court deferred ruling pending receipt of an accounting), and a permanent injunction based on the four-factor test set forth in *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

***Romper Room, Inc. v. Windmark Corp.*, Bus. Franchise Guide (CCH) ¶ 15,369, 2014 WL 5106887 (E.D. Wis. Oct. 10, 2014)**
Romper Room, Inc. entered into franchise agreements with Windmark Corporation to operate two Once Upon A Child (OUAC) stores in Wisconsin.

Pursuant to the terms of the agreements, Windmark had the right to terminate the agreements in the event that the franchisee or any of its managers, directors, officers, or majority shareholders were convicted of or pled guilty to a crime "which adversely impacts upon the reputation of the franchise business" or the franchisee was "involved in any act or conduct which materially impairs the goodwill associated with the name Once Upon A Child or any of the Marks or the Business System." After operating the OUAC stores for more than ten years, Greg Gering, one of the principals of Romper Room, was convicted of three counts of misdemeanor theft in connection with collecting government subsidized health insurance funds to which he was not entitled. Gering was sentenced to thirty days in jail and ordered to pay $30,000 in fines. Gering's conviction was reported in the newspaper, and several days later Windmark served a notice of termination for cause without an opportunity to cure.

The plaintiffs filed suit in the U.S. District Court for the Eastern District of Wisconsin seeking to enjoin the termination of the franchise agreements. The plaintiffs claimed that the pending termination violated the Wisconsin Fair Dealership Law (WFDL) because it was not based on good cause and, even if good cause existed for the termination, Windmark had violated the WFDL by failing to provide sixty days' opportunity to cure as required by the statute. The court granted the plaintiffs' motion.

The court first addressed the irreparable harm factor, finding that the plaintiffs would suffer irreparable harm absent an injunction because they would be compelled to close their business, would be bound by a covenant not to compete, had long-term leases for both stores, had no other source of income, and would likely be unable to pay the attorney fees and costs required to pursue their claims. The court further found that it would be difficult to determine the nature or amount of the losses that the plaintiffs would suffer in the absence of an injunction, thereby "mak[ing] it difficult, if not impossible" to determine damages in the event the plaintiffs were to prevail. Thus, the court also found that the plaintiffs would have no adequate remedy at law.

The court then considered whether the plaintiffs were likely to succeed on their claims, concluding that they had established at least "some likelihood on the success of the merits." Notwithstanding some news media articles and social media regarding Gering's conviction, the court found that Windmark had provided no evidence establishing that Gering's conviction had "materially" impaired the reputation of its business or the goodwill associated with the OUAC name or trademark. Although it was not required to reach the issue given its finding that it could not conclude based on the record before it that the termination was for good cause, the court further found that the notice of termination violated the WFDL because it did not provide the plaintiffs with a sixty-day opportunity to cure. Although Windmark argued that the breach was incurable, the court disagreed and suggested that Gering could have cured the default by transferring his interest in the franchises to his wife or another family member.

Finally, the court analyzed the nature and degree of the plaintiffs' injuries and the likelihood of the prevailing on the merits against the possible harm to Windmark. The court was persuaded that the harm to the plaintiffs was significant, including the likely loss of their other ongoing business and that the thirty-two employees who worked at the plaintiffs' OUAC stores would lose their jobs. The court concluded that Windmark had already sustained whatever harm it was going to sustain, because the publicity regarding Gering's conviction had passed and no additional damage to Windmark's name or trademarks was likely to occur. Additionally, the plaintiffs were continuing to pay amounts owed under the franchise agreements and otherwise comply with their contractual obligations.

***Derma Pen, LLC v. 4EverYoung Ltd.*, Bus. Franchise Guide (CCH) ¶ 15,413, 773 F.3d 1117 (10th Cir. Dec. 9, 2014)**

In this case, the Tenth Circuit reversed an order by the U.S. District Court of the District of Utah, which had denied a motion for preliminary injunction. Derma Pen, LLC and 4EverYoung Limited entered into a distribution agreement regarding the sale of a micro-needling device. Pursuant to the agreement, Derma Pen had the exclusive right to use the Derma Pen trademark in the United States and 4EverYoung had the right to use the trademark in the rest of the world. The distribution agreement also provided 4EverYoung with a right of first refusal to purchase Derma Pen's trademark rights in the event the agreement was terminated.

Derma Pen terminated the agreement and 4EverYoung attempted to exercise its right to purchase Derma Pen's trademark rights. 4EverYoung sought financial information from Derma Pen in order to determine the value of the trademark, but Derma Pen refused to provide the requested information. As a result, "no money ever exchanged hands." Nevertheless, 4EverYoung started using the Derma Pen trademark to sell the micro-needling device in the United States.

Derma Pen filed suit asserting claims for trademark infringement and unfair competition under the Lanham Act. Derma Pen sought a preliminary injunction, which the district court denied on the ground that Derma Pen was not likely to prevail on the merits. On appeal, the Tenth Circuit, reviewing the district court's rulings de novo, reversed.

The parties agreed that Derma Pen owned the rights to the trademark while the agreement was in place. 4EverYoung argued, however, that Derma Pen's rights had terminated upon termination of the agreement or, alternatively, that 4EverYoung had a concurrent right to use the trademark in the United States. The Tenth Circuit quickly dispensed with 4EverYoung's first argument, finding that Derma Pen continued to have an interest in the trademark after termination of the agreement. The court concluded that the provision requiring Derma Pen to offer to sell the trademark to 4EverYoung upon termination of the agreement made sense only if Derma Pen remained the owner of the trademark after termination because a trademark could only be sold by its owner. Because no sale had occurred, the court found that Derma Pen likely remained the owner of the U.S. trademark rights.

The court was also unpersuaded by 4EverYoung's alternative argument that it had concurrent rights to use the trademark in the United States. 4EverYoung argued that a provision in the agreement providing that "[t]he parties agree that the Distributors of the U.S. 'Derma Pen' trademark will not infringe with 4EverYoung's use of the 'Derma Pen' trademark, and vice versa" permitted such concurrent uses. The court found, however, that 4EverYoung's interpretation of this provision was at odds with other provisions in the agreement, including the provisions dividing up the territorial restrictions on the use of the trademark and requiring Derma Pen to offer to sell 4EverYoung the right to use the trademark in the United States upon termination of the agreement. The court found that these provisions would not make sense if, as 4EverYoung argued, it had concurrent rights to use the trademark.

Finally, 4EverYoung claimed that Derma Pen had breached the distribution agreement by not selling the U.S. trademark rights. The court held that such a breach, even if true, did not result in Derma Pen losing its property interest in the trademark.

Having concluded that Derma Pen was likely to prevail on the merits of its Lanham Act claims, the court remanded the matter to the district court to consider the other preliminary injunction factors.

***JTH Tax, Inc. d/b/a Liberty Tax Serv. v. Geraci*, Bus. Franchise Guide (CCH) ¶ 15,382, 2014 WL 4955373 (E.D. Va. Oct. 2, 2014)**
This case is discussed under the topic heading "Arbitration."

***Watchung Spring Water Co., Inc. v. Nestle Waters N. Am. Inc.*, Bus. Franchise Guide (CCH) ¶ 15,406, 2014 WL 5392065 (D.N.J. Oct. 23, 2014)**
This case is discussed under the topic heading "Definition of Franchise."

***Yonkers Cent. Ave. Snack Mart, Inc. v. NY Fuel Distrib., LLC*, Bus. Franchise Guide (CCH) ¶ 15,403, 581 F. App'x 103 (2d Cir. Oct. 31, 2014)**
The primary issue in this case was whether, under the Petroleum Marketing Practices Act (PMPA), the defendant New York Fuel Distributors, LLC (NYFD) could terminate its agreement with the plaintiff Yonkers Central Avenue Snack Mart after Yonkers fell into arrears. Yonkers moved the district court for a preliminary injunction under the PMPA barring the termination of its agreement with NYFD. The U.S. District Court for the Southern District of New York denied Yonkers' motion for a preliminary injunction, and Yonkers appealed to the Second Circuit.

Under the PMPA, the court "shall" grant a preliminary injunction if the franchisee shows: (1) "the franchise of which he is a party has been terminated"; (2) "there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation"; and (3) "the court determines that, on balance, the hardships imposed upon the franchisor by the issuance of such preliminary injunction will be less than the hardship which would be imposed upon such franchisee if such preliminary injunctive relief were not granted." Reviewing these factors, the Second Circuit held that the district court did not abuse its discretion in denying Yonkers' motion for a preliminary injunction because it was undisputed that Yonkers was in arrears on payments owed to NYFD.

***United States v. ITS Fin., LLC*, Bus. Franchise Guide (CCH) ¶ 15,416, 2014 WL 6610420 (6th Cir. Nov. 21, 2014)**

ITS Financial was the franchisor of a tax preparation franchise that the IRS contended violated Section 6701 of the Internal Revenue Code, which prohibits causing the understatement of tax liability. The government sought an injunction against ITS and its affiliated entities. Initially, the government and ITS negotiated and stipulated to a preliminary injunction against filing tax returns using pay stubs, charging certain fees for tax preparation, and offering direct refund anticipation loans. At trial, the U.S. District Court for the Southern District of Ohio issued a permanent injunction against ITS and its co-defendant affiliates enjoining them from operating or being involved in any way with the preparation of tax returns. Section 7402 of the Internal Revenue Code authorizes the issuance of such injunctive relief. ITS appealed the injunction on the ground that Section 7402 does not authorize the court to enjoin a tax preparation franchisor not directly involved in the preparation of tax returns.

The Sixth Circuit held that the permanent injunction was appropriate because the district court specifically found that ITS, as franchisor (along with the ITS founder Ogbazion), intentionally and explicitly trained franchisees to charge customers deceptive and exorbitant fees, lure low-income customers with unavailable tax refund anticipation loans, and file tax returns without customers' permission. The Sixth Circuit also relied on the district court's finding that ITS obstructed and circumvented tax laws through fraudulent applications for and use of electronic filer identification numbers.

The court also held that the injunction was not overly broad, unprecedented, or ambiguous. On the other hand, the court agreed that defendant Tax Tree was not a "tax preparer," so it could not be enjoined as a tax preparer under Section 7402. In summary, the court agreed with the district court that the permanent injunction was appropriate because ITS was likely to violate the federal tax laws again.

7-*Eleven, Inc. v. Grewal*, Bus. Franchise Guide (CCH) ¶ 15,417, 2014 WL 6604717 (D. Mass. Nov. 20, 2014)

This case is discussed under the topic heading "Trademark Infringement."

JURISDICTION

***Premium Beverage Supply, Ltd. v. TBK Prod. Works, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,388, 2014 WL 4698429 (Ohio Ct. App. Sept. 23, 2014)**

A terminated beer distributor sued a beer manufacturer, alleging claims under the Ohio Alcoholic Beverages Franchise Act and seeking a declaration of its rights and responsibilities under the Act. The trial court granted summary judgment in favor of the distributor but did not address any of the specific questions about the distributor's rights. The Ohio Court of Appeals held that, although the trial court apparently made some legal determinations, its failure to state the rights and responsibilities of the parties involved in a declaratory judgment action meant the trial court's judgment was not an appealable final order.

***Dunkin' Donuts Franchised Rests. LLC v. Nader*, Bus. Franchise Guide (CCH) ¶ 15,372, 2014 WL 4662322 (D. Mass. Sept. 17, 2014)**

Anton Nader controlled nine corporate entities, each of which was a Dunkin' Donuts franchisee. Dunkin' Donuts filed a lawsuit against Nader and these entities in the U.S. District Court for the District of Massachusetts alleging violations of the Lanham Act. Following the filing of the lawsuit, Dunkin' Donuts alleged that it learned during a review of corporate documents that Nader transferred interests in the corporate entities—and thus the Dunkin' Donuts franchises owned by them—to an individual named Leonard Tallo without Dunkin' Donuts' knowledge or consent. Dunkin' thereafter filed a motion seeking to amend its complaint to add twenty-four more corporate defendants, each purportedly controlled by Nader and associated with other Dunkin' Donuts franchise locations. Dunkin' Donuts alleged that Tallo was a minority interest holder in each of the additional corporate defendants.

The defendants opposed the amendment on several grounds. First, they argued that the attempted amendment was untimely because it was filed after a deadline in the joint discovery plan and pretrial schedule filed by the parties. Holding that the deadline was not adopted by the court, the court allowed the amendment because the parties had not embarked on any significant discovery and the court had discretion under Federal Rule of Civil Procedure 15(a) to freely grant leave to amend.

The defendants next argued that the amendment was futile because the New Jersey Franchise Practices Act (NJFPA) mandated that any attempt to terminate a New Jersey franchise had to be filed in New Jersey. The court held that the NJFPA does not include such a requirement.

Next, the defendants attempted to invoke the first-to-file rule based on a case filed by the defendants in New Jersey state court. The court noted that the first-to-file rule applies to two proceedings pending in federal court. The court also noted that the defendants actually filed the New Jersey case after the original complaint filed by Dunkin' Donuts.

Finally, the defendants asserted statute of limitations arguments based on an allegation that Dunkin' Donuts knew about Tallo's interests in 2008 when Dunkin' Donuts invoked its right to review documents pertaining to twenty-nine Dunkin' Donut shops owned by entities controlled by Nader. Dunkin' Donuts responded that it did not learn of Tallo's interests until 2012. The court determined that it needed more facts related to the 2008 review before it could decide this issue. The court therefore held that the statute of limitation arguments were premature and also did not provide a basis for denying Dunkin' Donuts' motion to amend.

***Torres v. CleanNet, U.S.A., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,393, 2014 WL 5591037 (E.D. Pa. Nov. 4, 2014)**

Eddy Torres, who was a franchisee of cleaning service franchisor CleanNet U.S.A., Inc., alleged that CleanNet failed to provide him with the amount of billings required under the franchise agreement. When Torres sought a refund of the franchise fee, CleanNet refused. Torres subsequently brought a class action suit against CleanNet and several of its area operators under Pennsylvania statutory and common law, alleging that CleanNet improperly classified its franchisees as independent contractors while simultaneously asserting an allegedly significant amount of control over all aspects of the franchisee's business. CleanNet removed the case to the U.S. District Court for the Eastern District of Pennsylvania based on the Class Action Fairness Act of 2005 (CAFA). CleanNet also filed a motion before the Judicial Panel of Multidistrict Litigation (MDL Panel) seeking to transfer the case and centralize it with cases brought by franchisees pending in the U.S. District Court for the Northern District of Illinois and in the U.S. District Court for the Northern District of California. The MDL Panel denied the motion to transfer on the grounds that, although the cases involved similar claims by franchisees, they also involved different CleanNet area operator defendants and different causes of action under state law. The MDL Panel also noted that duplicative discovery would be minimized because the parties in the various actions had agreed to coordinate discovery.

Torres subsequently filed a motion seeking to remand the matter to state court based on two exceptions to subject matter jurisdiction under CAFA: (1) the home state exception and (2) the local controversy exception. The home state exception requires a federal court to decline the exercise of subject matter jurisdiction under CAFA where "two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed." The parties disputed whether CleanNet was a "primary" defendant. Torres argued that the area operators were primary defendants and that CleanNet was a secondary defendant. In deciding this issue, the court considered the following factors, whether CleanNet: (1) was the "real target" of Torres' allegations; (2) had potential exposure to a significant portion of the class; and (3) would sustain a substantial loss as compared to other defendants if found liable. The court noted that Torres named CleanNet as a defendant in every count of his complaint and sought to hold CleanNet directly liable for every alleged violation. The court further noted that, if Torres prevailed, CleanNet would sustain the greatest loss because it would be deemed the "mastermind of the scheme and a joint employer of all defendants." Therefore, the court held that CleanNet was a primary defendant and that the home state exception was inapplicable.

The local controversy exception requires a district court to refrain from asserting subject matter jurisdiction under CAFA where, among other factors, no other class action asserting the same or similar allegations against any of the defendants has been filed in the preceding in three years. CleanNet argued that the exception was not met because of the other class actions pending in Illinois and California. The court determined that "no other class action" was to be defined narrowly solely to further the purpose of the exception, which is to ensure that defendants did not face copycat, or near copycat, suits in multiple jurisdictions. The court concluded that the other cases qualified as "other class actions" because in all three cases the plaintiffs asserted that CleanNet controlled the operations of its franchisees nationwide and improperly classified them as independent contractors, even though the actual causes of action in the various cases were based in different state statutory and common laws. Therefore, the court held that the local controversy exception was also not met and denied the motion to remand.

LABOR AND EMPLOYMENT

Saleem v. Corporate Transaction Grp., Ltd., Bus. Franchise Guide (CCH) ¶ 15,373, 2014 WL 4626075 (S.D.N.Y. Sept. 16, 2014)

The plaintiffs, who worked as limousine service drivers pursuant to franchise agreements, sued the defendants, limousine service franchisors and their affiliates, alleging violations of the Fair Labor Standards Act (FLSA) and the New York Labor Law (NYLL). The plaintiffs complained that the defendants failed to pay them overtime as required by the statutes. The U.S. District Court for the Southern District of New York conditionally certified a collective action under the FLSA, but denied class certification under NYLL. On the parties' cross-motions for summary judgment, the district court analyzed whether the drivers were "employees" or "independent contractors" under the multifactor tests applicable to each statute, considering the economic reality of the employment relationship and "whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll, and (5) was on a fixed schedule."

With respect to the FLSA claims, the court found that the defendants exercised limited control over the drivers, who were free to work for other car services or independently, despite the dress code and limited monitoring and discipline of drivers. Moreover, the court held that the drivers had the opportunity for profit or loss and investment in each of their franchisees and that the franchise agreements governed the terms of the respective relationships. Accordingly, the court dismissed the FLSA claims because the totality of circumstances weighed in favor of classifying the plaintiffs as independent contractors, not employees.

In its analysis of the NYLL, the court acknowledged that a finding of whether a person is an employee or an independent contractor under the NYLL has never been inconsistent with a determination under the FLSA. However, the court analyzed each statute separately. As with the FLSA claims, the court primarily focused on the degree of control (or lack thereof) the purported employer exercised and found in favor of independent contractor status. Under both analyses, the court weighted heavily the fact that the franchisors and affiliates may have had the right to exert more control and restrict competition but did not exercise that right. Thus, the court granted the defendants' motion for summary judgment and denied the plaintiffs' partial motion for summary judgment. The court amended the order to restrict the application of the dismissal of the NYLL claim only to the named plaintiffs, specifically excluding the opt-in plaintiffs based on the language of the opt-in consent-to-join form.

NONCOMPETE AGREEMENTS

Everett v. Paul Davis Restoration, Inc., Bus. Franchise Guide (CCH) ¶ 15,399, 771 F.3d 380 (7th Cir. 2014)

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

ORAL AGREEMENTS

Kroshnyi v. U.S. Pack Courier Servs., Inc., Bus. Franchise Guide (CCH) ¶ 15,400, 771 F.3d 93 (2d Cir. Nov. 4, 2014)

The plaintiffs, who worked as delivery drivers for the defendants' package delivery companies, brought a lawsuit against the defendants alleging violations of the Fair Labor Standards Act (FLSA), Federal Insurance Contributions Act (FICA), New York Labor Law (NYLL), and New York Franchise Sales Act (FSA), in addition to other contract-related claims. The plaintiffs alleged that the defendants orally agreed to pay them a 60 percent commission per delivery, which the defendants denied. The plaintiffs further alleged that, despite the defendants' attempt to categorize them as independent contractors for tax and labor law purposes, the defendants treated them as employees and should have categorized them as such under the FLSA and NYLL.

On the defendants' motion, the U.S. District Court for the Southern District of New York granted summary judgment in favor of the defendants on the FLSA, FICA, NYLL, and breach of contract claims. The FSA claims remained. Specifically, the plaintiffs alleged that the defendants violated FSA Section 683(1), which prohibits a franchisor from selling a franchise without first registering an offering prospectus, and Section 687(2), which prohibits fraud in connection with the offer or sale of a franchise. Following a trial on the FSA claims, a jury awarded damages to the plaintiffs.

On cross-appeals, the Second Circuit considered, among other things, whether the FSA's statute of limitations barred the plaintiffs' claims and whether the court erred in granting summary judgment on the plaintiffs' breach of contract and NYLL claims. The appellate court held that the statute of limitations barred six of the eight plaintiffs' FSA claims, noting that the FSA statute of limitations runs from the inception of plaintiffs' franchise relationship with defendants, regardless of the purported transfer of the relationship. It affirmed the verdict on the remaining two plaintiffs' FSA claims, stating that the jury's finding reflected its implicit factual findings concerning the calculation of those plaintiffs' net profits and losses.

In addition, the court held that the statute of frauds did not bar the plaintiffs' NYLL and breach of contract claims because New York courts generally view oral employment agreements without a fixed duration, like the one here, as outside of the statute of frauds because they could be terminated within one year. The court also determined that the plaintiff-drivers raised a genuine issue of fact regarding whether they voluntarily and intentionally abandoned their right to collect 60 percent commissions. As a result, the Second Circuit vacated and remanded to the district court the breach of contract and violation of NYLL claims.

PETROLEUM MARKETING PRACTICES ACT

***Yonkers Cent. Ave. Snack Mart, Inc. v. NY Fuel Distrib., LLC*, Bus. Franchise Guide (CCH) ¶ 15,403, 581 F. App'x 103 (2d Cir. Oct. 31, 2014)**
This case is discussed under the topic heading "Injunctive Relief."

STATE DISCLOSURE/REGISTRATION LAWS

***A Love of Food I, LLC v. Maoz Vegetarian USA, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,384, 2014 WL 4852095 (D.D.C. Sept. 30, 2014)**
Franchisor Maoz Vegetarian USA, Inc. and franchisee A Love of Food I, LLC (ALOF) entered into a franchise agreement whereby ALOF was authorized to open a vegetarian restaurant in Washington, D.C. ALOF opened the restaurant in 2009, but went out of business less than two years later. ALOF alleged that it sustained losses in excess of $900,000 related to the venture. ALOF sued Maoz in the U.S. District Court for the District of Maryland. The Maryland district court subsequently transferred the case to the U.S. District Court for the District of Columbia on the ground that the Maryland district court did not have personal jurisdiction over Maoz.

ALOF alleged that Maoz had violated Maryland and New York franchise laws by: (1) failing to register the franchise offering statement in either state; (2) failing to provide the statement to ALOF in a timely manner; (3) making statements about ALOF's future earnings, despite disclaiming the use of such statements; and (4) making materially false statements regarding initial start-up expenses for the restaurant.

The court addressed each of these claims in connection with the parties' cross-motions for summary judgment. The court performed a detailed analysis of the background facts, noting that the parties disputed almost every fact. However, it was undisputed that Maoz did not register in either Maryland or New York.

The court concluded that the Maryland Franchise Registration and Disclosure Law (MFRDL) applied because ALOF's principal place of business was in Maryland and also because ALOF's principal, who signed the franchise agreement on its behalf, was a Maryland resident. The court also concluded that the New York Franchise Sales Act (NYFSA) applied because Maoz's principal was in New York when he e-mailed the offering prospectus and proposed franchise agreement to ALOF's principal.

The court then turned to analyzing each of ALOF's claims under the MFRDL. First, the court concluded that Maoz was in violation of the MFRDL for failing to register. Maoz argued that the MFRDL could not apply because ALOF had not been formed as of the offer to sell the franchise. However, because ALOF was in existence at the time the parties executed the franchise agreement, the court concluded that Moaz violated the MFRDL for failing to register. The court went on to note that ALOF did not show any harm related to the failure to register. Rather, it was clear from the record that ALOF was aware of the information in the unregistered offering prospectus. Moreover, the record showed that ALOF was responsible for much of the damages it sustained by, for example, picking a location that required substantial build-out and historical building permits and involved costly disputes with the landlord. Therefore, the court concluded that Maoz was in "technical" violation of the MFRDL for failing to register, but that ALOF was not entitled to damages. For the same reasons, the court refused to rescind the franchise or otherwise award restitution to ALOF.

The court next turned to ALOF's arguments that Maoz was in violation of the MFRDL for the untimely disclosure of the offering prospectus. While the parties disputed the timeline of events, the court noted that even if the disclosure was untimely, the MFRDL does not provide private litigants with a cause of action based on untimely disclosure.

The court then addressed ALOF's assertions that Maoz violated the MFRDL by making materially false assertions regarding the start-up cost estimates. The court held that it was an issue of fact for the jury to determine whether the estimated initial start-up costs set forth in the offering prospectus were false and whether ALOF actually relied upon the false statements. There was also an issue of fact regarding a subsequent offering prospectus showing higher start-up costs that was never provided to ALOF.

ALOF also alleged that Maoz made statements of future earnings but then disclaimed in the offering prospectus that any such statements were made in violation of the MFRDL. The court held that this assertion was based on fraud and that ALOF had failed to plead the purported fraud with sufficient particularity as required by Federal Rule of Civil Procedure 9(b).

The court next focused on each of ALOF's claims under the NYFSA, which mirrored the MFRDL claims. The court reached the same conclusion with the exception of ALOF's allegation that Maoz violated the NYFSA for making an untimely disclosure. Unlike the MFRDL, the NYFSA does allow for a private right to sue for the violation. The court granted summary judgment in favor of ALOF on this point, but found that ALOF had not shown any damages related to that claim.

The court also addressed whether Maoz's failure to register in New York was excused by the "isolated sales exception," which excuses a franchisor from registering if the sale of a single franchise pursuant to an offer is directed by the franchisor to not more than two people. The court concluded that the exception did not apply because Maoz had plans to expand the franchise concept well beyond the one offered to ALOF. Again, however, the court ruled that ALOF failed to show any damages related to this "technical" violation.

Finally, the court addressed ALOF's common law fraud claim based on the alleged false estimate of start-up costs provided by Maoz to ALOF. The court determined that under District of Columbia common law, there remained issues of fact on this claim as well.

STATUTE OF LIMITATIONS

***Kroshnyi v. U.S. Pack Courier Servs., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,400, 771 F.3d 93 (2d Cir. Nov. 4, 2014)**

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

STATUTORY CLAIMS

***Tri Cnty. Wholesale Distrib., Inc. v. Labatt USA Operating Co., LLC*, Bus. Franchise Guide (CCH) ¶ 15,425, 2014 WL 7014716 (S.D. Ohio Dec. 11, 2014)**

Plaintiffs Tri County Wholesale Distributors, Inc. and Bellas Company entered into distribution agreements with Labatt USA Operating Co., LLC pursuant to which they were granted an exclusive and indefinite right to distribute certain brands of beer and alcohol in their respective territories. Unrelated entities manufacture the Labatt USA brands on behalf of Labatt USA, which does not own or operate brewing facilities and does not brew any alcoholic beverages. Labatt USA was wholly owned by North American Breweries Holdings, LLC (NAB Holdings). In turn, NAB Holdings was owned by three related entities (the KPS entities). In 2012, Cerveceria Costa Rica, S.A. (CCR) acquired 100 percent of the KPS entities' membership interests in NAB Holdings (KPS/CCR transaction). As part of that transaction, all of the KPS entities' assets were transferred to CCR or one of its affiliates. One of CCR's affiliates was subsequently merged into NAB Holdings, with NAB Holdings being the surviving entity. Below the level of NAB Holdings, the various operating entities did not change. Further, the agreements between the plaintiffs and Labatt USA remained in effect, and the plaintiffs continued to order products from Labatt USA and were invoiced by Labatt USA.

In 2013, CCR gave written notice to the plaintiffs of its intent to terminate its distribution agreements pursuant to the "successor manufacturer" provision in the Ohio Alcoholic Beverages Franchise Act. The plaintiffs filed an action in the U.S. District Court for the Southern District of Ohio alleging breach of contract and seeking a declaration that (1) the defendants were prohibited from terminating the plaintiffs' agreements with Labatt USA; or (2) to the extent the Act permitted such termination, it would constitute an unconstitutional taking as applied to their circumstances. The plaintiffs filed a motion for preliminary injunction seeking to enjoin the termination of their agreements. The court granted the motion on the limited basis that the question of whether a successor manufacturer could terminate a written franchise agreement (rather than just an oral franchise agreement) had been accepted for review by the Ohio Supreme Court. Otherwise, the court found that the plaintiffs were unlikely to succeed on the merits of their claims. The Ohio Supreme Court subsequently issued an opinion finding that a "successor manufacturer" may terminate a written franchise agreement without cause. The court then vacated its preliminary injunction order and the parties filed cross-motions for summary judgment.

The parties' motions turned on the issue of whether CCR was a "successor manufacturer" within the meaning of the Act. Pursuant to Section 1333.85(D), a successor manufacturer is permitted to terminate a franchise without just cause if it provides notice of the termination within ninety days of an acquisition pursuant to which it acquired "all or substantially all of the stock or assets of another manufacturer." The Act does not, however, define successor manufacturer. The plaintiffs argued that CCR was not a successor manufacturer and, therefore, could not terminate the distribution agreements without cause. CCR argued that the plaintiffs' claims should be rejected under the law-of-the-case doctrine or, alternatively, that CCR should be found to be a successor manufacturer. The court ultimately found that CCR was a successor manufacturer and, therefore, granted CCR's motion for summary judgment and denied the plaintiffs' motion.

The defendants argued that because of the court's prior determination that the plaintiffs did not have a likelihood of success on the merits, summary judgment should be granted in the defendants' favor. The court disagreed, noting that the law-of-the-case doctrine typically does not apply to preliminary injunction decisions and that the court was not bound by its prior findings.

The court then proceeded to address whether CCR was a successor manufacturer. The plaintiffs argued that CCR was not a "successor" because the KPS/CCR transaction was a "remote, parent-holding company stock transaction" and Labatt USA remained the licensed manufacturer. The plaintiffs also argued that CCR was not a "manufacturer" because it does not "manufacture" or "supply" any alcoholic beverages, is not registered to manufacture or supply alcoholic beverages as required by Ohio law, and is not the entity that enters into agreements with the Ohio distributors subsequent to the transaction. The defendants argued that CCR was a "successor manufacturer" under the Act based on a plain reading of the statute and because it had acquired "all of the stock" in Labatt USA.

The court first addressed the plaintiffs' argument that CCR was not a "successor" because the franchise agreements between Labatt USA and the plaintiffs remained in place after the KPS/CCR transaction. Relying on the Ohio Supreme Court's recent decision in *Esber Beverage Co. v. Labatt USA Operating Co.*, the court found that continuation of a written distribution agreement does not ipso facto disqualify CCR from being a successor manufacturer under the Act. The court also carefully considered the legislative history of the Act, finding that the "evolution of the statute" supported the interpretation that a successor manufacturer is permitted to "terminate" a franchise agreement even if the agreement "carries over" as a result of the transaction. Next, relying on the Ohio appellate court's ruling in *Esber*, the court rejected the plaintiffs' argument that because Labatt USA's corporate structure had not changed after the KPS/CCR transaction, CCR was not a "successor."

Finally, the court turned to the plaintiffs' argument that CCR was not a "manufacturer" because CCR did not actually "manufacture" alcoholic beverages. Again relying on the Ohio appellate court's decision in *Esber*, the court disagreed with the plaintiffs and found that a manufacturer is one that "manufactures or supplies" or is in the "business of manufacturing or supplying" alcoholic beverages to distributors. This, according to the court, was broad enough to cover CCR. In reaching this decision, the court was persuaded by the unrebutted testimony of one of Labatt USA's key employees, who (1) confirmed that CCR had ultimate "business making decisions" and had taken "tangible steps" to exercise to such authority, including hiring a third-party consultant to evaluate the business and develop business plans; and (2) cited Labatt USA's management reports to CCR's management.

***Volvo Constr. Equip. N. Am., LLC v. Clyde/West, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,415, 2014 WL 6886679 (W.D. Wash. Dec. 3, 2014)**
This case is discussed under the topic heading "Termination and Nonrenewal."

***Volvo Constr. Equip. N. Am., LLC v. Clyde/West, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,407, 2014 WL 5365454 (W.D. Wash. Oct. 20, 2014)**

Clyde/West, Inc. entered into a dealer agreement with Volvo Construction Equipment of North America, LLC to sell heavy construction equipment. The parties' relationship soured and Volvo terminated the dealer agreement. Volvo brought suit in the U.S. District Court for the Western District of Washington seeking a declaratory judgment that the termination did not violate the Washington Manufacturers' and Dealers' Franchise Agreements Act, the Washington Franchise Investment Protection Act (FIPA), the Federal Dealer Suits Against Manufacturers Act, or any covenant of good faith and fair dealing.

Shortly after the parties exchanged their initial disclosures and long before discovery was to be completed, Volvo filed a motion for summary judgment on all of its claims. Volvo agreed to extend Clyde's deadline to oppose Volvo's motion and also agreed to make its Rule 30(b)(6) corporate designee and all of its employees who submitted declarations in support of its motion available for deposition before Clyde's opposition was due. Notwithstanding, Clyde sought to continue the motion in order to conduct discovery relevant to its opposition pursuant to Federal Rule of Civil Procedure 56(d).

The court started its analysis by noting that a continuance is appropriate if the application is timely and identifies relevant information as to which there is some basis to believe actually exists. Provided that the moving party can make this showing, a continuance is required. The court then considered Clyde's motion with respect to each of Volvo's claims.

Clyde argued that it needed to depose various personnel and obtain documents from the Washington Department of Licensing with respect to the Washington Dealer Act claim. Volvo argued that the Act did not apply because the equipment that Clyde sold is not required to be registered and titled in the State of Washington and, therefore, Clyde did not qualify as a "new motor vehicle dealer" under the Act. Volvo further argued that the issue was purely a matter of law and could be decided without discovery. The court rejected these arguments, noting that Volvo had supported its motion with respect to this claim with factual declarations and exhibits.

The court also granted Clyde's request for continuance as to its FIPA claim, which provides that a franchisee can only be terminated for "good cause." Although FIPA does not include a remedy, a violation of FIPA may constitute an unfair, deceptive act or practice that is actionable under the Washington Consumer Protection Act (CPA) if, among other things, the alleged violation impacts the public interest. Clyde indicated that it intended to seek discovery from the Department of Licensing and municipalities that purchase Volvo construction equipment in order to establish that the public's interest "in maintaining and building safe roads and infrastructure" impacts disputes between dealers and manufacturers of such equipment. Volvo argued that a breach of a private contract did not affect the public interest. The court rejected this argument, holding that whether the public has an interest in an action is typically a question of fact.

The court denied, however, Clyde's request for continuance with respect to the Federal Dealer Act claim. The federal act applies to an "automobile dealer," which is defined as a person or entity "engaged in the sale or distribution of passenger cars, trucks, or station wagons." Volvo argued that its construction equipment did not fit within the definition of covered vehicles. The court found that any evidence that Clyde would need with respect to this claim would be within its knowledge or could be obtained from Volvo's declarants and its corporate designee.

Finally, the court considered whether a continuance was appropriate with respect to the breach of the duty of good faith and fair dealing claim. Volvo argued that there was no applicable duty of good faith because Volvo terminated Clyde pursuant to a specific section of the parties' agreement. Clyde argued, however, that Volvo's decision to terminate was motivated by different reasons than those stated for the termination. The court agreed with Volvo that the issue of whether a duty of good faith existed could be decided as a matter of law and that Clyde had not established that it was unable to oppose this issue without the requested discovery.

***LeCompte v. AFC Enters., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,386, 149 So. 3d 366 (La. Ct. App. 2014)**

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

***Mass. State Auto. Dealers Ass'n, Inc. v. Tesla Motors, MA, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,370, 15 N.E.3d 1152 (Supr. Ct. Mass. Sept. 15, 2014)**

Tesla Motors MA, Inc., a wholly owned subsidiary of Tesla Motors, Inc., incorporated to operate sales and service centers for the sale and service of Tesla vehicles, operated an automobile showroom in Massachusetts. The Massachusetts State Automobile Dealers Association, Inc. (MSADA), representing automobile and truck franchised dealerships, sued Tesla MA and Tesla Motors, alleging they were operating an automobile dealership without a license and in violation of a Massachusetts statute prohibiting a manufacturer from owning a dealership. Both defendants moved to dismiss the claims for lack of standing and failure to state a claim on which relief could be granted. After a hearing on the motion to dismiss and MSADA's request for an injunction, the trial court denied the requested injunctive relief and granted the motion to dismiss based on MSADA's lack of standing. On appeal, the Supreme Judicial Court of Massachusetts affirmed that MSADA lacked standing to sue Tesla under the Massachusetts Motor Vehicle Dealer Law because the law was aimed at protecting automobile dealers from unfair and deceptive trade practices directed at them by their own brand manufacturers and distributors. Because MSADA was not affiliated with Tesla, the court concluded that MSADA did not have standing to sue Tesla under the Act.

***Saleem v. Corporate Transaction Grp., Ltd.*, Bus. Franchise Guide (CCH) ¶ 15, 373, 2014 WL 4626075 (S.D.N.Y. Sept. 16, 2014)**
This case is discussed under the topic heading "Labor and Employment."

***Kroshnyi v. U.S. Pack Courier Servs., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,400, 771 F.3d 93 (2d Cir. 2014)**
This case is discussed under the topic heading "Oral Agreements."

***S. Motors Chevrolet, Inc. v. Gen. Motors, LLC*, Bus. Franchise Guide (CCH) ¶ 15,394, 2014 WL 5644089 (S.D. Ga. Nov. 4, 2014)**
Plaintiff Southern Motors Chevrolet attempted to purchase a Chevrolet dealership in Georgia. General Motors did not approve the plaintiff's application but did approve the application of a minority-owned business. The plaintiff sued GM under the Federal Civil Rights Act, 42 U.S.C. § 1981, alleging racial discrimination. GM moved to dismiss and stay discovery pending the outcome of the motion to dismiss. While the motion to dismiss was pending, a magistrate judge denied the motion to stay discovery. Recognizing the court's discretion to manage the process and ensure that parties are not subjected to unnecessary and burdensome discovery, the magistrate judge nonetheless held that although the motion to dismiss was not "wholly insubstantial," it was also "not so clearly meritorious as to warrant a stay of discovery." GM argued that the plaintiff's speculation as to whether GM went too far in its minority applicant preferential treatment was insufficient to meet the standard to survive a motion to dismiss under *Bell-Atlantic Corp. v. Twombly*. The magistrate judge, however, held that "[j]ust as a plaintiff should not be able to embark on unfettered discovery by filing a defective complaint, neither should a defendant be able to halt resolution of a case every time it conceives of a Rule 12 motion."

***CMS Volkswagen Holdings, LLC v. Volkswagen Grp. of Am., Inc.*, Bus. Franchise Guide (CMS) ¶ 15,381, 2014 WL 4961769 (S.D.N.Y. Oct. 3, 2014)**
CMS Volkswagen Holdings, LLC, a Volkswagen dealer in New York, sued Volkswagen Group of America, Inc. in the U.S. District Court for the Southern District of New York alleging that certain of Volkswagen's practices with respect to its dealers violated the New York Franchised Motor Vehicle Act. The court entered an order dismissing CMS's claims and CMS filed a motion to reconsider.

The court analyzed the motion to reconsider under the "strict" standard of Federal Rule of Civil Procedure 60(b), which requires showing either controlling contrary decisions or a clear error that must be corrected to prevent injustice. After addressing each of CMS's claims under this standard, the court denied the motion to reconsider.

First, the court considered CMS's claims related to Volkswagen's Variable Bonus Program, which provided bonuses to dealers that met certain sales objectives, which were determined based on a set formula that applied to all dealers. Volkswagen argued that the program fell within the safe harbor provision of Section 463(2)(g) of the Dealer Act, which permits incentives or discounts that "are reasonably available to all franchised motor vehicles in this state on a proportionately equal basis." CMS argued that the incentives were not proportionally equal for two reasons. First, the program used a market share variable that was measured at the regional level. CMS argued that this did not adequately account for consumer preferences that differed within the same region. Second, the program's sales objectives were determined in reference to a dealer's assigned territory, but also allowed dealers to account for sales from customers in territories that have no assigned dealers (open points). CMS argued that this impermissibly favored dealers that were located close to unassigned territories. The court noted that most of the arguments made by CMS were raised and fully considered prior to the dismissal order being entered. The court also held that no clear error was present and affirmed its prior decision that requiring customer preferences to be taken into consideration would defeat the safe harbor's objective standard.

The court next addressed CMS's argument that the court incorrectly applied the "functional availability doctrine" with respect to Volkswagen's application of the program. The court noted that its analysis was derived from a Sixth Circuit decision that held that an incentive program is functionally available to all participants if it is applied evenhandedly and available to everyone on the same qualification terms. The court concluded that Volkswagen had applied the program evenhandedly and offered all dealers the same qualification terms.

The court also addressed certain modifications to the franchise agreement that concerned CMS's ownership structure. Volkswagen permitted the modifications on the condition that CMS sign certain additional agreements. CMS argued that Volkswagen's actions were unfair and therefore unlawful under the Dealership Act. CMS based its argument on Section 263(2)(ff), which prohibits a franchisor's unilateral modification to franchise agreements without ninety days' written notice. Subsection (3) permits a franchisee to demand a review for fairness once the franchisee receives the notice. CMS argued that Subsection (3) makes "unfair" franchise modifications unlawful. The court disagreed, stating that Subsection (3) deals with review of unilateral decisions under Section 263(2)(ff) and does not address bargained-for franchise modifications, which were at issue in this case.

TERMINATION AND NONRENEWAL

***Jackson Hewitt Inc. v. Larson & Savage, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,401, 2014 WL 5511389 (D.N.J. Oct. 31, 2014)**

In this case, a U.S. District Court for the District of New Jersey entered a default judgment in favor of Jackson Hewitt Inc. and against its former franchisee, Larson & Savage, Inc. (L&S). Jackson Hewitt terminated its franchise agreement with L&S for transferring the franchise business without Jackson Hewitt's consent and failing to maintain the confidentiality of its proprietary information. Jackson Hewitt subsequently filed a complaint alleging that L&S had breached its post-termination obligations and asserting various claims under the Lanham Act. The defendants defied specific court orders and were warned that their continued failure to comply would result in sanctions. Nonetheless, the defendants failed to attend two mandatory status conferences. As a result, Jackson Hewitt filed an unopposed motion to strike L&S's answer and counterclaim and enter a default. The court granted Jackson Hewitt's motion and a default was entered. Thereafter, Jackson Hewitt brought an unopposed motion for a default judgment.

In order to impose a default judgment, a district court must make specific factual findings regarding: (1) whether the party subject to default has a meritorious defense, (2) the prejudice suffered by the party seeking default, and (3) the "culpability" of the party subject to the default. The court had previously concluded that L&S was the culpable party and that Jackson Hewitt had been prejudiced by L&S's conduct. Thus, the only remaining issue was whether the defendants had a meritorious defense to Jackson Hewitt's request for damages and a permanent injunction. The court quickly concluded that the defendants owed Jackson Hewitt amounts due under the parties' franchise agreement and awarded Jackson Hewitt in excess of $180,000 in past-due fees and other items, as well as attorney fees and costs. The court also found that Jackson Hewitt was entitled to a permanent injunction and enjoined the defendants from engaging in a competitive business within the geographic territory set forth in the franchise agreement for a two-year period; compelled the defendants to return all franchise client files, trade secrets, and similar items to Jackson Hewitt; and ordered the transfer of their telephone numbers to Jackson Hewitt.

***Tri Cnty. Wholesale Distrib., Inc. v. Labatt USA Operating Co., LLC*, Bus. Franchise Guide (CCH) ¶ 15,425, 2014 WL 7014716 (S.D. Ohio Dec. 11, 2014)**
This case is discussed under the topic heading "Statutory Claims."

***Volvo Constr. Equip. N. Am., LLC v. Clyde/West, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,415, 2014 WL 6886679 (W.D. Wash. Dec. 3, 2014)**
Clyde/West, Inc. entered into a dealer agreement with Volvo Construction of North America, LLC to sell heavy construction equipment. The parties' relationship deteriorated and Volvo terminated the dealer agreement. Clyde brought suit in the U.S. District Court for the Western District of Washington, alleging violations of the covenant of good faith and fair dealing, the Federal Dealer Suits Against Manufacturers Act (Federal Dealer Act), and other statutes. Volvo filed a motion for summary judgment as to all of

Clyde's claims. In this case, the court addressed Clyde's good faith and fair dealing and Federal Dealer Suits claims and granted Volvo's motion.

Pursuant to Section 7.1 of the dealer agreement, either party had the right to terminate the agreement upon 180 days' advance written notice. Additionally, pursuant to Section 22.1, in the event either party breached the agreement, the nonbreaching party had the right to give the breaching party written notice of default and sixty days to cure. Certain breaches, however, were exempt from Section 22.1, including the dealer's failure to "achieve and maintain" specific market share requirements and to cure any such default within 180 days (Section 22.2).

Volvo sent Clyde a notice of termination pursuant to Section 7.1. Clyde argued, however, that Volvo's subjective reason for terminating the agreement was its belief that Clyde was underperforming and, therefore, the duty of good faith and fair dealing required Volvo to terminate the agreement under Section 22.2. The court disagreed, noting that the implied duty of good faith is "derivative" and, therefore, applies to the performance of specific contract obligations. Further, if there is no such obligation, nothing must be performed in good faith. The court found that the agreement did not limit Volvo's right to terminate the agreement with 180 days' advance notice and Section 22.2 was optional. Thus, the court held that there was no applicable "contractual duty" that Volvo was required to perform in good faith. Clyde further argued that because Volvo had "discretion" to choose which termination provision to use, it had a duty to exercise that discretion in good faith. The court also rejected this theory, finding that under Washington law, a party cannot breach the duty of good faith when it "simply stands on its rights to require performance of a contract according to its terms." Finally, Clyde argued that the termination provisions rendered the parties' agreement "illusory." The court disagreed, noting that a termination provision does not render a contract illusory where the option to terminate can only be exercised in the event of certain conditions.

The court then turned to Clyde's Federal Dealer Act claim. The Federal Dealer Act permits an "automobile dealer" to file suit against an "automobile manufacturer" that fails to act in good faith when terminating the parties' relationship. An automobile dealer is defined as a person or entity "engaged in the sale or distribution of passenger cars, trucks or station wagons." An "automobile manufacturer" is defined as any person or business entity "engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons." The statute does not, however, define "passenger cars, trucks or station wagons." Accordingly, the court was required to determine whether the heavy construction equipment manufactured by Volvo and distributed by Clyde fit within the phrase "passenger cars, trucks, or station wagons."

The court started its analysis by reviewing the Federal Dealer Act's legislative history and noting that the original version of the statute included the phrase "and other automotive vehicles." This phrase was specifically deleted and the legislature stated that the statute "excludes transactions involving buses, tractors, motorcycles, and other transportation vehicles propelled by power." The court found that the heavy construction equipment at issue was more "closely analogous" to a tractor than to a passenger car or truck. The court then went on to consider the language of the statute and found that the plain and ordinary understanding of "passenger car and station wagon" would be vehicles seating "a limited number of people . . . for transportation of a small amounts of cargo over established roadways." The court contrasted this with Volvo's heavy construction equipment that was "designed to haul massive amounts of cargo at off-road construction sites." Thus, based on both the legislative history and the plain language of the statute, the court found that the equipment at issue did not come within the scope of the Federal Dealer Act.

***Romper Room, Inc. v. Windmark Corp.*, Bus. Franchise Guide (CCH) ¶ 15,369, 2014 WL 5106887 (E.D. Wis. Oct. 10, 2014)**
This case is discussed under the topic heading "Injunctive Relief."

***Ditto, Inc. v. Davids*, Bus. Franchise Guide (CCH) ¶ 15,421, 2014 WL 5840728 (Mo. Ct. App. Nov. 12, 2014)**
Ditto, Inc., which owned and operated a chain of clothing stores in Kansas City, entered into a joint venture agreement with the defendant-operators to operate a clothing store. The parties were unsatisfied with the joint venture and attempted to negotiate an early termination of the agreement. Unable to reach an agreement, the defendants unilaterally terminated the agreement and renamed their store. Ditto then sued the operators, alleging breach of the joint venture agreement and breach of fiduciary duty. In response, the operators contended that the agreement was terminable at will because it contained no fixed duration. The parties filed cross-motions for summary judgment. The court granted summary judgment in favor of the operators, finding that the joint venture agreement was indeed terminable at will because it did not contain a fixed duration.

The Missouri Court of Appeals reversed the trial court's decision because, although the joint venture agreement did not contain a fixed duration on its face, the agreement had to be read and construed in conjunction with the accompanying lease, which did contain a fixed duration. Thus, the agreement was not terminable at will, and the defendant-operators were not entitled to summary judgment.

The court also addressed and rejected the operators' affirmative equitable estoppel defense. The operators claimed Ditto had represented that the agreement was of unlimited duration and thus would be terminable at will. The court held, however, that the alleged representation did not estop Ditto from claiming that the joint venture agreement was not terminable at will because the representation, which Ditto expressly disclaimed, was a conclusion of law and not a statement of an existing material fact. Accordingly, the appellate court reversed the trial court's grant of summary judgment on the equitable estoppel defense and remanded.

***Volvo Trucks N. Am. v. Andy Mohr Truck Ctr.*, Bus. Franchise Guide (CCH) ¶ 15,387, 2014 WL 4794185 (S.D. Ind. Sept. 25, 2014)**
This case is discussed under the topic heading "Definition of Franchise."

TORTIOUS INTERFERENCE

***Fresno Motors, LLC v. Mercedes Benz USA, LLC*, Bus. Franchise Guide (CCH) ¶ 15,396, 771 F.3d 1119 (9th Cir. 2014)**
Ashbury Fresno Imports, LLC owned a Mercedes-Benz dealership in Fresno, California. Ashbury operated the dealership on premises leased from CAR AAG CA, L.L.C. Seeking to purchase the dealership, Selma Motors, Inc. worked with Mercedes-Benz USA, LLC (MB) to provide the necessary information to qualify as a dealer. Selma's owner subsequently formed Fresno Motors, LLC for the sole purpose of acquiring the dealership. This required additional documentation providing that the relevant asset purchase agreement rights were transferred from Selma to Fresno. Eventually, Ashbury and Fresno entered into an asset purchase agreement for the sale. MB subsequently exercised its contractual right of first refusal (ROFR) by sending notice to Ashbury in various formats, including mail and e-mail. The effect of the ROFR was that MB became the purchasing party under the terms of the Fresno Motors asset purchase agreement.

A few days after sending the notice, MB and Ashbury entered into an acknowledgment agreement providing that, if MB assigned the Fresno Motors asset purchase agreement and related agreements, including the lease of the premises, MB would remain primarily responsible under those agreements. MB subsequently tried to assign the Fresno Motors asset purchase agreement and the lease to a third party, but those efforts failed. MB then attempted to mediate its dispute with Fresno. The negotiations broke down when MB refused to provide the landlord with a guaranty of Fresno's obligations under the lease. Fresno, which at the time was unaware of the acknowledgment agreement between MB and Ashbury, negotiated directly with the landlord in an attempt to assume the lease or to enter into a new lease with an option to purchase. Those negotiations failed as well.

Thereafter, Fresno and Selma filed suit against MB in the U.S. District Court for the Eastern District of California asserting several claims under California law, including tortious interference, fraudulent concealment, violation of California Vehicle Code Section 11713.3(t)(6), and violation of the California Unfair Competition Law. The district court granted summary judgment in favor of MB on all claims and plaintiffs appealed to the Ninth Circuit.

The Ninth Circuit first addressed the tortious interference claim. The plaintiffs asserted that by exercising its ROFR in an untimely manner, MB tortuously interfered with their contractual relationship with Ashbury. The district court dismissed this argument, finding that, under California law, tortious interference claims may only be made by "strangers" or "interlopers" who do not have a direct and significant interest in the applicable contractual relationship. The Ninth Circuit analyzed California law on this issue and determined that it was in a "state of flux" with no indication that the California Supreme Court would clarify the situation any time soon. The Ninth Circuit affirmed the dismissal, however, on the grounds that MB's ROFR notice was timely and legally correct. MB was required to provide written notice. The e-mails sent by MB qualified as written notice under applicable law, including Section 1633.7 of the California Electronic Transfer Act. Further, nothing in the California Vehicle Code or otherwise required MB to provide notice to the plaintiffs, in addition to the notice that was provided to Ashbury.

The Ninth Circuit next addressed the plaintiffs' claim that MB fraudulently concealed the existence of the acknowledgment agreement, which caused them to waste time and effort negotiating directly with the landlord because they would not have had those negotiations has they known about the agreement. The Ninth Circuit affirmed the district court's dismissal of this claim, holding that the plaintiffs misinterpreted the agreement. Although the agreement required MB to remain obligated to Ashbury in the event of an assignment of the Fresno Motors asset purchase agreement, it did not impose any obligations on MB to Fresno. Therefore, there was nothing for MB to fraudulently conceal from the plaintiffs.

The Ninth Circuit then turned to MB's arguments that the plaintiffs had no standing to bring a claim for reimbursement of expenses under the California Vehicle Code. The district court held that the plaintiffs lacked standing because the statute did not explicitly provide for such standing. The Ninth Circuit reversed the dismissal on the grounds that a proposed transferee clearly had the right to be reimbursed under the statute and that denying the transferee standing would preclude the transferee from enforcing that right.

Finally, the Ninth Circuit affirmed the dismissal of the plaintiffs' unfair competition claims on the grounds that the remedy for a violation under the statute is injunctive relief or restitution, neither of which the plaintiffs sought.

TRADEMARK INFRINGEMENT

***Derma Pen, LLC v. 4EverYoung Ltd.*, Bus. Franchise Guide (CCH) ¶ 15,413, 773 F.3d 1117 (10th Cir. Dec. 9, 2014)**

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

7-*Eleven, Inc. v. Grewal*, Bus. Franchise Guide (CCH) ¶ 15,417, 2014 WL 6604717 (D. Mass. Nov. 20, 2014)

Grewal Corp., which was owned by Mohinder and Mann Grewel, entered in a franchise agreement with 7-Eleven Corp. for the operation of a 7-Eleven convenience store in Massachusetts. Although the Grewals successfully operated the store for several years, 7-Eleven found out in 2014 that unusual register activity was occurring. After conducting an investigation that included reviewing many hours of store security camera footage, 7-Eleven ultimately concluded that the Grewals were manipulating register transactions in order to pocket extra money and sent them a noncurable notice of material breach and termination. The Grewals continued to operate the store after the date of termination.

7-Eleven filed suit in the U.S. District Court for the District of Massachusetts seeking a preliminary injunction enjoining the Grewals from using 7-Eleven's trademarks and to enforce the franchise agreement's noncompetition clause. The Grewals responded by filing their own motion for preliminary injunction seeking an order requiring 7-Eleven to reinstate the franchise agreement.

The court analyzed 7-Eleven's motion under the well-accepted test: (1) whether 7-Eleven was likely to succeed on the merits, (2) whether 7-Eleven was likely to suffer irreparable harm in the absence of a preliminary injunction, (3) whether the injury incurred by 7-Eleven if an injunction were not granted would outweigh the harm which granting the injunction would impose on the Grewals, and (4) how the injunction would affect the public interest.

As to the first prong, the court found that 7-Eleven's investigation demonstrated that it was likely to succeed on its claims because it had the right to terminate the franchise agreement. In addition to the contractual rights under the agreement, the court noted that the Lanham Act gave 7-Eleven the right to enjoin the unauthorized use of its trademark. As to the second prong, the court determined that 7-Eleven would suffer significant harm related to confusion in the marketplace if the Grewals were permitted to use 7-Eleven's trademark post-termination. As to the third prong, the court noted that, while the Grewals had put eight years of hard work into the store, their efforts were outweighed by the significant time and money 7-Eleven had invested in promoting and refining its brand around the world. Finally, as to the fourth prong, the court found that preventing customer confusion in the marketplace was in the public's interest. The court therefore granted 7-Eleven's motion to enjoin the Grewals' use of the company's trademark.

The court then considered the same four factors to determine whether 7-Eleven was entitled to a preliminary injunction with respect to the noncompete provision. As to the first prong, the court found that 7-Eleven was likely to succeed on enforcing this part of the franchise agreement. As to the second prong, the court concluded that 7-Eleven was not able to show irreparable harm because the harm of having the Grewals compete during the period it would take for 7-Eleven to fully litigate the matter would be "miniscule" for a company of 7-Eleven's size. As to the third prong, the court found that the balance of harms favored the Grewals because they risked being put out of business versus the fairly small harm risked by 7-Eleven. Finally, as to the fourth prong, the court found that the public interest weighed in favor of granting 7-Eleven's request to enforce the noncompete provision. The court concluded on the balance of these factors that 7-Eleven was not entitled to a preliminary injunction with respect to the noncompete provision.

The court also held that the Grewals were not entitled to a preliminary injunction against 7-Eleven because 7-Eleven had demonstrated that it likely was justified in terminating the franchise agreement.

TRANSFERS

Pooniwala v. Wyndham Worldwide, Corp., Bus. Franchise Guide (CCH) ¶ 15,369, 2014 WL 4659643 (D. Minn. Sept. 17, 2014)

The plaintiffs entered into a number of separate franchise agreements with Wyndham Worldwide Corp., Super 8 Worldwide, Inc., Travelodge Hotels, Inc. and Days Inn Worldwide, Inc. The plaintiffs filed suit in the U.S. District Court for the District of Minnesota, alleging violations of the Minnesota Franchise Act, breach of contract and the implied covenant of good faith and fair dealing, and unlawful retaliation as a result of a New Jersey lawsuit between plaintiffs and Ramada Worldwide Inc. (RWI).

The defendants sought to transfer the action to the U.S. District Court for the District of New Jersey pursuant to 28 U.S.C. § 1404(a), which permits a transfer "[f]or the convenience of the parties and witnesses, [and] in the interest of justice." The defendants argued that New Jersey was a proper forum because two of the four franchise agreements at issue in the Minnesota action included a "nonexclusive" forum selection clause providing that New Jersey was an appropriate forum and because a significant portion of the events giving rise to the claims allegedly occurred in New Jersey. The plaintiffs argued that the forum selection clauses were nonexclusive and therefore not determinative. The court agreed with the plaintiffs and further noted that only two of the four agreements contained the forum selection provision.

The court then considered the § 1404(a) factors and concluded that transfer was not appropriate. First, the court found that the convenience of the parties' factor did not weigh in favor of the defendants and "more likely weigh[ed] slightly against defendants." Even though the plaintiffs were in litigation in New Jersey with RWI, the court was not persuaded that New Jersey was any more convenient than Minnesota because the plaintiffs were located in Minnesota. Therefore, the court concluded the defendants had failed to establish that any inconvenience they may face in litigating in Minnesota "strongly outweigh[ed]" the plaintiffs' inconvenience.

The court found that the second factor, the convenience of the witnesses, also did not weigh in favor of the defendants. Although many of the witnesses, including inspectors and hotel employees were based in New Jersey, the plaintiffs and individuals involved in the contract negotiations were located in Minnesota. Thus, the court found that this factor weighed in favor of the plaintiffs.

The court then turned to the interest of justice factor. The defendants argued that transfer would promote judicial economy because the Minnesota action was "inherently similar" to the New Jersey action and that both matters could be consolidated, thereby eliminating potential duplication and conflicting orders. The court found that while there may be some overlap between the parties and issues, the actions were different, involved different agreements, and were brought by different parties with different procedural postures. The court also noted that although there might be streamlined discovery and the like, such benefits were not enough to overcome the deference that the court was required to provide to the plaintiffs' chosen forum. As a result, the court found that there would not be any substantial judicial economy resulting from transferring the matter. Accordingly, the court denied the defendants' motion to transfer.

VICARIOUS LIABILITY

Hamrick v. Rest. Mgmt. Grp., LLC, Bus. Franchise Guide (CCH) ¶ 15,380, 2014 WL 4698489 (S.D. W. Va. Sept. 19, 2014)

Plaintiff Paula Hamrick was the administratrix of the Estate of Nathaniel Hamrick, an employee of a Hardee's franchise restaurant in West Virginia who ultimately died of first and second degree burns that he sustained while cleaning a fryer box. Hamrick filed suit in West Virginia state court against the franchisee of the Hardee's restaurant where Hamrick worked, as well as Hardee's Restaurants, LLC and Hardee's Food Systems LLC (franchisor defendants) and the alleged manufacturer of the fryer box. The plaintiff asserted claims for deliberate intent workplace injury under West Virginia law, negligence, and a number of product liability claims. The defendants removed the matter to the U.S. District Court for the Southern District of West Virginia, and the franchisor defendants filed a Rule 12(b)(6) motion to dismiss. The plaintiff filed a motion to remand.

In her motion to remand, Hamrick asserted that the defendants had failed to present adequate proof of the defendants' citizenship because (1) they had not alleged the precise names and addresses of the members of some of the LLC defendants, and (2) they had failed to properly allege the citizenship of one of the defendant LLCs that had dissolved. The court rejected both arguments, finding first that a removing party's notice of removal is not held to a higher pleading standard than a plaintiff pleading diversity jurisdiction in a complaint, and then finding that the plaintiff had failed to establish or suggest any reason why the citizenship of the dissolved LLC would have changed after its termination.

The court then turned to the motion to dismiss. With respect to the deliberate intent workplace injury claim, the plaintiff alleged that all defendants, including the franchisor defendants, were Hamrick's employer and therefore liable. The franchisor defendants argued that the plaintiff had not pled any facts establishing that they were Hamrick's employer. The court disagreed, noting the plaintiff had alleged that the franchisor defendants '"were in the business of operating and managing Hardee's restaurants[,]' . . . including the Hardee's restaurant where Hamrick worked when he was injured." The franchisor defendants also argued that the plaintiff had not pled any facts establishing they had knowledge of the alleged unsafe working conditions. The court again disagreed, finding that the plaintiff's allegation that the fryer box had been broken for some time and that there had been prior complaints about it were sufficient to infer that the franchisor defendants, as the claimed operators of the restaurant, should have had actual knowledge of the purportedly unsafe working conditions.

The court then addressed the plaintiff's alternative claim for negligence, which alleged that if the franchisor defendants were not Hamrick's employer, they were liable for negligence due to their involvement in the operation and management of the restaurant. The franchisor defendants argued that the plaintiff had not pled any facts supporting a legal duty and that they lacked the requisite control. The court, however, found that the plaintiff had adequately alleged that the franchisor defendants operated and managed the restaurant and provided training, supervision, and inspections. Based on these allegations, the court concluded that it was reasonable to infer that the franchisor defendants had control over the equipment and procedures that contributed to Hamrick's injuries. Thus, the court also refused to dismiss the plaintiff's negligence claim.

Finally, the court considered the plaintiff's product liability claims alleging that "to the extent that the [defendants] were involved in the distribution, lease or sale" of the fryer box, they were liable under a variety of theories. The court found that this allegation was "conditional" and therefore insufficient to assert the product liability causes of action. Accordingly, the court dismissed the plaintiff's product liability claims.