Franchising (& Distribution) Currents

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ANTITRUST

***Dunkin' Donuts Franchising LLC v. Sai Food Hospitality, LLC*, Bus. Franchise Guide (CCH) ¶ 15,065; No. 4:11CV01484 AGF, 2013 WL 3766566 (E.D. Mo. Apr. 18, 2013)**

The franchisor of the Dunkin' Donuts franchise system sued a franchisee for fraud and violation of the law in falsely representing the identities of the owners of the franchisee entity, among other claims. The franchisee asserted numerous counterclaims against Dunkin' Donuts, including violation of state and federal antitrust laws based on the alleged tying of the sale of franchises to the sale of equipment required to operate the franchise. Dunkin' Donuts moved to dismiss the franchisee's antitrust counterclaims. The court granted the motion.

Dunkin' Donuts and the franchisee entered into a store development agreement pursuant to which the franchisee was to open ten Dunkin' Donuts stores in the St. Louis area. The store development agreement required the franchisee to execute a franchise agreement for each Dunkin' Donuts store it was to open. The Dunkin' Donuts franchise agreement requires the store to be constructed and equipped to the franchisor's standards and specifications and further gives the franchisor "the right to specify all equipment to be used in connection with store operations."

The franchisee's antitrust counterclaim alleged that, by requiring the franchisee to purchase equipment needed to operate the franchised stores from the franchisor's af-

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filiates, the franchisor had unlawfully exercised market control by tying the sale of the franchise to the purchase of equipment in violation of antitrust law.

In dismissing the franchisee's antitrust counterclaims, the court described a tying arrangement as "a device used by a seller with market power in one product market to extend its market power to a distinct product market." To do so, the seller conditions the sale of one product on the purchase of a second product. The court further explained that it is not enough to presume the seller has the relevant market power; rather, that conclusion must be supported by proof of power in the relevant market.

The claimant has the burden to define the relevant market in which the seller's power can be assessed. In this case, the defendant defined the relevant market as "donut franchises," arguing that there is no interchangeable substitute for donuts. The court found that "donut franchises" was not a sufficiently defined relevant market for antitrust claims, pointing out that "courts generally reject antitrust claims based on such a purported relevant market." *See Martrano v. Quizno's Franchise Co.*, 2009 WL 1704469 (W.D. Pa. June 15, 2009) (dismissing a franchisee's antitrust claim based on the allegations that franchisor tied the sale of its franchises to the subsequent sale of supplies and services, where the purported relevant market was market quick service toasted sandwich restaurant franchises).

***Witt Co. v. Riso, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,079; No. 03:13-cv-00166-HZ, 2013 WL 2468308 (D. Or. June 7, 2013)**

A dealer of digital duplicating equipment brought tying claims under the Sherman and Clayton Acts and related state law claims against the manufacturer in the U.S. District Court for the District of Oregon. The dealer's failure to overcome defenses based on the statute of limitations and the manufacturer's unilateral conduct doomed the dealer's tying claim, and its state law claims fell by the wayside as well.

The troubles began in 2009 when Riso offered Witt a new dealer agreement to replace an existing agreement. Witt objected to language in the new agreement that prohibited it from selling products, parts, and services directly or substantially competitive with those of Riso. Further complicating matters, Witt sought to acquire additional territories from Riso for $700,000, but Riso refused to close the transaction without a new dealer agreement. The parties agreed to close the transaction in 2011 and reinstate the 2007 dealer agreement for ninety days while they attempted to resolve their differences.

Riso ultimately told Witt its status as an authorized Riso dealer would end on March 31, 2013, if it did not sign the new dealer agreement. In response, Witt filed this action on January 29, 2013, alleging that digital duplicators and the supplies used with these duplicators constituted two separate markets and that forcing Witt to sell Riso supplies in order to sell Riso duplicators constituted an illegal tying arrangement. Riso sought to dismiss Witt's claims, arguing that they were barred by the four-year statute of limitations governing antitrust claims.

In discussing the statute of limitations defense, the court said it was unclear whether Witt based its claims on Riso's enforcement of the exclusivity language in the dealer agreement or on the threat Witt would lose its authorized dealership if it refused to sign the 2012 agreement. Importantly for Riso's statute of limitations defense, the 2007 and 2012 agreements contained the same language that prohibited the dealer from selling competitive products. The court said that, if Witt based its claim on enforcement of this provision, that claim accrued on April 1, 2007, the effective date of the 2007 dealer agreement, and was barred by the statute of limitations. The court rejected Witt's argument that sales of duplicating equipment and supplies subject to the exclusivity language constituted continuing violations that would extend the statute of limitations period. The court said that a continuing violation must be a "new and independent act that is not merely a reaffirmation of a previous act." The court said that continuing performance of an alleged illegal contractual tying arrangement is not a new and independent act.

The court examined whether the alleged violation was Riso's threat to end the authorized dealer relationship if Witt did not sign the new agreement. Riso sent Witt a letter dated September 20, 2012, stating that it would consider Witt's failure to accept the new dealer agreement by December 31, 2012, as Witt's determination it no longer intended to remain an authorized Riso dealer. Riso further stated that Witt's status as an authorized dealer would expire on March 31, 2013. Witt saw Riso's letter as an attempt to coerce it to sign the new dealer agreement. Riso argued that the letter simply was the sort of unilateral conduct not prohibited by the antitrust laws.

The court cited the famous Colgate doctrine from *United States v. Colgate*, 250 U.S. 300 (1919) that under § 1 of the Sherman Act a manufacturer's unilateral refusal to deal with distributors does not violate the antitrust laws. In support of its unilateral conduct argument, Riso noted that there were no allegations here of any concerted action by Riso with any other entity. The court rejected Witt's argument that a manufacturer's refusal to sell to a distributor for an unlawful reason is actionable under Section 1. The court said that in certain circumstances a party can claim that a seller unlawfully enforced a refusal to deal as a way of enforcing a tying arrangement, but such a claim required a showing that the claimant unwillingly complied with the practice or that although it refused to do so other buyers complied to avoid termination. The court cited a case holding that there is no illegal tie where the claimant refuses to acquiesce to the proposed tying arrangement. The court also noted that when the case was filed, there was no agreement in place containing the alleged tying arrangement because the parties had operated without a dealer agreement after the ninety-day extension in 2011.

The court dismissed the Sherman Act claim based on threat of termination without prejudice, finding that in theory Witt may be able to amend to state a claim. Although dismissing Witt's antitrust claims, the court addressed whether Witt had adequately pleaded relevant market and relevant market power in the event Witt amended its claims. The court concluded that Witt had adequately pleaded the relevant markets for the tying and tied products, but that it failed to plead barriers to entry and that Riso's conduct precluded other competitors from increasing output, so it failed to adequately plead market power.

Turning to Witt's state law claims, the court first dismissed a claim for intentional interference with an economic relationship. One of the elements of that claim is that an action is accomplished by an improper means or for an improper purpose. The court dismissed this claim because the improper means was inseparable from the dismissed antitrust claims. Witt's breach of contract claim failed because the parties' asset purchase agreement did not obligate Riso to sell its products to Witt absent a signed dealer agreement. The finding that there was no contractual obligation to sell products to Witt also doomed its breach of the covenant of good faith and fair dealing claim.

ARBITRATION

***In re Brooke Corp.*, Bus. Franchise Guide (CCH) ¶ 15,097; No. 08-22786, 2013 WL 3214687 (Bankr. D. Kan. June 24, 2013)**

Brooke Corporation is a franchisor of insurance agencies, which entered into separate franchise agreements with Bucheli Insurance Agency and Hosford Insurance Agency. Both agreements included an arbitration provision and were guaranteed by Fausto Bucheli.

After Brooke and related corporations filed petitions for bankruptcy protection, Hosford Insurance and Bucheli Insurance (the agency defendants) and Bucheli (collectively, defendants) filed a proof of claim for more than $1 million, alleging that they were "fraudulently induced" to enter into a loan with Brooke and seeking to recover unpaid commissions. The Chapter 7 trustee later filed a complaint against Bucheli and Bucheli Insurance, seeking to recover money allegedly advanced prepetition to Bucheli Insurance and for amounts owed by Bucheli for the post-petition period. Defendants filed a motion to dismiss, which was denied, and filed an answer. Thereafter, the parties served and responded to discovery, including document requests, interrogatories, and requests for admission.

The trustee ultimately discovered that the money he was seeking to recover from Bucheli individually was allegedly the liability of Hosford Insurance and that Bucheli's liability was that of a guarantor. The trustee filed a motion to amend the complaint, which defendants opposed on the ground that it was untimely. At the hearing, defendants claimed for the first time that the trustee's delay in asserting his claims had "prejudiced their opportunity to raise the 'defense'" of the arbitration provision. The court nonetheless granted the trustee's motion to amend the complaint. Thereafter, the parties, including Bucheli included, participated in an informal mediation.

Defendants moved to dismiss the amended complaint on the ground that the trustee's claims were subject to arbitration. One day later, Hosford Insurance filed a proof of claim for more than $1 million based upon Brooke's alleged breach of the franchise agreement and buyer assistance program.

In opposition to defendants' motion to dismiss, the trustee argued that: (1) the claims against Bucheli were not subject to arbitration; (2) defendants had waived their right to compel arbitration; (3) the trustee's separate claims, as opposed to the claims asserted on behalf of Brooke, were not subject to arbitration; (4) the court should "exercise its discretion and refuse to enforce the arbitration agreement"; and (5) if the court found that arbitration was required, the case should be stayed and not dismissed pending arbitration.

The court first found that Bucheli's claims were not subject to arbitration because he was not a party to the franchise agreements that included the arbitration provisions. In reaching this decision, the court rejected Bucheli's argument that the "incorporation by reference" language in the personal guaranties extended to the arbitration provisions, noting that while he had guaranteed the agency defendants' performance under the franchise agreements, he had not personally agreed to be bound by the agreements.

In considering whether the agency defendants had waived their right to compel arbitration, the court considered a number of factors. First, the court found that the agency defendants had engaged in conduct that was "inconsistent" with the right to arbitrate and evidenced an intentional waiver of that right. Among other things, the court found that the agency defendants' filing of proofs of claim without seeking relief from the bankruptcy stay to pursue their claims in arbitration or otherwise preserving their right to arbitrate amounted to a waiver. Additionally, the court found that Hosford Insurance's filing of a proof of claim after defendants' motion to dismiss was denied was further evidence of waiver in that it amounted to a counterclaim. The court also held that the agency defendants' participation in the litigation by responding to various motions and participating in discovery without asserting their right to arbitrate was inconsistent with preserving their right to enforce the arbitration clauses. The court further found that the circumstances "suggested" that defendants were attempting to "manipulate the judicial process" in that they did not raise the arbitration issue until it became an "attractive defensive litigation tactic." The court also concluded that, as a matter of judicial efficiency, it made more sense that the defendants' claims be pursued in the bankruptcy court given the court's familiarity with the facts and other similar cases filed by the trustee. Having analyzed the factors relevant to determining whether a waiver had occurred, the court summarily rejected defendants' "primary defense to a finding of waiver," i.e., that they had just become aware of the arbitration provision, on the basis that it was "not credible."

Additionally, the court found that several of the claims asserted by the trustee were "unique" to the trustee and not derivative of the debtor, including the claims for recovery of fraudulent conveyances, to avoid transfers, disallowing proofs of claim and seeking setoffs. The court noted that these claims would not have been subject to the arbitration provisions in any event.

Accordingly, the court denied defendants' motion to dismiss.

***Navraj Rest. Group, LLC v. Panchero's Franchise Corp.*, Bus. Franchise Guide (CCH) ¶ 15,099; No. 11-cv-7490 (PGS), 2013 WL 4430837 (D.N.J. Aug. 15, 2013)**

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

***Woodbridge Ctr. Prop. LLC v. AMP Food Holdings, LLC*, Bus. Franchise Guide (CCH) ¶ 15,089; No. L-1112-12, 2013 WL 3064587 (N.J. Super. Ct. App. Div. June 20, 2013)**

A New Jersey state appellate court reversed a trial court's decision not to enforce an arbitration provision in the franchise agreement entered into by Panchero's Franchise Corporation and a franchisee, AMP Food Holdings, LLC.

After entering into the franchise agreement, AMP entered into a lease agreement with Woodbridge Center Property LLC. The owners of AMP and their spouses guaranteed the lease. AMP failed to take possession of the premises and Woodbridge filed a lawsuit against AMP, its owners, and the additional lease guarantors. In response, AMP filed a third-party complaint against Panchero's, alleging that Panchero's was liable for any damages for which AMP was responsible. Additionally, AMP filed a lawsuit seeking affirmative relief from Panchero's, which was removed to New Jersey federal court.

Panchero's moved to compel arbitration, and AMP opposed on the ground that, if the motion were granted, AMP would be forced to litigate in three separate jurisdictions, i.e., the arbitration proceeding, the New Jersey state court action, and the New Jersey federal court action. The trial court denied Panchero's motion, finding that it could "see how a multiplicity of litigation would be generated by granting arbitration." After unsuccessfully moving for reconsideration, Panchero's appealed, arguing, among other things, that "the law does not permit a court any discretion to abrogate the parties' intent to arbitrate simply because multiple proceedings will be generated." The appellate court agreed.

The appellate court first held that both federal and New Jersey public policy "strongly support arbitration." It held that the U.S. Supreme Court has found that the Federal Arbitration Act "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement" and that "an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." Thus, the appellate court reversed and remanded the matter to the trial court.

ATTORNEY FEES

***Coral Group, Inc. v. Shell Oil Co.*, Bus. Franchise Guide (CCH) ¶ 15,106; No. 4:05-CV-0633-DGK, 2013 WL 4067625 (W.D. Mo. Aug. 12, 2013)**
The U.S. District Court for the Western District of Missouri awarded Shell attorney fees and costs of over $3.1 million in an action brought by a franchisee of Shell gasoline stations and convenience stores in Missouri and Kansas. The fee award followed the court's dismissal of plaintiff's entire case with prejudice as a sanction for plaintiff's "bad faith failure to preserve evidence." Not surprisingly, the court characterized the underlying case as a "litigation street brawl."

Coral Group, Inc. and Sentis Group, Inc., the franchisees, entered into two multisite operator agreements (MSO) with Shell, both of which contained attorney fee provisions permitting the prevailing party to recover reasonable attorney fees and costs incurred by a party to secure, protect, or defend its rights under the MSO.

In reviewing Shell's request, the court first noted that in a diversity case in federal court, state law governs the ability to receive attorney fees absent a conflicting federal statutory or court rule, and both Missouri and Kansas law permit the awarding of attorney fees when permitted by contract or statute. The court further noted that federal law governs how a party is to apply for its fees.

Plaintiffs argued that attorney fees are special damages that must be pled under Federal Rule of Civil Procedure 9(g), and Shell failed to request attorney fees in its answer. The court rejected this argument, determining that attorney fees were not an item of damages to be proven at trial and holding that Shell was not required to include a request for attorney fees and expenses in its answer. The court cited Eighth Circuit cases holding that attorney fees are not an unusual type of damages where they are permitted by contract and that by agreeing to the attorney fee provision in the contract the other party had adequate notice that a request for such fees was possible.

The court next gave short shrift to the argument by plaintiffs that Shell was not a prevailing party, for attorney fees purposes, because Shell did not receive a judgment on the merits, but obtained a dismissal with prejudice as a sanction for discovery issues. The court cited cases from the Eighth and Ninth Circuits indicating that the defendant in a case dismissed as a discovery sanction is the prevailing party for attorney fee purposes. The court dismissed plaintiffs' argument that the court should not award Shell attorney fees for defending the breach of contract claim, referring to language in the fee provision in the MSOs. This language provided for attorney fees when a party sought to defend or protect its rights under the contract. The court also found it appropriate to award attorney fees for Shell's defense of the franchisees' tort claims, as these claims required Shell to defend its performance under the MSOs.

After reviewing the factors for determining reasonable awards under Missouri and Kansas law, the court determined that the 11,554 hours billed by

Shell counsel were "an inordinate number of hours," but that the litigation had gone on for more than eight years. The court believed that large companies like Shell carefully review their legal fee bills and object when they believe fees are excessive. The court suggested that Shell's prompt payment of more than $2.4 million in fees suggested the fees were reasonable. The court also noted the case involved a complicated dispute with sophisticated plaintiffs; it was a complex high-stakes case for Shell; and the result, dismissal with prejudice as a discovery sanction, justified the large fee. As a result, the court awarded the entire amount of fees and costs sought by Shell.

***Curves Int'l, Inc. v. Nash*, Bus. Franchise Guide (CCH) ¶ 15,102; No. 5:11-CV-0425, 2013 WL 3872832 (N.D.N.Y. July 25, 2013)**

After the mutual termination of the franchise agreement between Curves International, as franchisor, and Veronica Scrivener Nash, as franchisee, franchisee violated a number of the post-termination obligations in the franchise agreement, including the covenant not to compete and the requirements that she cease using all marks and proprietary information belonging to plaintiff and turn over the list of all membership lists or leads. Plaintiff sent a cease and desist letter demanding that defendant comply with her post-termination obligations. When she failed to comply, plaintiff sued for breach of contract and Lanham Act violations. After defendant failed to respond to the complaint, plaintiff moved for default judgment and payment of its attorney fees.

The court granted the motion for default judgment and also awarded attorney fees. As relates to the contract claims, the court found that where the parties include a fee-shifting provision in the contract, the court will honor the parties' intention and order the losing party to pay the prevailing party's reasonable attorney fees. Because the franchise agreement included a fee-shifting provision, plaintiff was entitled to its reasonable attorney fees incurred in connection with the breach of contract claims.

As for the Lanham Act claims, the Lanham Act includes a fee-shifting provision when the violation by the defendant is found to have been willful. Courts have found that the standard for willfulness is "whether the defendant had knowledge that [her] conduct represented infringement or perhaps recklessly disregarded the possibility." In this case, the court found that defendant's conduct constituted willful violation of the Lanham Act because, among other things, defendant ignored the cease and desist letter she received from plaintiff and continued using the plaintiff's trademarks in providing services. Therefore, the court awarded plaintiff reasonable attorney fees with respect to its Lanham Act claims.

After determining that plaintiff was entitled to reasonable attorney fees, the court had to determine the amount of fees that would be considered reasonable. The presumption is that the prevailing rates in the district in which the court is situated are reasonable. However, in this case the plaintiff hired out-of-district counsel and its counsel charged higher rates than the prevailing rates in the district. The burden is on the prevailing party to prove that the higher rates are also reasonable. To show that the higher rates charged by out-of-district counsel are reasonable, the plaintiff must prove that its out-of-district counsel was likely to produce a substantially better result and that the use of in-district counsel would produce a substantially inferior result. Plaintiff did not provide information sufficient to find that its counsel's higher rates were reasonable; therefore, the prevailing rates of the district were applied in determining plaintiff's award.

***In re Am. Suzuki Motor Corp., Debtor(s)*, Bus. Franchise Guide (CCH) ¶ 15,073; No. 8:12-bk-22808-SC, 494 B.R. 466 (C.D. Cal. June 4, 2013)**
This case is discussed under the topic heading "Bankruptcy."

BANKRUPTCY

***In re Am. Suzuki Motor Corp., Debtor(s)*, Bus. Franchise Guide (CCH) ¶ 15,073; No. 8:12-bk-22808-SC, 494 B.R. 466 (C.D. Cal. June 4, 2013)**
American Suzuki commenced a Chapter 11 bankruptcy in an effort to restructure its automotive division. As part of the automotive restructuring, American Suzuki rejected its automobile dealership agreements and offered its dealers the opportunity to transition its automotive dealers from new sales to provision of services and parts. However, South Motors Suzuki rejected the option to continue as an American Suzuki service and parts dealer.

After American Suzuki rejected the dealership agreement, South Motors sued American Suzuki for $1,595,601 in damages, plus attorney fees and costs. South Motors alleged that the Florida Motor Vehicle Licenses Act (Act) provided for the calculation of its damages claim and alternatively argued it was entitled to a common law claim for breach of contract under Florida law. However, the U.S. Bankruptcy Court for the Eastern District of Louisiana found both of South Motors' arguments unpersuasive.

The court concluded that remedies under the Act ran counter to the purpose of U.S. Bankruptcy Code § 365, which is to allow debtors to receive the economic benefits necessary to reorganize. Therefore, absent public health or safety issues, the federal law preempts the state statutes. The court further determined that even if federal law did not preempt the Florida statutes, they still did not apply because they were enacted after the agreement and lacked a clear retroactive intent.

Additionally, the court held South Motors was not entitled to any damages based on lost profits with respect to future sales or services or any common law breach of contract damages because it did not mitigate its damages by entering into the initially offered agreement. The court declined to enforce the liquidated damages provision, finding that enforcing such a provision merely in the name of state law comity served only to unnecessarily enrich an individual nondebtor at the expense of the underlying estate.

On the issue of attorney fees, the court followed the agreement's provision for recovery of attorney fees to the prevailing party. Taking into account the respective positions of the parties, the demands asserted, payments initially made through the executory contract rejection process, and the results of the objected claim, the court concluded that American Suzuki was the prevailing party, recommending the award of attorney fees following an evidentiary hearing.

***In re Brooke Corp.*, Bus. Franchise Guide (CCH) ¶ 15,097; No. 08-22786, 2013 WL 3214687 (Bankr. D. Kan. June 24, 2013)**
This case is discussed under the topic heading "Arbitration."

CHOICE OF FORUM

Editor's Note: Note that the cases below were decided before the U.S. Supreme Court's nonfranchise decision concerning the enforceability of forum selection clauses in *Atlantic Marine Construction Co., Inc. v. U.S. District Court for the Western District of Texas*, No. 12-929 (Dec. 3, 2013), which should be consulted with respect to any federal court matter involving enforcement of forum selection clauses.

***KFC Corp. v. Wagstaff*, Bus. Franchise Guide (CCH) ¶ 15,088; No. CV-00674-CRS, 2013 WL 3166165, (W.D. Ky. June 20, 2013)**
In this case, the U.S. District Court for the Western District of Kentucky considered defendants' motions to dismiss or transfer an action brought by KFC Corporation. Defendants are the owners, officers, and directors of six related franchisee corporations that operated seventy-seven KFC restaurants in six states—Alaska, California, Idaho, Minnesota, Oregon, and Texas. The individual defendants do not live in Kentucky, but KFC is a Kentucky corporation.

KFC terminated the franchisee corporations for failing to pay royalties and advertising expenses. The parties entered into negotiations that ultimately led to a series of new agreements:

1. KFC, the franchisee corporations, and the individual defendants entered into a pre-negotiation and forbearance agreement (pre-negotiation agreement), under which KFC agreed to forego legal proceedings for breach of the original franchise agreements so that the parties could negotiate a payment schedule and potential reinstatement of the franchise agreements to provide defendants with the opportunity to sell their restaurants;
2. KFC and the franchisee corporations entered into a reinstatement agreement;
3. KFC and the franchisee corporations entered into new franchise agreements;

4. The franchisee corporations signed promissory notes in favor of KFC;
5. The individual defendants signed personal guaranties for the franchisee corporations guaranteeing payment of the promissory notes and obligations under the old franchise agreements.

In April 2011, the franchisee corporations filed bankruptcy petitions in the U.S. Bankruptcy Court in Minnesota. KFC subsequently filed a lawsuit in Kentucky seeking a declaration that the individual defendants, as guarantors, were liable to KFC for the franchisee corporations' debts arising out of their restaurant operations and promissory notes, and that the individual defendants had breached their personal guaranties.

Defendants moved to dismiss KFC's claims on the grounds that they had not consented to personal jurisdiction in Kentucky; that personal jurisdiction was not otherwise proper under Kentucky's long-arm statute because they were not "transacting business" in the state; and, even if they were transacting business in the state within the meaning of the long-arm statute, they lacked sufficient minimum contacts with Kentucky for jurisdictional purposes. In response, KFC argued that the promissory notes and pre-negotiation agreements contained forum selection clauses and that those documents and personal guaranties, which did not contain forum selection clauses, were inseparable and should be read together as one contract.

With respect to the pre-negotiation agreement, KFC argued that the individual defendants had consented to jurisdiction because that agreement defined the "franchisee" as both the franchisee corporations and the individual defendants and further specified that the "franchisee" consented to personal jurisdiction in Kentucky for "all purposes." The district court characterized the link between the pre-negotiation agreement and defendants' intent to consent to personal jurisdiction as "weak," finding that (1) the prenegotiation agreement was a separate instrument from the promissory notes and guaranties, and (2) KFC's claims against the individual defendants did not arise from the pre-negotiation agreement. The court also found that the broad language in the pre-negotiation agreements' forum selection clause did not evidence the parties' intent "to consent to jurisdiction under all subsequent contracts."

The court considered the promissory notes, which also included forum selection clauses. KFC argued that the notes were "inseparable" from the personal guaranties because they were cross-referenced. In addressing this argument, the district court noted several franchise cases within the Sixth Circuit addressed similar claims in which the courts had found that exercising personal jurisdiction over individual guarantors was improper when the individuals had not signed the underlying documents containing the forum selection clause. However, the court also noted that decisions from other jurisdictions held that guarantors could be bound by forum selection clauses in the underlying agreement. The district court compared the language in the various KFC agreements with the language in the agreements from the other cases and found that the promissory notes and guaranties could not be construed as one document and therefore concluded that the individual defendants had not intended to consent to jurisdiction in Kentucky by signing the personal guaranties.

The court next addressed whether jurisdiction was appropriate under Kentucky's long-arm statute. In Kentucky, the threshold predicate for long-arm jurisdiction is that the claims "arise from" conduct or activity of the defendant that fits within one of the statute's identified categories. If not, personal jurisdiction is inappropriate. If yes, the court must determine whether exercising personal jurisdiction would violate the nonresidents' federal due process rights. Here, the district court found that the individual defendants transacted business within Kentucky and turned to the issue of whether KFC's claims "arise from such business." Several of the individual defendants had never been to Kentucky. As to those that had, their travels to Kentucky were infrequent and unrelated to the promissory notes and guaranties. The district court also found that the fact that the guaranties were with a Kentucky company was not enough to find personal jurisdiction. Thus, the court concluded that KFC's claims did not "arise from" defendants' business in Kentucky.

Having so found, the district court concluded that the individual defendants were not subject to personal jurisdiction in Kentucky.

The district court considered the individual defendants' motion to transfer the case to the U.S. District Court of Minnesota pursuant to 28 U.S.C. § 1412, which permits a "district court to transfer a case for proceeding under Title XI to a district court for another district, in the interest of justice or for the convenience of the parties." As a foundational matter, the court first considered whether it was appropriate to transfer a case under § 1412 when the claims are only "related to" the bankruptcy proceeding or whether such cases must be analyzed under 28 U.S.C. § 1404(a). The court found that where a case may result in indemnification claims by a defendant against a debtor's estate, the case may be transferred pursuant to § 1412 given the consequence that such indemnification claim could have upon the bankruptcy estate. The court turned to the issue of whether transferring the case would serve the interest of justice or facilitate the convenience of the parties. The district court analyzed the seven factors relevant to determining whether the interest of justice warrants a transfer. The district court found that three of the factors militated in favor of transfer, three factors appeared neutral, and only one factor—the plaintiff's original choice of forum—weighed in KFC's favor. Thus, the court granted defendants' motion to transfer the action to the district court of Minnesota.

***Maaco Franchising, Inc. v. Tainter*, Bus. Franchise Guide (CCH) ¶ 15,072, No. 12-5500, 2013 WL 2475566 (E.D. Pa. June 6, 2013)**

Maaco, a franchisor offering automotive painting and body repair shop franchises, sued its franchisee in the U.S. District Court for the Eastern District of Pennsylvania, alleging that the franchisee failed to pay royalties and advertising fees and failed to comply with an audit. The franchise was located in Palo Alto, California.

Although the franchise was located in California, the franchise agreement provided that Pennsylvania law governed, and it contained a forum selection clause providing that all actions arising out of or related to the franchise agreement must be brought and litigated in Pennsylvania. The franchisee filed a motion challenging the enforceability of the forum selection clause and seeking transfer of venue to the U.S. District Court for the Northern District of California. The court denied the motion.

The franchisee made three arguments regarding why the forum selection clause should not be enforced. First, there was no meeting of the minds so there could not be an agreement on the forum selection. Second, if there was an agreement, the forum selection clause was unenforceable because it contravened California's strong public policy, as reflected in § 20040.5 of the California Business and Professions Code, against enforcing out-of-state forum selection clauses. Third, even if the forum selection clause was valid, public and private factors under 28 U.S.C. § 1404(a) weighed heavily in favor of transfer to California. The court found each of these arguments unpersuasive.

Forum selection clauses are presumptively valid. To prove the clause is invalid, a party must show that there was fraud or overreaching in entering into the clause, such a clause contravenes a strong public policy, or enforcing the clause would be so gravely difficult as to effectively deprive a party of its day in court.

The franchisee relied on *Laxmi Investments, LLC v. Golf USA*, 193 F.3d 1095 (9th Cir. 1999) to argue that the court should invalidate the forum selection clause based on § 20040.5. However, the court found *Laxmi* unpersuasive because the language of the forum selection clause was clear and unambiguous and because the franchise agreement contained an integration clause, which limited the interpretation of the franchise agreement to its four corners.

The court also found that § 20040.5 did not apply because the proper inquiry is whether there is a strong public policy against enforcing the forum selection clause in the forum in which the lawsuit is pending. In reaching this decision, the court examined prior cases that held § 20040.5 did not apply to invalidate a forum selection clause in a proceeding outside of California. However, the court also acknowledged that other cases came to the opposite conclusion when interpreting the effect of § 20040.5 and invalidated the forum selection clause. Interestingly, a prior case in the same district court reached the opposite conclusion as the court in *Maaco*. *See Cottman Transmission Sys., LLC v. Kershner*, 492 F. Supp. 2d 461 (E.D. Pa. 2007).

Finally, the court found that weighing the public and private factors under 28 U.S.C. § 1404(a) did not require transferring the case to California.

***Navraj Rest. Group, LLC v. Panchero's Franchise Corp.*, Bus. Franchise Guide (CCH) ¶ 15,099; No. 11-cv-7490 (PGS), 2013 WL 4430837 (D.N.J. Aug. 15, 2013)**

In this case, a court once again rejected another franchisee's argument that the arbitration clause was unconscionable, but refused to enforce a forum selection clause designating Illinois as the forum, concluding that such forum selection clause was unenforceable under the New Jersey Franchise Practices Act.

Franchisor Panchero's alleged numerous New Jersey and Iowa statutory and common law violations against Navraj and AMP. Navraj and AMP claimed that Panchero's made knowingly false and misleading statements to induce them into their respective agreements and thereafter breached the agreements. Under Navraj's agreement, Navraj agreed to serve as an agent of Panchero's for the purpose of recruiting and soliciting franchises in the New Jersey area. Under AMP's agreement, AMP agreed to enter into a franchise relationship with Panchero's. Despite the fact that both agreements contained identical forum selection and mandatory arbitration clauses, Panchero's asserted the basis for dismissal of Navraj's claims was the forum selection clause while the basis for dismissal of AMP's claims was the mandatory arbitration clause.

Turning to Navraj's claims, the court stated that any forum selection clause in a franchise relationship was presumed invalid under the New Jersey Franchise Protection Act. Therefore, finding that Navraj's agreement met all three factors for the classification of a franchise relationship under the act and Panchero's failed to show the forum selection clause was not imposed because of its superior bargaining position, the court determined the forum selection clause was unenforceable.

Turning to AMP's claims, the court found the Federal Arbitration Act governed the enforcement of the arbitration clause, preempting the state franchise act. The court held the clause was enforceable, determining the matter needed to be adjudicated by an arbitrator. Additionally, the court found Navraj's and AMP's defense of unconscionability unpersuasive, reasoning that such a defense requires more than the allegation that a contract is one of adhesion. The court noted the contract was not wholly nonnegotiable because it contained handwritten changes by Navraj.

CHOICE OF LAW

***ERA Franchise Sys., LLC v. Hoppens Realty, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,112; No. 12-cv-594-slc, 2013 WL 3967869 (W.D.Wis. July 31, 2013)**

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

***Depianti v. Jan-Pro Franchising Int'l, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,069, 990 N.E.2d 1054 (Mass. 2013)**
This case is discussed under the topic heading "Labor and Employment."

***Ocean City Express Co., Inc. v. Atlas Van Lines, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,103; No. 13-1467 (JBS/KMW), 2013 WL 3873235 (D.N.J. July 25, 2013)**
A federal court for the District of New Jersey dismissed claims brought by a moving van agent against its principal on the grounds that the agent failed to plead facts sufficient to show that the relationship constituted a franchise under the New Jersey Franchise Practices Act (NJFPA). The district court also dismissed the agent's claim that the principal violated its implied covenant of good faith and fair dealing.

Plaintiff-agent Ocean City Express entered into an agency agreement with defendant-principal Atlas Van Lines in 2006. In late 2010, Atlas Van Lines sent Ocean City Express a letter terminating the agency agreement, without giving Ocean City Express written notice or setting forth the reasons for the termination. Ocean City Express sued in New Jersey Superior Court, and Atlas Van Lines removed the case to federal court.

The district court dismissed the NJFPA claim on the grounds that Ocean City Express had failed to demonstrate that the relationship qualified as a franchise under the NJFPA. In its complaint, Ocean City Express alleged that the business relationship with Atlas Van Lines constituted a franchise within the meaning of the NJFPA but did not allege facts to support this conclusion. Ocean City Express alleged additional facts in a later certification; however, the district court held that a plaintiff may not add factual allegations in its opposition and dismissed the claim without prejudice.

The district court also dismissed Ocean City Express's common law claim that Atlas Van Line breached its implied covenant of good faith and fair dealing. In reaching this decision, the district court ruled on the issue of governing law and determined that Indiana law, which does not recognize a common law duty of good faith and fair dealing, governed the relationship. The district court used the law of the forum state to interpret the choice of law provision in the agency agreement and held that a choice of law provisions will be upheld under New Jersey law unless it violates public policy. The district court held that the implied duty of good faith and fair dealing arises from New Jersey's common law, not from an overarching statement of public policy, and therefore upheld the Indiana choice of law provision in the agency agreement.

CLASS ACTIONS

***Machado v. System4 LLC*, Bus. Franchise Guide (CCH) ¶ 15,076; 989 N.E.2d 464 (Mass. 2013)**
Courts in Massachusetts have become popular venues for cases alleging that janitorial franchisees have been misclassified as independent contractors

rather than as employees. This case challenges the validity of class action and multiple damages waivers in the arbitration provision of a janitorial franchise agreement.

System4 was the master franchisor of a janitorial franchised system. NECCS, Inc. was in essence a subfranchisor that entered into "local franchise agreements" with plaintiffs. In addition to prohibiting class actions, the arbitration provisions in the local franchise agreements prohibited multiple, such as double or treble, damages.

The trial court invalidated the arbitration clause as contrary to Massachusetts public policy. The Supreme Judicial Court of Massachusetts reviewed this ruling in view of *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), in which the U.S. Supreme Court held that the Federal Arbitration Act preempted a California rule that considered most collective arbitration waivers in consumer contracts to be unconscionable. The Supreme Judicial Court found that in light of *Concepcion*, a court cannot invalidate class action waivers based on Massachusetts public policy favoring consumer class actions as evidenced by a statute. Instead, the invalidation of such clauses required a showing of the consumer's inability to pursue the statutory claim under the individual claims arbitration provisions of the agreement. The court noted that once a court invalidates the class action waiver, it must invalidate the entire arbitration agreement and permit class litigation to proceed, reasoning that *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) precludes a court from ordering nonconsensual class arbitration.

The Supreme Judicial Court said that in the post-*Concepcion* world, a claimant must show that the class action waiver and other terms of the arbitration agreement will effectively deny the claimant a remedy and insulate defendant from liability. The court observed that plaintiffs in this case sought, among other damages, the return of certain franchise fees ranging from approximately $9,500 to $21,800 per claimant. The court said that the amount of damages alone does not determine the claimant's ability to seek a remedy, but it may be the most important factor. The court noted that in *Concepcion* the U.S. Supreme Court rejected the argument that damages of $4,000 were small enough to require class adjudication. As a result, the Supreme Judicial Court refused to invalidate the class action waiver.

Turning to the arbitration clause's prohibition against multiple damages, the court noted that the statute provided that treble damages as well as attorney fees *shall* be awarded for Wage Act violations. The mandatory nature of such damages led the court to uphold the trial court's invalidation of the multiple damages waiver language in the arbitration provisions. Defendants had argued that the multiple damages provision can be severed from the arbitration agreement; the court agreed, determining that the statutorily mandated multiple damages provision did not "impinge on any fundamental characteristic of arbitration."

After the Supreme Judicial Court's decision, the U.S. Supreme Court decided in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) that an arbitration agreement cannot be invalidated under the Federal Arbitration Act on the basis that it effectively denies plaintiff a remedy. The Supreme Judicial Court sought responses from the parties as to whether *American Express* affected the validity of its decision in *Machado*. The claimants filed no response, and the court agreed with defendants that *American Express* abrogates its analysis in *Machado* that relied on a prior case finding that class action waivers may be struck down where they effectively deny plaintiff a remedy. The court noted that its reversal of the trial court's invalidation of the class action waiver as well as its invalidation of the prohibition in the franchise agreement on multiple damages remained sound in the aftermath of *American Express*.

CONTRACT ISSUES

***Ayu's Global Tire, LLC v. Big O Tires, LLC*, Bus. Franchise Guide (CCH) ¶ 15,083; 2013 WL 2298585, No. B236930 (Cal. Ct. App. May 24, 2013)**

Ayu's Global Tire, a former franchisee, sued Big O Tires in California state court after closing its Big O store in Hawthorne, fifteen months after opening. Ayu pursued claims for declaratory relief, breach of contract, breach of the implied covenant of good faith and fair dealing, and fraud in the inducement, alleging that Big O promised services and benefits Ayu did not receive and withheld unfavorable information regarding Ayu's likelihood of success. Ayu appealed after the trial court granted Big O's motion for summary judgment. In a nonpublished and noncitable opinion, the California Court of Appeals affirmed the summary judgment in favor of Big O. Ayu did not discuss its covenant of good faith and fair dealing claim on appeal, so the appeals court limited its review to the breach of contract and fraud in the inducement claims.

The court applied Colorado law in reviewing the breach of contract and fraud in the inducement claims. The court noted that the parol evidence and economic loss rules do not apply to fraud in the inducement claims under Colorado law. As a result, Big O could not rely upon the integration clause in the franchise agreement in defending the fraud claim. The economic loss rule, if applicable, would have prevented Ayu from asserting a tort claim for an economic loss created by a breach of contract.

The court noted that reasonable reliance is an essential element of Ayu's fraud claim and that the reliance issue may be resolved as a matter of law where the relevant facts are undisputed. The court further noted that Colorado law uses the inquiry notice doctrine in determining reasonable reliance, which deems a claimant to have knowledge of certain facts when it had sufficient information regarding such facts. The court stated that "clear and specific" language in an offering circular or franchise agreement can be used to prove the absence of reasonable reliance.

The appeals court applied these principles to Ayu's claims. Ayu alleged that Big O told Hailemariam, Ayu's owner, that he did not need previous tire store experience to be successful and that Big O misrepresented and omitted facts regarding the benefits Big O provided to franchisees, provided exaggerated estimates of profits for a typical Big O location, and concealed information that many Big O franchisees had failed. Big O responded by arguing that it provided presale disclosures sufficient to preclude reasonable reliance on any purported misrepresentations, provided evidence that Hailemariam admitted that he neither carefully reviewed his Uniform Franchise Offering Circular (UFOC) nor had his lawyer review it, that many franchisees who lacked prior experience have been successful, and that Hailemariam received more training than the typical franchisee. Big O also submitted evidence that it provided competitively priced tires to Hailemariam, contrary to his allegations. Big O countered allegations regarding the suitability of Ayu's location by noting that the UFOC stated that the franchisee made the final decision on location and that Big O disclaimed liability regarding site selection.

The court concluded that the showing made by Big O shifted the burden of proving the existence of triable issues of fact to the franchisee on the fraud claim, based on evidence provided from Hailemariam's deposition and Big O's evidence that Ayu could not have reasonably relied on certain alleged misrepresentations in view of disclosures in the UFOC and franchise agreement. In addition, the court determined Big O had presented evidence that it had complied with its obligations under the franchise agreement in response to the breach of contract claims sufficient to shift that burden to Ayu. After determining that the burden of showing triable issues of fact had shifted to Ayu, the court evaluated Ayu's arguments.

In pursuing its fraud claim, Ayu argued that Big O personnel had made false statements regarding training programs, the profitability of its stores, the supply and pricing of tires, and alleged franchisee dissatisfaction with these issues. Ayu also argued that Big O failed to disclose an internal memorandum expressing concern about the high failure rate for new franchisees that lacked tire experience and an internal pro forma prepared by Big O showing a smaller profit than projected by Ayu. The appeals court affirmed the trial court's granting of summary judgment for Big O on the fraud issue, finding that the inquiry notice doctrine precluded Ayu from proving reasonable reliance and that Hailemariam did not heed the admonitions of Big O's UFOC that he review the Big O opportunity carefully and seek professional advice. In arriving at this conclusion, the court noted that Ayu presented no evidence that Big O had made any false representations regarding the necessity for experience or was under any duty to disclose its internally prepared pro forma to Ayu. In fact, Big O provided evidence it did not believe it could disclose the pro forma, because it was an earnings claim under applicable disclosure rules. The appeals court also concluded that it was appropriate for the trial court to exclude portions of Hailemariam's declaration as being contradictory to his deposition testimony.

The appeals court concluded its opinion by upholding the trial court's ruling that there was no triable issue of fact on the breach of contract claim. The appeals court first concluded that, under the franchise agreement's integration clause, the UFOC was to be considered part of the franchise agreement. Ayu argued that Big O breached the franchise agreement by selling tires to other franchisees at lower prices, directing Ayu to sell unsuitable tires, selling Ayu unnecessary equipment, and providing products and services that were "indistinguishable from competitors." In rejecting each of these arguments, the court noted that Big O had no obligation to sell tires to all franchisees at uniform prices, under the franchise agreement Big O did not give a guarantee as to the adequacy of the tire inventory, the equipment purchased by the franchisee was within the range stated in the UFOC, and the franchisee agreement had no obligation that Big O provide distinctive products and services.

In summary, this case demonstrates the importance to franchisors of having well-written and integrated franchise agreements and disclosure documents in defending claims from unsuccessful franchisees. It also highlights the importance of thoroughly investigating a franchise opportunity and seeking the assistance of experienced counsel before making the substantial investment of time and money involved in purchasing a franchise.

***Ford Motor Co. v. Ghreiwati Auto*, Bus. Franchise Guide (CCH) ¶ 15,064; 945 F. Supp. 2d 851 (E.D. Mich. 2013), *motion for reconsideration denied*, 2013 WL 6482402 (Dec. 10, 2013)**

Plaintiff Ford Motor Company was party to a global importer dealer sales and service agreement (GIDSSA) with defendant Ghreiwati Auto under which Ghreiwati Auto operated a motor dealership in Syria. Plaintiff was also party to a GIDSSA with a second defendant, Orient, that operated a motor dealership in Iraq. The two defendants had common, although not identical, ownership; the common owners worked and lived in Syria. As a result of President Obama's Executive Order issued in August 2011 prohibiting the exportation and the sale or supply of services from the United States to Syria, the Ghreiwati Auto GIDSSA was terminated in August 2011 and the Orient GIDSSA was terminated in September 2011.

After the terminations and settlement meetings between the parties, Ford filed a complaint to enjoin arbitration proceedings, defendants filed numerous counterclaims, and Ford moved to dismiss all such counterclaims, except for the breach of contract claims. After lengthy analysis, the court dismissed defendants' counterclaims for violation of the Michigan Dealer Act (MDA), breach of fiduciary duty, and taking of trade secrets or corporate opportunities. However, the court did not grant the motion to dismiss as to defendants' unjust enrichment or promissory estoppels claims.

In their counterclaims, defendants included a claim under the MDA alleging that plaintiff failed to act in good faith, wrongfully terminated the agreement, and failed to give the required notice of termination, among other allegations. Defendants argued that the MDA applied because the GIDSSAs included choice of law provisions making Michigan the governing law. However, Ford argued that the MDA only applies to dealers of motor vehicles located in the State of Michigan. The court agreed with Ford, finding that the MDA clearly and unambiguously states that the provision applies to those dealerships with an established place of business located in Michigan. Because neither defendant has a physical location in Michigan, the MDA does not apply to them and the claim was dismissed.

Ford also sought dismissal of defendants' breach of fiduciary duty, taking of trade secrets, and taking of corporate opportunity claims, which the court granted. The court acknowledged that a contract alone does not give rise to a fiduciary duty. However, defendants alleged that the GIDSSAs were drafted broadly to allow the parties to interpret the relationship based upon the parties' laws, traditions, religions, and cultures, and that the defendants put faith, confidence, and trust in Ford's judgment, thereby creating a heightened duty on the party of Ford to advise defendants in the terms of the relationship. Defendants further alleged that, based on the contractual arrangement, Ford had access to defendants' confidential and proprietary information, and therefore Ford owed defendants fiduciary duties. Ford, on the other hand, argued that because this was a manufacturer-dealer relationship, no fiduciary relationship existed by law. Whether a fiduciary relationship exists outside of the traditional fiduciary relationships is a question of fact. Ford pointed to a number of cases that supported its argument, including one which found that a dealer cannot simply allege reliance on the manufacturer where both parties are experienced for-profit entities in a commercial setting. Although defendants pointed to another Ford case, that case supported Ford's position as well. In *Franklin Park Lincoln-Mercury v. Ford Motor Co.*, 2010 WL 2650041 (N.D. Ohio July 2, 2010), the court held that unless the franchise agreement expressly creates a fiduciary duty, a fiduciary duty will be found only under exceptional circumstances, such as when an agreement includes a provision giving the franchisor "the authority to exercise near life and death economic power over" the franchisee. Examining the agreement, the court ultimately found no fiduciary relationship, and it acknowledged that the parties' contract provisions, which are standard in the franchisor-franchisee relationship, do not create a fiduciary duty. In this case, the court found that the breach of fiduciary duty claim was not well pleaded, and defendants did little more than state that there was a fiduciary relationship based on the GIDSSA without providing any supporting facts.

As for the claims for taking of trade secrets and corporate opportunity, defendants did little more than make conclusory statements that they had such claims without providing specific facts as to what trade secrets and confidential information were taken by Ford, to whom Ford provided them, how they were used, and what damages were suffered as a result.

The court did not grant Ford's motion to dismiss defendants' claims for unjust enrichment and promissory estoppel. Ford argued that both claims should be dismissed because the parties had valid, express contracts. However, as part of defendants' counterclaims, they questioned whether the GIDSSAs remain enforceable and if so, whether Ford breached the contracts. The court pointed out that promissory estoppel and unjust enrichment claims can be brought together with breach of contract claims where there is a question as to the validity of the contract. Here, Ford asserted the defenses of impracticability and impossibility to the contract claims, raising the issue of whether the contracts were valid. Therefore, the court found that it was not appropriate to dismiss the claims for unjust enrichment and promissory estoppel without first determining whether the GIDSSAs were valid, enforceable contracts. Because the breach of contract claims were not before the court on the motion to dismiss, it could not make that determination and therefore could not dismiss the claims for unjust enrichment or promissory estoppel.

***Jackson Hewitt, Inc. v. Luke*, Bus. Franchise Guide (CCH) ¶ 15,075; No. 13-512 (JLL), 2013 WL 2444064 (D.N.J. June 3, 2013)**

Jackson Hewitt terminated Terry Luke's franchise following Luke's failure to remit to Jackson Hewitt amounts required by the franchise agreement. Luke responded to the action filed by Jackson Hewitt with a seven-part counterclaim, which Jackson Hewitt sought to dismiss. Jackson Hewitt also sought to strike Luke's demand for a jury trial, citing a jury trial waiver in the franchise agreement. In a not-for-publication opinion, the U.S. District Court for the District of New Jersey dismissed the franchisee's counterclaims without prejudice but declined to strike the jury trial waiver at the current stage in the litigation.

In seeking to have Luke's counterclaims dismissed or made more certain under the Federal Rules of Civil Procedure, Jackson Hewitt argued that these counterclaims were simply recitations or summaries of provisions in the franchise agreement "followed by nonspecific conclusory statements that Jackson Hewitt engaged in some, unspecified wrongful conduct." In dismissing Luke's counterclaims, the court found that Luke's allegations were broad allegations insufficient to satisfy the pleading requirements of the Federal Rules of Civil Procedure. The court noted that Luke's general statements of wrongdoing did not refer to any specified contractual provisions that Jackson Hewitt allegedly violated.

The jury trial waiver Jackson Hewitt sought to strike appeared in bold print in the franchise agreement and purported to waive jury trials in any actions arising out of or related to the franchise relationship, including post-termination conduct. The court noted that in a federal case premised on diversity jurisdiction the right to a jury trial is a question of federal law. After reciting the familiar requirements that jury trial waivers must be knowing and voluntary, the court cited four factors to consider in determining the validity of the waiver: (1) the absence of gross disparity of the parties' bargaining power, (2) the business sophistication of the parties, (3) the opportunity to negotiate contract terms, and (4) whether the waiver was conspicuous. The court determined that the record in this case did not enable the court to determine if the waiver is valid. The court expressed concerns whether the waiver was bargained for and whether Luke was represented by counsel at the time. In addition, the court ruled that Jackson Hewitt had not provided the court with the entire franchise agreement to enable it to determine if the waiver provision was conspicuous.

The court's unwillingness to allow a collection of conclusory and nonspecific counterclaims to proceed should cheer franchisors that often face counterclaims in termination cases. At the same time, this case shows the importance of marshaling as much evidence as possible regarding the voluntary nature of a jury trial waiver, including providing the entire franchise agreement to the court to illustrate the conspicuous nature of the jury trial waiver.

***KFC Corp. v. Kazi*, Bus. Franchise Guide (CCH) ¶ 15,086; No. 3:11-CV-00475-M, 2013 WL 2257606 (W.D. Ky. May 22, 2013)**

KFC Corporation filed this action in the U.S. District Court for the Western District of Kentucky, seeking to enforce a settlement agreement and close three franchised locations in California. KFC terminated the franchise agreements for these locations in May 2011 for the franchisees' failure to comply with certain conditions in the franchise agreements and remodel agreements and sued the franchisees in August 2011. Settlement negotiations resulted in a settlement agreement executed on May 8, 2012. KFC agreed to reinstate the franchise agreements, and the franchisees agreed to meet certain deadlines for remodeling the locations.

Under the settlement agreement, the franchisees were required to remodel two of the three locations as selected by the franchisees within six months with the third location to be remodeled within nine months. The franchisees had to complete the remodeling of the first two stores by November 8, 2012. They received a three-week extension of the deadline to November 29. The franchisees had not even begun the remodels before the extended deadline arrived, and KFC sought enforcement of the settlement agreement.

The franchisees argued that delays in obtaining permits stalled their remodeling of the locations, a circumstance they argued the settlement agreement addressed. The franchisees contended that staffing shortages and significant delays at the permitting authorities had caused the delays, and that the permitting entities informed the franchisees that the delays may continue for several months.

In reviewing the settlement agreement, the court noted that to obtain an extension of the deadline for a permitting delay, the franchisees had to provide documentation that they had applied for permits within one week of receipt of KFC's approval of the architect's specifications and drawings, and that the franchisees had satisfied all permit requirements within one week after a request from the permitting agencies. The settlement agreement provided that the franchisees' failure to satisfy these two conditions would result in the permitting delay being deemed unreasonable.

In arguing there had been an unreasonable permit delay, KFC noted that it had approved the franchisees' remodel drawings on September 17, 2012. KFC agreed to extend the date by which the franchisees had to file for permits from September 24 to October 15, but the franchisees did not submit permit applications until October 25 for one location and October 29 for the other. As a result, KFC contended that the first condition under the settlement agreement was not satisfied and the permit delay was deemed unreasonable under the settlement agreement.

The franchisees countered that KFC's analysis was contrary to the intent of the settlement agreement. The franchisees argued that the settlement agreement provided for termination of the franchise agreement for unreasonable permit delays or delays based on the franchisees' action or inaction resulting in failure to remodel within the required time frames. Here, the franchisees argued, delays by the permitting authorities and not the franchisees' "minimal delay in submission" led to the failure to remodel within the required times.

The court disagreed with the franchisees' reading of the settlement agreement and interpreted the settlement agreement to allow termination of the franchise agreements for either an unreasonable permit delay or any delay based on the franchisees' actions or inactions. The court determined that there was no question that a permit delay, which met the requirements of the settlement agreement for an unreasonable delay, resulted in failure to remodel within the required time period. The court gave short shrift to the franchisees' argument that it did not receive formal notice of the delay from the permitting authorities so it could not request an extension of the remodel deadline from KFC. The court noted that the settlement agreement did not require formal notice of any delay to be received from the permitting authorities. The court granted KFC's motion to enforce the settlement agreement and close the locations.

***Volvo Trucks N. Am., LLC v. Andy Mohr Truck Ctr.*, Bus. Franchise Guide (CCH) ¶ 15,067; No. 1:12-cv-448-WTL-DKL, 2013 WL 2939052 (S. D. Ind. June 14, 2013)**

A federal court for the Southern District of Indiana strictly interpreted the integration and limitation of remedies clauses in a dealership agreement and granted motions to dismiss claims brought by a car dealer against a franchisor.

Volvo encouraged Mohr to open a Volvo trucks dealership in central Indiana. During the course of negotiations, Mohr came to believe that a dealership combining both the Volvo and Mack truck brands would yield significantly higher benefits than operating a Volvo dealership alone. In a meeting with Mohr, Volvo executives represented to Mohr that they would grant Mohr dealerships for Volvo trucks and Mack trucks in separate agreements. Mohr entered into the agreement for a Volvo dealership first. Mohr was never granted the Mack truck dealership and sought relief from the court.

Mohr argued that the representation to grant a Mack truck franchise was a separate oral contract that Volvo breached. Volvo filed a motion for judgment on the pleadings, arguing that the Volvo dealership agreement contained an integration clause, which provides that the dealership agreement represents the entire agreement between the parties. The court held that because Mohr implied in his complaint that the Mack trucks franchise was promised in exchange for Mohr's agreement to enter into the Volvo dealership agreement, Mohr had cast the Mack trucks franchise as consideration for the Volvo franchise, rather than a separate oral agreement. In addition, because the consideration was not set forth in the Volvo dealership agreement, the integration clause barred its inclusion in the terms of that agreement. The court used the same reasoning to dismiss (1) Mohr's promissory estoppels claim on the grounds a valid and enforceable contract covered the disputed subject, and (2) his fraud claim under the Indiana Franchise Disclosure Act (IFDA) on the grounds that the integration clause in the Volvo dealership agreement makes reliance on the misrepresentations made by the executives unreasonable as a matter of law.

Mohr also brought a claim of breach of the dealership agreement on the grounds that Volvo failed to provide Mohr the support promised under the terms of the agreement. Mohr's claim was based on the fact that Volvo would not grant certain price concessions necessary for Mohr to complete a large sale. Volvo argued that this claim should be barred by the limitation of remedies clause in the dealership agreement, which prohibits recovery of loss of profit, good will, or business opportunities. Mohr argued that he was seeking only a franchise of the value Volvo promised and not extraordinary forms of relief barred by the limitation of remedies clause. The court disagreed with Mohr, holding that the value of a franchise is measured in terms of profit, goodwill, and business opportunity, all of which are barred by the limitation of remedies clause.

***Volvo Trucks N. Am., LLC v. Andy Mohr Truck Center*, Bus. Franchise Guide (CCH) ¶ 15,068; No. 1:12-cv-448-WTL-DKL, 2013 WL 2938913 (S. D. Ind. June 14, 2013)**

In this same case, the court held in an opinion issued the following day that Volvo could not sue Mohr for misrepresentations made in his application because the dealership agreement contained an integration clause.

Volvo had initiated this action against Mohr, asserting that he failed to fulfill the promises, representations, and guarantees made in the business plan he included in his dealer application, including representations that he would meet certain sales quotas, secure specific business accounts, and build a new facility within a year of being awarded the dealership.

Mohr filed a motion for judgment on the pleadings, arguing that the dealer application was excluded from the dealership agreement by that agreement's integration clause, which provided that the dealership agreement represents the entire agreement between the parties. Volvo argued that its portfolio of criteria was incorporated into the dealership agreement by reference and the portfolio of criteria cross-referenced to the dealer application. The district court rejected Volvo's argument, pointing to a provision in the dealership agreement that defined the portfolio of criteria as criteria prepared by Volvo, whereas the business plan was prepared by Mohr. The district court also pointed to a section of the dealer application where sales criteria were marked "to be determined," instead of referencing the representations made by Mohr in his business plan. On these grounds, the district court rejected Volvo's theory of incorporation, finding that Mohr's business plan was not incorporated into the dealer agreement and was therefore barred by the integration clause. The same reasoning was used by the district court to dismiss Volvo's fraud claim under the Indiana Franchise Disclosure Act (IFDA) on the grounds that the integration clause in the dealership agreement makes reliance on the representations in the dealer application unreasonable as a matter of law.

Volvo also sought declaratory judgments regarding its right to terminate the dealer agreement due to Mohr's alleged misconduct. Mohr filed a motion for judgment on the pleadings of this claim but the district court dismissed this motion, holding that the business plan provided by Mohr contained statements of objective and verifiable facts, which Volvo is entitled to claim are false.

DAMAGES

***In re Am. Suzuki Motor Corp., Debtor(s)*, Bus. Franchise Guide (CCH) ¶ 15,073; No. 8:12-bk-22808-SC, 494 B.R. 466 (C.D. Cal. June 4, 2013)**
This case is discussed under the topic heading "Bankruptcy."

***Machado v. System4 LLC*, Bus. Franchise Guide (CCH) ¶ 15,076, 989 N.E.2d 464 (Mass. 2013)**
This case is discussed under the topic heading "Class Actions."

DEFINITION OF FRANCHISE

***Garbinski v. Nationwide Prop. & Cas. Ins. Co.*, Bus. Franchise Guide (CCH) ¶ 15,087; 523 F. App'x 24 (2d Cir. 2013)**
In this case, the U.S. Court of Appeals for the Second Circuit considered whether a former Nationwide insurance agent was a franchisee within the

meaning of the Connecticut Franchise Act (CFA). Garbinski entered into an agreement with Nationwide to sell Nationwide insurance policies. Nationwide terminated Garbinski's agreement after he was arrested for threatening his wife with a gun and holding her captive for several hours. In response, Garbinski sued Nationwide in the U.S. District Court for the District of Connecticut, alleging that the agreement was wrongfully terminated and asserting a claim under the CFA, as well as claims for violations of the Connecticut Unfair Trade Practices Act, tortious interference with business, and breach of the implied covenant of good faith and fair duty. Nationwide filed a motion for summary judgment arguing that the CFA did not apply and, because Garbinski's other claims relied on the CFA claim, summary judgment was appropriate as to those claims as well. The district court agreed and Garbinski appealed.

The dispositive issue on appeal was whether there was a franchise relationship between Nationwide and Garbinski within the meaning of the CFA, which defines a franchise as an arrangement involving the "offering, selling or distributing of goods or services under a marketing plan prescribed in substantial part by a franchisor" in which "the operation of the franchisee's business is substantially associated with the franchisor trademark, service mark," names, etc. The Second Circuit withheld judgment as to whether an insurance agent may ever be a franchisee but agreed with the district court that Garbinski and Nationwide had not entered into a franchise relationship under the CFA. In reaching this conclusion, the court was persuaded by the fact that Garbinski did not buy the insurance products from Nationwide before reselling them to clients (Nationwide owned the policies) and that he was not required to meet any minimum sales requirements. Relying on the Connecticut Supreme Court's findings in a case involving a similar relationship between an oil company and an alleged franchisee, the Second Circuit affirmed the district court's ruling that the relationship between Nationwide and Garbinski was not a franchise and therefore not subject to the CFA.

FRAUD

***Ayu's Global Tire, LLC v. Big O Tires, LLC*, Bus. Franchise Guide (CCH) ¶ 15,083, 2013 WL 2298585, No. B236930 (Cal. Ct. App. May 24, 2013)**

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

***Palermo Gelato, LLC v. Pino Gelato, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,090, No. CV-00931, 2013 WL 3147312 (W.D. Pa. June 19, 2013)**

Palermo Gelato entered into a license agreement with Pino Gelato under which Palermo agreed to purchase Pino's gelato products and sell them to the public using Pino's trademarks. The agreement included an integration clause and a provision stating the parties agreed that their relationship was not a franchise. Palermo claimed that prior to entering into the license agreement, Pino represented that Pino was the "exclusive" owner of a "unique recipe" of gelato developed in Sicily. Palermo subsequently discovered that Pino's gelato was manufactured in bulk by a third party (G.S.) and sold on a wholesale basis through its website.

Palermo filed a complaint in the U.S. District Court for the Western District of Pennsylvania claiming that it was fraudulently induced to enter into the license agreement by Pino's alleged misrepresentation. In response, Pino filed a motion to dismiss, arguing that the alleged misrepresentations were barred by the parol evidence rule.

In addressing Pino's arguments, the district court noted that while the scope of the parol evidence rule is not altogether clear under Pennsylvania law, if "a writing represents the entire contract between the parties," evidence of any prior oral or written negotiations or agreements "involving the same subject matter" as the contract are generally inadmissible to either "explain or vary the terms of the contract." The district court quickly found that the license agreement was fully integrated based in large part on the integration clause. The court turned to the central issue in the case, i.e., "how close" does the relationship between the alleged misrepresentations and the parties' contract need to be? According to the district court, the cases that had previously addressed this question were somewhat at odds. After analyzing these cases, the court concluded that under Pennsylvania law the representations need only "relate to" subjects that are specifically addressed in the written contract, which it characterized as the "same subject matter" requirement.

In determining whether the parol evidence rule applied, the court reviewed and compared various provisions in the parties' agreement with Pino's purported misrepresentation that it was the owner of a high-end special gelato recipe rather than a private labeler of somebody else's mass-produced gelato recipe. The district court noted that the agreement identifies Pino as "the supplier of" gelato products, some of which are used with Pino's marks, and that various other provisions in the agreement specifically referred to the gelato recipe itself. Based on these provisions, the court concluded that the agreement as a whole "relates to" the subject matter of the claimed misrepresentations (i.e., the ownership and source of the gelato and the recipe). The court noted, however, that this case was somewhat "unusual" because the contractual terms "confirm, rather than deny," the subject matter of the alleged misrepresentations. The court found that the same subject matter requirement does not appear to require either a positive or negative "valance." Thus, the fact that the contract relates to the ownership and source of the gelato recipe was sufficient for the parol evidence rule to apply and bar the alleged misrepresentations.

Palermo also argued that the agreement was a franchise and that Pino failed to comply with the Pennsylvania disclosure laws, which would have brought to light the "truth" regarding the ownership and source of the gelato. Interestingly, the district court gave this argument short shrift and summarily concluded that the "no franchise" clause also eliminated Palermo's claim that it was fraudulently induced into entering into an agreement that was a franchise agreement.

GOOD FAITH AND FAIR DEALING

***North Star Int'l Trucks, Inc. v. Navistar, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,085; No. A12-1524, 2013 WL 2149949 (Minn. Ct. App. May 20, 2013)**
This case is discussed under the topic heading "Termination and Nonrenewal."

INJUNCTIVE RELIEF

***Choice Hotels Int'l, Inc. v. Patel*, Bus. Franchise Guide (CCH) ¶ 15,066; 940 F. Supp. 2d 532 (S.D. Tex. 2013)**
This case is discussed under the topic heading "Trademark Infringement."

***Dunkin' Donuts Franchised Rest., LLC v. Claudia I, LLC*, Bus. Franchise Guide (CCH) ¶ 15,081; No. 12-2010, 2013 WL 2147951 (E.D. Pa. May 16, 2013)**
Dunkin' Donuts sought a preliminary injunction in the U.S. District Court for the Eastern District of Pennsylvania against Claudia I, LLC, a Pennsylvania franchisee, after Claudia withheld all payments of rent and common area maintenance for eighteen months under a sublease for the franchised location. Dunkin' Donuts contended the total amount owed by Claudia was nearly $305,000. Claudia had purchased an existing franchised location in Jenkintown, Pennsylvania, in 2009, obtaining an assignment of the prior franchisee's interest in the lease and franchise agreement. Claudia entered into a franchise agreement and transfer agreement with Dunkin' Donuts, which required Claudia to remodel and refurbish the location by December 21, 2012. Dunkin' Donuts terminated the franchise agreement and sublease after Claudia withheld payments under the sublease; failed to complete the required remodel; and neglected to pay sales and payroll taxes, which led to the recording of ten tax liens on the property. Claudia argued the dispute concerned Claudia's failure to pay rent and that because Dunkin' Donuts waited so long to file its action a preliminary injunction would be inappropriate.

The court stated that in deciding whether to grant a preliminary injunction it had to consider: (1) the likelihood that Dunkin' Donuts would ultimately prevail on the merits, (2) the extent to which Dunkin' Donuts was being harmed by Claudia's conduct, (3) the extent to which Claudia would be irreparably harmed by the granting of the injunction, and (4) the public interest. In granting the preliminary injunction, the court stated that Dunkin' Donuts had the power to terminate the franchise relationship for the alleged violations, independent of any claims Claudia may have against Dunkin' Donuts, which included allegations against Dunkin' Donuts of bad faith and breach of the franchise agreement. The court noted that a franchisor has the right to enjoin unauthorized use of its marks following termination of the franchise.

The court concluded that Dunkin' Donuts had demonstrated that it would be likely to succeed at trial on its infringement claim, satisfying the first prong of the four-part test for a preliminary injunction. The court noted that Claudia's continued use of the marks following termination created a "great likelihood of consumer confusion" between Dunkin' Donuts and Claudia. In reviewing the extent to which Dunkin' Donuts had been harmed by Claudia's continued operation at the location, the court determined that Dunkin' Donuts' arguments were focused on its alleged non-monetary damages, such as loss of goodwill and reputation. Dunkin' Donuts argued these damages are immeasurable and constitute irreparable harm as a matter of law. This satisfied the second prong of the court's four-part test for granting an injunction.

Claudia argued that Dunkin' Donuts was directly responsible for Claudia's financial condition that led to its withholding of sublease payments and that Claudia would be irreparably harmed by Dunkin' Donuts' attempt to destroy its business without a trial. The court cited several cases in which the loss of a franchise caused harm to a franchisee, but in each case the court determined that the franchisee brought on the harm by failing to pay amounts owed under the franchise agreement. The court found such situations to be very similar to the current case and found that any harm to Claudia was within its control, finding in favor of Dunkin' Donuts on the issue of irreparable harm to Claudia.

Finally, the court focused the public interest element of its test on "the right of the public not to be deceived or confused" and found that Dunkin' Donuts had satisfied this requirement. Finding that Dunkin' Donuts satisfied the four-part test for granting a preliminary injunction, the court granted the injunction.

***Home Instead, Inc. v. Florance*, Bus. Franchise Guide (CCH) ¶ 15,093; 721 F.3d 494 (8th Cir. 2013)**

In this case, the U.S. Court of Appeals for the Eighth Circuit reviewed a Nebraska district court's decision denying a franchisee's motion for preliminary injunction to permit it to continue operating as a franchisee pending the outcome of litigation with its franchisor.

Home Instead, Inc. is a franchisor of businesses that provide in-home senior care services. Friend of a Friend, Inc. entered into two franchise agreements with Home Instead to operate Home Instead franchises. The franchise agreements were renewed in 2002. In 2012, the parties engaged in negotiations to renew the agreements for an additional ten years, but were unable to agree whether Home Instead could raise the minimum "monthly performance requirement."

Two provisions in the 2002 agreements were relevant in this case. The first provision required that Friend maintain minimum gross sales of $30,000 per month "from the end of the fifth year of operation . . . through the end of the term of [the franchise agreement] or any renewal term of a renewal [f]ranchise [a]greement" (the minimum performance requirement). The other provision provided that Friend "agree[d] to comply with the specifications and standards applicable for new franchised business" in order to renew the franchise.

Home Instead filed a lawsuit seeking a declaration regarding the parties' respective rights under the 2002 franchise agreements. In response, Friend and its guarantors sought an injunction. The parties claimed that the relevant provisions in the franchise agreement were unambiguous, albeit with conflicting interpretations. Home Instead argued that it was permitted to raise the minimum monthly performance requirement provided that the requirement was "generally applicable" to all new franchises. Friend, on the other hand, argued that the $30,000 minimum monthly performance requirement set forth in the 2002 franchise agreements applied to all subsequent renewals.

The district court did not actually analyze whether the 2002 franchise agreements were ambiguous; instead, it simply stated that Friend (the franchisee) agreed that the agreements were unambiguous. It found that the agreements gave Home Instead the right to insist on new terms and conditions, including the minimum performance requirement, in connection with renewing the franchise agreements. Thus, the district court denied Friend's motion, finding that Friend had no possibility of success on the merits. Friend appealed.

On appeal, the central issue was whether the 2002 franchise agreements were ambiguous. A divided panel of the Eighth Circuit noted that even where both parties claim that a contract is unambiguous and supports their respective positions, the court must determine whether the contract is in fact unambiguous. The majority concluded that the district court had failed to "meaningfully analyze" the 2002 franchise agreements. Reviewing the issue de novo, the Eighth Circuit found that the relevant provisions in the 2002 franchise agreements were subject to at least two reasonable interpretations, thus rendering the agreement ambiguous. Accordingly, the appellate court found that the district court had abused its discretion in denying Friend's motion for preliminary injunction, vacated the decision, and remanded the matter to the district court with directions that it consider each of the preliminary injunction factors.

Interestingly, the chief judge of the Eighth Circuit dissented, concluding that the district court was correct in finding that the 2002 franchise agreements were unambiguous and that Home Instead had the right to raise the minimum monthly performance requirements in the renewed franchise agreements.

***Novus Franchising, Inc. v. Dawson*, Bus. Franchise Guide (CCH) ¶ 15,110; 725 F.3d 885 (8th Cir. 2013)**

In this case arising out of Novus's termination of a Virginia franchisee, the Eighth Circuit rejected an appeal of the trial court's refusal to grant Novus a preliminary injunction enforcing a post-termination noncompete covenant in its franchise agreement with Michael Dawson. The noncompete provision prohibited Dawson from engaging in a business competitive with or similar to Novus's glass repair, replacement, and installation business within the area of primary responsibility granted to Dawson or any other Novus franchisee or business, or within ten miles of the business location of any Novus franchisee or business in the United States. The noncompete restrictions were to continue for two years after termination or expiration of the franchise agreement.

Dawson ceased paying royalties under his franchise agreement in October 2010, asserting that the competition between Dawson and another Novus franchisee, which was granted a franchise in what Dawson believed to be his territory, was destroying Dawson's business. Novus sent a notice of default to Dawson on February 11, 2011, four months after he stopped paying royalties. On October 21, 2011, a full year after he halted his royalty payments, Novus finally terminated the franchise agreement. Despite the termination, Dawson continued operating his business, advertised as "Novus Glass by CarMike, Inc." Novus sued Dawson and CarMike on February 29, 2012, demanding an accounting and alleging breach of the franchise agreement, conversion, trademark infringement, violation of the Minnesota Deceptive Trade Practices Act, unjust enrichment, and unfair competition.

Novus moved for preliminary injunction on March 26, 2012, more than seventeen months after Dawson stopped paying royalties, seeking to enforce the noncompete and to prohibit Dawson's use of Novus's products and trademarks. Because Dawson had not responded to Novus's complaint, Novus also sought a default judgment. Four days before the date set for hearing Novus's motions, Dawson e-mailed the court seeking additional time to respond. The court granted the request. Despite the extension, Dawson did not respond before the reset hearing date, but instead appeared pro se at the hearing, saying that, although he could not afford a lawyer, he nonetheless would like to try to find one. The following week the court dismissed CarMike from the suit for lack of personal jurisdiction and granted a preliminary injunction to prohibit Dawson's use of Novus's marks and products. In its order, however, the court refused to grant the motion enforcing the noncompete agreement.

In deciding to reject Novus's motion to enforce the noncompete agreement, the court determined that Novus had not shown it would suffer irreparable harm from continued operation of Dawson's business if Novus's products and services were abandoned. Furthermore, the court found that Novus had not proven that the balance of harms or public interest weighed against Dawson's continued operation of his business. Novus appealed, arguing that the district court erred (1) in finding it lacked personal jurisdiction over CarMike, (2) in giving Dawson an additional sixty days to respond to the complaint, and (3) in refusing to enforce the noncompete agreement.

As a matter of first concern, the Eighth Circuit considered whether it had jurisdiction over the district court's decision, finding a lack of personal jurisdiction over CarMike and granting Dawson additional time to respond. Determining that the dismissal of CarMike did not satisfy the requirements for appellate jurisdiction, the court reasoned that the dismissal order would not result in irreparable consequences if not immediately appealed. The court also found that it lacked jurisdiction over the decision to grant Dawson additional time to respond, concluding that the decision was not "inextricably intertwined with the properly reviewable claims involving the preliminary injunction."

The court's review turned to the district court's refusal to grant a preliminary injunction enforcing the noncompete under an abuse of discretion standard. Motions for preliminary injunctions in the Eighth Circuit are judged on four elements: (1) threat of irreparable harm to the movant, (2) the balance between this harm and the injury the injunction will inflict on the other parties, (3) probability of success on the merits, and (4) the public interest. However, the Eighth Circuit followed the district court in focusing on the irreparable harm element. For its part, Novus claimed it would suffer irreparable harm because "Minnesota courts infer irreparable harm from the breach of a valid and enforceable non-compete clause."

Countering Novus's arguments, Dawson asserted that the Supreme Court's decision in *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) rejecting "a general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances" undermined cases inferring irreparable harm in preliminary injunction cases. In support of his argument, Dawson cited a case that considered, but did not decide, whether the *eBay* prohibition against presumptions applied to preliminary injunctions in Lanham Act cases. Dawson maintained, then, that *eBay* requires courts to view as suspect presumptions or inferences in favor of automatically granting injunctions.

Unsurprisingly, Dawson also claimed that the seventeen-month delay between the time he had stopped paying royalties and Novus sought a preliminary injunction undermined Novus's irreparable harm argument. Dawson also argued that the harm alleged by Novus, i.e., damage to the integrity of its franchise system, was too speculative to use as the basis for granting a preliminary injunction. Novus opposed the claim by asserting that failure to enforce the noncompete in this case would cause other franchisees to violate their noncompetes as well. The Eighth Circuit, however, agreed with Dawson, citing cases finding that success on the merits by Novus would dissuade other franchisees from violating their noncompete provisions. Ultimately, the court, however, ruled that the district court did not abuse its discretion by finding a lack of irreparable harm, pointing to the seventeen months before Novus sought an injunction.

The moral of this story should be familiar to franchisors—delay in seeking a preliminary injunction can fatally undermine the irreparable harm argument at the core of many preliminary injunction actions. Lawyers for franchisors should also continue to be aware of the potential for the argument based on *eBay* to undermine the use of presumptions or inferences of irreparable harm in preliminary injunction matters. Here, the court noted that the seventeen-month delay rebutted any presumption of irreparable harm and ultimately declined to address the *eBay* argument.

Noya v. Frontier Adjusters, Inc., Bus. Franchise Guide (CCH) ¶ 15,070; No. WDQ-13-0965, 2013 WL 2490360 (D. Md. June 7, 2013)
Plaintiff, the franchisee of an insurance adjustor franchise, was not entitled to a preliminary injunction when it failed to demonstrate its likelihood of success on the merits or irreparable harm when the franchise agreement at issue was scheduled to expire by its own terms and the franchisor did nothing to terminate the agreement.

In 1983, plaintiff entered into a franchise agreement with defendant franchisor for a ten-year term. The parties renewed the franchise in 1993 for another ten years, and the franchisee received an option to renew for one additional ten-year term to June 9, 2013. The franchisee exercised this option in 2003. With the expiration of the final term imminent, plaintiff filed suit and sought a preliminary injunction seeking to bar the franchisor from terminating the franchise agreement.

In denying the franchisee's motion for a preliminary injunction, the court noted that it was unlikely to succeed on the merits because the franchise agreement was expiring on its own terms, not because of any action by the franchisor to terminate. The franchisee also argued that it would suffer irreparable harm in that the termination of the franchise agreement would cause the immediate and irreparable "evaporation" of a thirty-year family business. However, the court said that the franchisee failed to show irreparable harm when the franchisee had agreed to sell its franchise to two other existing franchisees and it still had twelve other franchises, which accounted for 40 percent of the franchisee's annual sales.

***RPC Acquisition Corp. v. J&D World Corp.*, Bus. Franchise Guide (CCH) ¶ 15,091; No. CV-13-1400-DWF/LIB, 2013 WL 3338784 (D. Minn. July 2, 2013)**
J&D World Corp. signed franchise agreements with RPC Acquisition Corp. to operate Pro-Cuts salons in the Dallas-Fort Worth area. J&D's owners personally guaranteed each of the franchise agreements. After discovering that defendants were diverting Pro-Cuts products and failing to pay all sums due under the agreements, RPC terminated the franchise agreements, sued defendants, and sought injunctive relief.

The franchise agreements included a number of standard provisions, including provisions requiring, upon termination, that defendants: (1) maintain the confidentiality of Pro-Cuts materials; (2) not compete for a period of two years after termination of the agreements and not to seek to employ any person who is "employed by RPC or at any other Pro-Cuts franchise or other Regis business;" (3) cease using all RPC confidential information and trademarks; (4) advise the telephone company that they were no longer permitted to use the telephone numbers associated with their prior Pro-Cuts business; and (5) return all confidential materials to RPC.

Notwithstanding the termination of their franchise agreements, defendants continued to operate hair salons in four of their former franchised locations and to use the Pro-Cuts trademarks and confidential materials. As a result, RPC moved for preliminary injunction in the U.S. District Court of Minnesota.

The district court made quick work of RPC's motion. The court found that RPC had demonstrated a substantial likelihood of succeeding on the merits of its claims in that J&D was clearly infringing on the Pro-Cuts marks and violating an enforceable covenant not to compete. The court also found that RPC would be irreparably harmed absent an injunction by defendants' continuing post-termination use of RPC's trademarks because (1) it would harm the goodwill associated with the marks and brand; (2) there was the potential and "inevitable" use of RPC's confidential information; and (3) other franchisees might be the "emboldened to breach their franchise agreements." The court further found that the balance of hardship weighed in RPC's favor, noting that the injunction would only prohibit J&D and its owners from continuing to breach the franchise agreements. Finally, the court found that an injunction was in the public interest because it was consistent with strong public policy protecting parties' contractual rights, "valid" trademarks, and "a company's confidential information and customer goodwill."

JURISDICTION

***KFC Corp. v. Wagstaff*, Bus. Franchise Guide (CCH) ¶ 15,088; No. CV-00674-CRS, 2013 WL 3166165 (W.D. Ky. June 20, 2013)**
This case is discussed under the topic heading "Choice of Forum."

***Larsen Services, Inc. v. Nova Verta USA, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,078; No. 306280, 2013 WL 2095872 (Mich. Ct. App. May 14, 2013)**
Nova Verta was a Washington-based company that sold spray booth applications used in body shops. Larsen sold Nova Verta's products in Michigan under what Larsen contended was a sales representative relationship. In an action filed in state court in Michigan, Larsen contended that Nova Verta ceased doing business with Larsen in 2007 but continued to benefit from

Larsen's efforts by selling products to certain Larsen customers. Larsen also alleged that Nova Verta breached a contractual arrangement by which Larsen was to provide services in the distribution, construction, sales, and servicing of Nova Verta products in the Detroit area. In an unpublished opinion, the Michigan Court of Appeals determined that Nova Verta's activities in the state were sufficient to subject it to specific jurisdiction in Michigan.

In reviewing the trial court's dismissal for a lack of personal jurisdiction, the court examined whether a basis existed to find either general or specific jurisdiction over Nova Verta in Michigan courts. Because Nova Verta was neither incorporated in Michigan nor had consented to jurisdiction in the state, general jurisdiction would exist only if Nova Verta "carries on a continuous and systematic part of its general business" in Michigan. The appellate court said courts can consider whether an entity has a place of business, employees, or bank accounts in Michigan and the solicitation of sales and actual sales in the state. The court quoted from a 2011 U.S. Supreme Court decision that general jurisdiction could exist where a foreign corporation's "affiliations with the State are so 'continuous and systematic' " that the corporation is "essentially at home" in the state. The court determined that Nova Verta's activities, including its distributor relationship with Larsen and Nova Verta's entering into contracts with one company in Michigan, failed to support a finding of general jurisdiction.

The court turned to whether Nova Verta's activities supported a finding of specific jurisdiction, which under Michigan's statute permitted the courts to exercise jurisdiction over "claims that arise out of its contacts with this state, when the corporation transacts any business within the state." The court determined that Nova Verta clearly did business in Michigan, pointing to its sale of products in 2004 to Exhibit Works, a Michigan company, for use in Michigan and entering into a service contract with that company in 2007.

After finding that Nova Verta met the statutory grounds for specific jurisdiction, the court examined whether this finding met the due process requirements of the Fourteenth Amendment of the U.S. Constitution. This inquiry requires satisfying a three-part test to determine whether Nova Verta purposely established sufficient minimum contacts with Michigan. A court must determine whether (1) Nova Verta purposefully availed itself of the privilege of conducting activities in the state; (2) the action arose from Nova Verta's activities in the state; and (3) Nova Verta's actions were substantially connected to the state to make it reasonable to exercise jurisdiction over Nova Verta.

In determining whether a party purposefully availed itself of the opportunity to do business in Michigan, the court noted that it is the relationship of the parties, the state, and the litigation that is significant. The court noted that Larsen distributed Nova Verta's products in Michigan for ten years, including sales to at least one Michigan company to which it later sold products directly. The court next determined that the issues in this case arose out of Nova Verta's activities in Michigan. Larsen claimed it should have received commissions related to the additional products it sold to Exhibit Works in Michigan and North Carolina, which Larsen claimed resulted from its efforts. Larsen also claimed that Nova Verta breached a contract that allegedly permitted it to serve as an exclusive distributor and exclusive service provider for Nova Verta's products in Michigan. The court also found that Nova Verta's activities in Michigan were substantially connected to the state, making it reasonable to exercise jurisdiction over Nova Verta in Michigan.

The court concluded its analysis by determining that a finding of specific jurisdiction here "comports with fair play and substantial justice." The court noted this inquiry includes an examination of factors that include the burden on Nova Verta of litigation in Michigan and the benefit to plaintiff in obtaining "convenient and effective relief." The court observed that a defendant bore a heavy burden to show how jurisdiction offended fair play and substantial justice where it had purposely conducted activities in the forum state, a burden Nova Verta did not meet in this case.

***Mio, LLC v. Valentino's of Am., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,092; No. CV-191-T-26TGW, 2013 WL 3364392 (M.D. Fla. July 3, 2013)**

The U.S. District Court for the Middle District of Florida found that franchisor Valentino's of America, Inc. was not subject to personal jurisdiction in Florida. Valentino's is a Nebraska corporation with an office in Lincoln, Nebraska. All of its approximately thirty-five restaurants are located in the Midwest.

In mid-2012, Valentino's began discussions with several Florida residents about opening Valentino's restaurants in the state. During the course of these discussions, Valentino's filed an application for a one-year "franchise exemption" with the Department of Agriculture and Consumer Services (DACS), which was granted. Several of the Florida residents received a Valentino's franchise disclosure document (FDD), which stated that DACS was authorized to receive service of process for Valentino's. The Florida residents and Valentino's discussed the business opportunity and possible restaurant locations over a six-month period. In addition, Valentino's communicated with several Florida real estate brokers about potential locations.

During the course of the discussions between Valentino's and the Florida residents, the company learned that there was a "Valentinos" restaurant operating in Florida. Valentino's counsel sent a cease and desist letter to Mio, LLC, which in turn filed a declaratory relief action in federal court. In response, Valentino's moved to dismiss on the grounds that it was not subject to personal jurisdiction in Florida.

In assessing whether a party is subject to jurisdiction in Florida, a court must determine whether there are any grounds set forth in Florida's long-arm statute that would warrant the exercise of personal jurisdiction. If so, the court must determine whether there are sufficient minimum contacts between the defendant and the state to satisfy "traditional notions of fair play and substantial justice." In Florida, a defendant can be subject to either or both general or specific jurisdiction.

Under Florida law, general jurisdiction is appropriate if the defendant engaged in "substantial and not isolated activity in the state." The court found that Valentino's was not subject to general jurisdiction because: (1) it did not sell any franchises in Florida; (2) it did not market the franchises in Florida; (3) it did not have an office or own any real estate in Florida; and (4) it did not send any representatives to Florida to look for possible locations. The court noted that while Valentino's was in discussions with the Florida residents and spoke with Florida-based real estate brokers in that regard, the Florida residents had apparently done "the leg work." It also found that Valentino's application for a franchise application and designating an agent to accept service of required process as required by the FDD did not satisfy the "substantial and not isolated" requirement of the statute and thus did not establish general jurisdiction.

The court analyzed whether Valentino's was subject to specific jurisdiction, which requires that the action " 'arises from' the particular contact alleged on the part of the defendant." Mio argued that Valentino's activities demonstrated a "general course of business activity in the State for pecuniary benefit." The court disagreed, finding that the gravamen of the complaint, i.e., whether Mio was infringing on Valentino's trademarks, did not arise out of the company's discussions with the Florida residents about opening Valentino's restaurants in Florida. Rather, the alleged infringement was by Mio, which was not a part of and had no knowledge of the four residents' interest in opening a Valentino's franchise in Florida. Accordingly, the district court found that Valentino's was also not subject to specific jurisdiction.

LABOR AND EMPLOYMENT

Courtland v. GCEP-Surprise, LLC, Bus. Franchise Guide (CCH) ¶ 15,101; No. CV-12-00349-PHX-GMS, 2013 WL 3894981 (D. Ariz. July 29, 2013)

Courtland brought Title VII claims against franchisor Buffalo Wild Wings (BWW) and its franchisee GCEP-Surprise after she was allegedly demoted from bartender to server because of her pregnancy and ultimately terminated by the restaurant's general manager in retaliation for reporting sexual harassment. Moving for summary judgment, BWW argued that it could not be held liable for Courtland's allegations of employment discrimination because it was not Courtland's employer, nor was GCEP its agent for purposes of vicarious liability.

Under the first theory of liability, Courtland argued that BWW was a joint employer. Applying the Ninth Circuit economic reality test to determine the existence of a joint employment relationship, the court concluded BWW could not be held liable as a joint employer because GCEP acted independently in making its employment decisions related to Courtland and other nonmanagerial staff. The court stated BWW could not be a joint employer unless it had significant control over the day-to-day employee management. Having no involvement in human resources matters or a right to hire, supervise, or fire nonmanagerial staff, the court reasoned BWW did not exert such control. The court additionally emphasized the franchise agreement specifically stated that the franchise was an independent business and GCEP was responsible for control and management of its own employees, recognizing BWW had no power, responsibility, or liability with respect to firing employees.

Under the second theory of liability, Courtland argued GCEP was an agent of BWW for the purposes of establishing vicarious liability. Following the Ninth Circuit standard for agency between a franchisor and franchisee, the court stated an essential element for the purposes of establishing vicarious liability was whether BWW had control over the "instrumentality of harm," specifically the hiring, firing, and supervision of GCEP's employees. The court found BWW had no control over such daily conduct and therefore concluded BWW was not vicariously responsible for the managers' tortious conduct.

Under the third theory of liability, Courtland argued that GCEP was an apparent agent of BWW. The only evidence produced by Courtland was that all the logos, signage, and marketing materials used at the restaurant contained the Buffalo Wild Wings name and marks. The court found Courtland's apparent authority argument unpersuasive. The court reasoned BWW's marketing material, signage, and logos displayed at the franchise were not enough to establish reasonable reliance necessary for apparent agency. The court additionally determined Courtland could not have reasonably concluded an agency relationship because many of her employment papers listed only GCEP as her employer, not BWW.

Having proved no genuine issue of material fact as to whether BWW was Courtland's joint employer or liable for employment discrimination under either a theory of agency or apparent authority, the court granted BWW's motion for summary judgment.

***Depianti v. Jan-Pro Franchising Int'l, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,069, 990 N.E.2d 1054 (Mass. 2013)**

A judge of the U.S. District Court for the District of Massachusetts certified three questions to the Supreme Judicial Court of Massachusetts related to the procedural necessity of filing a complaint with the attorney general, vicarious liability, and employee misclassification.

Jan-Pro sells rights to use the Jan-Pro brand to regional master franchisors, which become the exclusive franchisors of the Jan-Pro brand in defined geographic areas. Regional master franchisors in turn sell rights to use the Jan-Pro brand to unit franchisees. Plaintiff-unit franchisee Depianti sued defendant-franchisor Jan-Pro for deceptive and unfair business practices based on alleged conduct of a regional master franchisor and for misclassification as an independent contractor.

The district court's first certified question was whether a court should consider the claims of a plaintiff that failed to file a complaint with the attorney general ninety days before instituting the private action, as required under Massachusetts law. The supreme court held that because Jan-Pro had previously waived its objection to this defect, it was only fatal if the failure deprived the district court of jurisdiction, which is determined by considering to what extent the defect interfered with the accomplishment of the statutory purpose and to what extent the opposing party can justifiably claim prejudice. The supreme court went on to state that the ninety-day filing requirement was intended to provide the attorney general with notice of possible violations; therefore, even where the complaint was filed with the attorney general during the pendency of a lawsuit, the purpose of the statute was effectively served. The supreme court further held that unless a defendant can show that the claim would have been time barred if the plaintiff had first filed with the attorney general, the defendant cannot claim prejudice.

The district court's second question was whether and how to apply the "right to control test" for vicarious liability to the franchisor-franchisee relationship. The supreme court determined that the test did apply to the franchisor-franchisee relationship, but specified that the marketing, quality, and operating standards commonly found in franchise agreements are insufficient to establish a right of control. Vicarious liability would only apply if the franchisor has the right to control the daily conduct or operation of the particular instrumentality or aspect of the franchisee's business that is alleged to have caused the harm.

The district court's third question was whether a defendant may be liable for employee misclassification under the Massachusetts independent contractor statute where there was no contract for service between the plaintiff and defendant. The supreme court considered the Massachusetts independent contractor statute ambiguous on this issue and therefore resolved to consider the legislative intent of the statute. Upon determining that the legislative intent of the statute was to protect workers by classifying them as employees, the supreme court held that limiting the statute's application to circumstances where the parties have a contract would undermine the purpose of the statute.

***Machado v. System4 LLC*, Bus. Franchise Guide (CCH) ¶ 15,076, 989 N.E.2d 464 (Mass. 2013)**
This case is discussed under the topic heading "Class Actions."

NONCOMPETE AGREEMENTS

***BP W. Coast Prods., LLC v. Shalabi*, Bus. Franchise Guide (CCH) ¶ 15,109; No. C11-1341 MJP, 2013 WL 4039380 (W.D. Wa. Aug. 6, 2013)**
This case from the U.S. District Court for the Western District of Washington involved a dispute between BP and a franchisee of fourteen "ampm"

convenience stores. Defendant entities, all controlled by Hatem Shalabi, entered into both gasoline dealer agreements granting BP exclusive rights to supply gasoline to defendants for twenty years and franchise agreements for the relevant locations. Shalabi also entered into a guaranty agreement for each location. In its complaint, BP contended that defendants breached the franchise agreements, guaranty agreements, and deed restrictions on the properties occupied by the convenience stores. The alleged breaches included royalty payment delinquencies, failure to provide sufficient amounts of gasoline of all grades to satisfy customer demand, sale of unbranded gasoline, and failure to comply with branding requirements.

Defendants' only argument regarding the gasoline dealer agreements and franchise agreements was that BP requested more damages in its motion for summary judgment than it had requested in its complaint, thereby creating a material factual issue precluding summary judgment. The court dispatched the argument, determining that defendants had conceded they owed the amount included in the complaint. A declaration filed by defendants showed they owed BP $1,326,180 after application of a stipulated credit due to defendants of $69,358. The court reviewed the declarations submitted by both parties and determined that there was no material issue of fact regarding the amount of damages alleged by BP and conceded by the defendants.

Defendants argued that the guaranties were not enforceable for lack of consideration because Shalabi signed them long before the parties finalized either their real estate transactions or franchise agreements. BP argued this was an affirmative defense that defendants had waived or alternatively that the guaranties were supported by consideration. The court rejected BP's waiver argument, determining that defendants' amended answer could be broadly interpreted to find that defendants raised the affirmative defense as to the guaranties.

The court rejected as "untenable" defendants' argument that the guaranties were made independent of the main debt and not supported by consideration, observing that the guaranties referred to both the proposed gasoline dealer agreements and franchise agreements. The court found that the signing of the guaranties before the franchise agreements actually supported the argument that "the bargain struck in the Franchise Agreements was intended to be consideration for the Guaranties."

In addition to its breach claims, BP sought a declaratory judgment that certain deed restrictions on the property sold by BP to defendants precluded defendants from operating unbranded gasoline stations and convenience stores. Defendants argued that the court should not enforce the deed restrictions because: (1) the deed did not contain enforcement mechanisms for the restrictions; (2) the restrictions did not run with the land, so they would end when the contracts between the parties ended; and (3) because BP claimed the restrictions were easements in gross they could not bind successors in interest to defendants.

The court determined that the parties' disputes over the deed restrictions constituted an actual case and controversy and met the standards for granting declaratory relief in the Ninth Circuit and further concluded that defendants' lack of an enforcement mechanism argument was the only argument that was ripe for adjudication. The court rejected defendants' argument for two reasons. First, the deed restrictions were incorporated by reference into the deeds by which the property was granted to defendants. Such deed restrictions contained language permitting BP to seek injunctive relief for breach of these restrictions. Secondly, the court distinguished the decision cited by defendants on the enforcement mechanism issue because that case dealt with enforcement in "the creation of a determinable fee simple estate with the possibility of reverter in the grantor," not restrictive covenants simply seeking to restrict land use.

The court noted that a restrictive covenant is not enforceable "if it is illegal, unconstitutional or violates public policy," but that defendant made no arguments on those grounds. Based on defendants' failure to make such a claim, the court granted BP's request for a declaratory judgment that the deed restrictions were valid and enforceable.

***Home Instead, Inc. v. Florance*, Bus. Franchise Guide (CCH) ¶ 15,093, 721 F.3d 494 (8th Cir. 2013)**
This case is discussed under the topic heading "Injunctive Relief."

***Jackson Hewitt, Inc. v. Dupree-Roberts*, Bus. Franchise Guide (CCH) ¶ 15,108; No. 13-00388, 2013 WL 4039021 (D.N.J. Aug. 7, 2013)**
Jackson Hewitt received damages and enforced a post-term noncompete provision in the franchise agreement by means of a default judgment obtained in this case filed in the U.S. District Court for the District of New Jersey. Jackson Hewitt brought this action against Doris Dupree-Roberts, a former Jackson Hewitt franchisee in Texas, seeking to enforce a post-term noncompete provision following the termination of both of her franchise agreements. Jackson Hewitt terminated the first franchise agreement for Dupree-Roberts's failure to meet performance standards; it terminated the second when she failed to pay certain amounts payable under the franchise agreement and a promissory note. Dupree-Roberts did not respond at any stage in the litigation but began to operate a competing business at one of her prior locations. Jackson Hewitt sought a default judgment, damages, and injunctive relief to enforce the post-term noncompete provisions in the franchise agreement.

The court noted that default judgments are not favored but may be granted in the court's discretion. The court found it had both subject matter and personal jurisdiction, the latter by way of a provision in the franchise agreements in which Dupree-Roberts consented to personal jurisdiction in the federal court nearest to Jackson Hewitt's principal place of business.

Before reviewing the propriety of granting a default judgment, the court first discussed Jackson Hewitt's claims against Dupree-Roberts.

Jackson Hewitt asserted breach of contract claims related to breach of the franchise agreement noncompete provisions, unpaid fees, breach of the promissory note, and breach of a personal guaranty. To prove breach of contract, Jackson Hewitt was required to show a valid contract, a breach, and damages resulting from that breach. The court determined that Dupree-Roberts's alleged failures to meet performance standards and pay amounts payable under both the franchise agreement and the promissory note breached the franchise agreements, the promissory note, and the guaranty.

The noncompete provisions prohibited Dupree-Roberts from engaging in certain specified competitive activities for twenty-four months after termination of the franchise agreement within the territory granted to the franchisee or within ten miles of its boundaries. The court noted that to be enforceable, the noncompete must be reasonable as judged by a three-part standard based on protection of a legitimate interest of the franchisor, not impose an undue hardship on the franchisee, and not impair the public interest.

The court determined that New Jersey courts had not decided whether noncompetes in franchise agreements are more similar to those in connection with an employment relationship or to covenants related to the sale of a business. The court found it did not need to decide that issue, because even under the stricter employment agreement standard the covenant in this case was reasonable. In reaching this conclusion, the court determined that the covenant protected Jackson Hewitt's legitimate interests in having the ability to transfer existing Jackson Hewitt customers to other franchisees. The court did not find the covenant to be unduly burdensome on Dupree-Roberts, as she acknowledged in the franchise agreement that she had other skills, which allowed her to earn an income from other activities. The court did not find the geographic restriction of five zip codes and a ten-mile radius around her former territory or the two-year duration to be an issue in enforcing the covenant. The court likewise determined that the public interest would not suffer if it enforced the covenant.

After reviewing Jackson Hewitt's substantive claims, the court discussed whether to enforce these claims by granting Jackson Hewitt a default judgment. The court stated that in determining the propriety of granting a default judgment, courts in the Third Circuit consider the prejudice to plaintiff if the default judgment is not granted, whether there is a litigable defense, and whether the delay is due to "culpable conduct" of defendant. The court assumed that defendant had no litigable defenses, given Dupree-Roberts's total nonresponsiveness throughout the case and the fact that the complaint contained no information that could lead to meritorious defenses. The court noted that "culpable conduct" has been defined in the Third Circuit as "conduct that is taken willfully or in bad faith," and that reckless disregard for communications from plaintiff and the court in a case can constitute culpable conduct.

Having determined that a default judgment was appropriate here, the court approved the amounts submitted by Jackson Hewitt for past due fees, rents, and promissory note payments in the amount of $123,084 and accrued interest of $35,874 for a total of $158,958 plus postjudgment interest. The court also found that Jackson Hewitt had satisfied the requirement for issuance of an injunction against Dupree-Roberts to enforce the post-term noncompete covenant, because the court determined that this covenant was intended to enable Jackson Hewitt to transfer existing customers to new and existing Jackson Hewitt franchisees and that any hardship to Dupree-Roberts from enforcement of this covenant was part of the basis of her bargain with Jackson Hewitt.

***Novus Franchising, Inc. v. Dawson*, Bus. Franchise Guide (CCH) ¶ 15,110; 725 F.3d 885 (8th Cir. 2013)**

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

***Novus Franchising, Inc. v. Superior Entrance Sys., Inc.*, Bus. Franchise Guide (CCH) ¶ 150,082; No. 12-CV-204-wmc, 2013 WL 2149718 (W.D. Wis. May 16, 2013)**

A former Novus glass repair franchisee and its owner barely avoided being held in contempt by the U.S. District Court for the Western District of Wisconsin for alleged violations of a post-termination covenant not to compete in a franchise agreement. The court had entered a final judgment in January 2013 enjoining defendants from violating a modified post-termination noncompete covenant. Among other things, the covenant prohibited defendants from owning, operating, consulting with, or being connected with Superior Glass, Inc. or any person or entity that was legally connected with or a successor to Superior Glass. In response to defendants' motion for clarification of this order, the court ordered Knute Pedersen to divest his interest in and control of Superior Glass or ensure that Superior Glass not perform glass repair work within one month of the order.

Superior Glass sold its windshield repair business to SGI Windshield Repair (SGI), which was owned by three Superior Glass employees and located in the same building as Superior Glass. Superior Glass actively referred its existing customers and new windshield repair business to SGI. The court concluded that the transfer of goodwill and windshield repair referrals from Superior Glass "was a primary asset in the sale" to SGI and that SGI would not have bought the business without them.

Novus argued that defendants were violating the covenant because Superior Glass, with Pedersen as its president, was materially assisting an entity that effectively was a successor to its auto glass repair business. Although stating that the question was close and that the court was disturbed by what it called Superior Glass and "Pedersen's deliberate orchestrated transfer of the glass repair business to achieve only arguably technical compliance with the terms, if not the spirit, of the court's injunction," the court declined to find defendants in contempt.

The court focused on whether Pedersen's actions constituted "consulting with, being connected with, having an interest in, or assisting" SGI. Again emphasizing that the question was close, the court concluded that Pedersen was not assisting SGI at least directly, although he arguably was doing so indirectly. The court believed the chain of causation was too remote to hold Pedersen in contempt. In emphasizing how close defendants had come to being in contempt, the court said they should have consulted with Novus's counsel in advance and with the court if the two parties were in disagreement as to whether their activities were consistent with the court's injunction.

The court noted that the name of SGI, its location in the same building as Superior Glass, the connection of people between the two businesses, and the referrals made SGI a de facto, if not de jure, branch of Superior Glass. The court denied Novus's request for attorney fees but ordered defendants to pay Novus $1,000 for violation of the injunction and to immediately remove all references linking Superior Glass to the windshield repair business or rock chip repair business of SGI.

***Outdoor Lighting Perspectives Franchising, Inc. v. Harders*, Bus. Franchise Guide (CCH) ¶ 15,104; 747 S.E.2d 256 (N.C. Ct. App. 2013)**
On appeal from the trial court's denial of a franchisor's request for the issuance of a preliminary injunction prohibiting a former franchisee from operating a competing outdoor lighting business, the North Carolina Court of Appeals affirmed the trial court's ruling, finding the noncompetition covenant in the franchise agreement to be overly restrictive.

Harders operated an outdoor lighting franchise offered by Outdoor Lighting Perspectives (OLP). After the termination of the franchise, Harders began operating another outdoor lighting business. OLP filed suit and sought an injunction requiring Harders to refrain from engaging in an outdoor lighting business within its former territory for two years.

Under North Carolina law, noncompetition covenants in an employment agreement are scrutinized more closely than noncompetition covenants in agreements for the sale of a business. However, the franchisor-franchisee situation does not fit neatly into either category. Accordingly, the court used a hybrid approach in analyzing the reasonableness of the noncompetition covenant, using elements of tests from both the employee-employer category and the business-sale category. Ultimately the court had to decide the extent to which the noncompetition covenant in the franchise agreement was no more restrictive than necessary to protect the franchisor's legitimate interests.

The noncompetition covenant restricted Harders from engaging in any competitive business within 100 miles of its territory or the territory of any other franchisee or affiliate of the OPL. Two of OPL's affiliates were engaged in lines of business totally unrelated to outdoor lighting. The court found the geographic scope to be too broad and the restrictions on any activities competitive with OPL's affiliates unrelated to outdoor lighting to be excessive. Accordingly, the appellate court affirmed the denial of the issuance of a preliminary injunction, finding that the trial court had correctly ruled that the franchisor had no likelihood of success on the merits of the claim.

***RPC Acquisition Corp. v. J&D World Corp.*, Bus. Franchise Guide (CCH) ¶ 15,091; No. CV-13-1400-DWF/LIB, 2013 WL 3338784 (D. Minn. July 2, 2013)**

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

PETROLEUM MARKING PRACTICES ACT (PMPA)

***BSD, Inc. v. Equilon Enters., LLC*, Bus. Franchise Guide (CCH) ¶ 15,111; No. C10-05223 SBA, 2013 WL 3944483 (N.D. Cal. July 29, 2013)**

This case, which involved an unusual set of facts and complicated legal issues, followed the franchisor's termination of both the franchise agreement for the operation of a Shell gasoline station in California and the right of first refusal for the purchase of the property where the station was located. Equilon, the franchisor of the Shell system, also owned the service station that had been leased to the franchisee, which the opinion referred to as Youstine. During the term of the franchise agreements, Anabi Oil Corporation purchased certain retail assets of Equilon and offered to purchase Youstine's station. Because Youstine operated the station and leased the property from Equilon, however, Youstine was entitled to receive a right of first refusal under California Business & Professions Code § 20999.25. Section 20999.25 statute precludes a franchisor that owns a fee interest in a property leased to a franchisee from selling the premises without giving the franchisee a bona fide offer to sell, assign, or transfer the franchisor's interest in the property to the franchisee or, if applicable, offering the franchisee a right of first refusal.

Because Youstine's station was entitled to receive a statutory right of first refusal, it was not included in a group of stations that Anabi purchased in July 2010. However, the station was erroneously deleted from Equilon's contract system and treated as if it had been transferred to Anabi. As a result of the error, beginning in July 2010 neither Equilon nor Anabi electronically drafted Youstine's rent payments as Equilon had done in the past. In January 2011, Equilon received a license renewal notice from the State of California, which included two stations that its system indicated had received rights of first refusal from Equilon. When Equilon contacted Anabi about the two stations, Anabi responded that Equilon had not transferred these leases. That triggered an inquiry by Equilon resulting in the discovery in early February 2011 that Youstine's station had been similarly treated and had not paid rent since July 2010. On February 16, 2011, Equilon attempted to electronically draft the unpaid rent, which was $115,656 plus $22,000 for a fuel invoice. Both that draft and another draft, made nine days later for a fuel invoice, were returned for insufficient funds.

On April 28, 2011, Equilon sent a notice of termination, effective July 31, 2011, to Youstine. The notice also stated that Equilon was terminating the right of first refusal Youstine had previously accepted to buy the property because Equilon had issued a notice terminating the franchise agreements under the Petroleum Marketing Practices Act (PMPA). Youstine subsequently filed an action contesting the termination; Equilon filed a counterclaim for breach of contract, conversion, and declaratory relief. The matter came before the court on both Equilon's motion for partial summary judgment relating to its claim for declaratory relief and its motion for summary judgment for three claims brought by Youstine.

In its motion for summary judgment seeking declaratory relief, Equilon contended that it had properly terminated Youstine's right of first refusal because it had issued notice of termination of the franchise agreements in compliance with the PMPA. The court granted Equilon's motion, relying on language in the right of first refusal providing that the right could be terminated if Equilon issued a notice of termination in accordance with the PMPA before the closing of the sale. In its analysis, the court addressed and rejected Youstine's counterarguments to Equilon's claims that its notice did not satisfy PMPA's time requirements and that Equilon had waived its right to terminate the right of first refusal or should be equitably estopped from doing so.

Youstine's waiver argument relied on the theory that an implied waiver had occurred because Equilon did not act promptly to terminate the right of first refusal after learning that Youstine had not paid rent in a timely manner. The court, however, found that Youstine had not presented evidence supporting the contention that Equilon knew of its failure to pay rent at the time Equilon accepted its purchase offer. On the contrary, the court held that Equilon had acted promptly upon learning of Youstine's failure to pay rent. Youstine's equitable estoppel argument failed for similar reasons; the franchisee was unable to show either that Equilon was aware of the failure to pay rent before Youstine's acceptance of the right of first refusal or that it reasonably relied to its detriment on Equilon's conduct.

Turning to Equilon's motion for summary judgment seeking dismissal of the first three claims for relief by Youstine, the court observed that despite the fact that Youstine had not responded to this motion, Ninth Circuit precedent required the court to determine whether Equilon was entitled to summary judgment. Youstine's claims alleged that: (1) Equilon had violated the California statute requiring it to give Youstine a right of first refusal; (2) its violation of the right of first refusal statute constituted "unfair and/or fraudulent business" practices under California law; and (3) Youstine was entitled to declaratory relief as to whether the right of first refusal was bona fide and whether Equilon should be enjoined from selling the premises.

The court granted Equilon's motion for summary judgment, finding that Equilon satisfied its initial burden by showing that Youstine could not show the right of first refusal violated the applicable statute. The court further determined that because Equilon validly terminated the franchise and right of first refusal before Youstine purchased the station under the right of first refusal, "the injunctive, equitable, and declaratory relief Youstine seeks is no longer available." In addition, because Equilon did not sell the property before termination of the right of first refusal, the court did not award Youstine restitution or damages.

STATE DISCLOSURE/REGISTRATION LAWS

***Garbinski v. Nationwide Prop. & Cas. Ins. Co.*, Bus. Franchise Guide (CCH) ¶ 15,087; 523 F. App'x 24 (2d Cir. 2013)**
This case is discussed under the topic heading "Definition of Franchise."

***Volvo Trucks N. Am., LLC v. Andy Mohr Truck Ctr.*, Bus. Franchise Guide (CCH) ¶ 15,067; No. 1:12-cv-448-WTL-DKL, 2013 WL 2939052 (S. D. Ind. June 14, 2013)**
This case is discussed under the topic heading "Contract Issues."

STATUTE OF LIMITATIONS

***Novus Franchising, Inc. v. Dawson*, Bus. Franchise Guide (CCH) ¶ 15,110; 725 F.3d 885 (8th Cir. 2013)**
Novus Franchising, Inc. brought suit in the U.S. District Court, District of Minnesota against its former franchisee (Dawson), alleging that Dawson was violating the covenant not to compete in the parties' franchise agreement and using the company's trademarks and name. Dawson filed a counterclaim asserting claims for fraud and violations of the Minnesota Franchise Act (MFA), which Novus sought to dismiss on the ground it was barred by the statute of limitations.

After a magistrate judge recommended that the motion be granted as to the MFA claim but denied as to the common law fraud claim, Dawson filed objections to the recommendation regarding the MFA claim, which the district court sustained.

Dawson entered into a franchise agreement with Novus in 1998. During pre-agreement discussions, Novus allegedly promised Dawson that he would have a "right of first refusal" to any new franchises in his territory. Dawson further claimed that Novus reiterated its promise in connection with the parties' 2008 renewal of the franchise agreement, notwithstanding that the company had already sold a franchise to a third party (Robinson) for the entirety of Dawson's territory. In late 2008, Robinson opened a Novus franchise location three miles from Dawson's location. Dawson alleged that Robinson "virtually destroyed" his business within a "few years" because Robinson set "ruinously low prices" and "acquired a reputation for poor quality work." Dawson also alleged that when he signed the renewal franchise agreement in 2008, his business was generating revenues of approximately $10,000 per month, but the revenues had dropped to between $3,000 to $4,000 a month by the middle of 2010.

The MFA requires that a claim for violations of the statute be filed within three years "after the cause of action accrues" but does not define what constitutes accrual. Thus, the court first addressed whether the discovery rule applied to the MFA claim. Under the discovery rule, the statute of limitations begins to run when the "plaintiff knew, or should have known in the exercise of reasonable diligence, the facts constituting" the claim. Relying on other district court decisions, the court held that the discovery rule applied to a misrepresentation claim under the MFA because such claims sound in fraud, and the discovery rule applies to common law fraud claims in Minnesota.

In its motion to dismiss, Novus argued that Dawson's MFA cause of action accrued in late 2008, shortly after the parties signed the renewal franchise agreement, when Dawson learned that the company had sold a franchise to Robinson. Dawson, however, asserted that his MFA claim did not accrue until October 2010 when he allegedly discovered that he had been "damaged" by reason of Novus's purported wrongdoing. Given this divergence of opinion, the court needed to determine whether Dawson's claimed damage was an element of the MFA cause of action. With minimal explanation, the court concluded that it was.

The court turned to whether Dawson knew or should have known that he had sustained damages by September 2009, which was three years before he filed his complaint. Even though Robinson had opened his competitive Novus location franchise in late 2008, the court held that Dawson's allegations that "his business was destroyed within a few years," his revenues had dropped precipitously by the middle of 2010, and he was unable to pay his franchise fees at that time were sufficient to meet his burden of alleging that he had not discovered the facts constituting his MFA claim until after September 2009. The court went on to hold that even though Dawson knew in late 2008 that Novus had allegedly lied to him and sold a franchise to Robinson, it was unwilling to find as a matter of law that "reasonable due diligence" required Dawson to have investigated and discovered prior to September 2009 that Robinson's low prices and shoddy work were harming his business. Accordingly, the district court denied Novus's motion to dismiss.

STATUTORY CLAIMS

General Motors Corp. v. State Motor Vehicle Review Bd., Bus. Franchise Guide (CCH) ¶ 15,098, 2013 WL 3306148, No. 4-08-0893 (Ill. App. Ct. June 26, 2013)

General Motors Corporation (GMC) sought to add GMC franchises to two existing Buick dealerships in Illinois. As required by the Illinois Motor

Vehicle Franchise Act (MVFA), GMC informed the existing GMC dealerships within a ten-mile radius of the proposed new dealerships of its plans. The dealerships filed objections with the Illinois Motor Vehicle Review Board, which found after a 19-day hearing that GMC had failed to prove that "good cause" existed to add the new dealerships and that the objecting dealerships were entitled to recover attorney fees and costs under the MVFA because they had "substantially prevailed" on their objections. The amount of the recoverable attorney fees and costs were to be determined at a subsequent hearing. After an Illinois circuit court upheld the board's rulings on administrative review, GMC appealed to the Illinois appellate court, which remanded the matter to the board to determine the amount of the attorney fees and costs award. The appellate court's decision was affirmed by the Illinois Supreme Court and the matter returned to the board.

The objecting dealerships filed motions to recover in excess of $1 million in attorney fees and costs, which the board granted and the circuit court confirmed. GMC again appealed. On appeal, GMC claimed, among other things, that the board had improperly awarded attorney fees because the dealerships had not established that GMC had engaged in "wrongful conduct" under MVFA § 13, which provides that a motor vehicle dealer

> who suffers any loss of money or property . . . as a result of the use or employment by a manufacturer . . . of an unfair method of competition or an unfair or deceptive act of practice declared unlawful by this Act or any action in violation of this Act, may bring an action for damages and equitable relief, including injunctive relief.

Section 13 also provides that a motor vehicle dealer "if it has not suffered any loss of money or property, may obtain permanent equitable relief if it can be shown that the unfair act or practice may have the effect of causing such loss of money or property." The MVFA further provides that "where the franchisee or dealer substantially prevails the court . . . shall award attorney's fees and assess costs." The objecting dealerships had not alleged that GMC had engaged in misconduct. Nor had they claimed that they had sustained financial loss or would sustain financial loss as a result of the proposed new dealerships.

GMC argued that an award of attorney fees and costs was only appropriate under the MVFA if the manufacturer had engaged in "wrongful conduct." The objecting dealerships argued that § 13 permitted an award of attorney fees when the manufacturer engaged in misconduct *and* the dealership "substantially prevails" on any claim brought under the MVFA. In other words, the dealerships claimed that they were entitled to recover attorney fees simply because GMC had failed to prove good cause to award the additional dealerships.

The pivotal issue on appeal was whether the "substantially prevails" language in the MVFA refers back to the circumstances where the manufacturer engaged in wrongful conduct or, alternatively, creates a further and separate basis for recovery of attorney fees and costs. The court found that the Illinois legislature had purposely intended to segregate "complainants by financial situation," i.e., those that had sustained loss and those that had not, *and* require that the manufacturer's conduct be wrongful in order to permit an award of damages. The court noted that, "if merely successfully protesting a franchise expansion would suffice to obtain an award of attorney fees, no reason would exist to identify the motor vehicle dealers by financial status or that the manufacturer engaged in misconduct."

The court was also not persuaded by the objecting dealerships' argument that the purpose of the MVFA, to protect franchisees and dealers, warranted an award of attorney fees. The court noted that the Illinois Supreme Court had clarified that one of the purposes of the MVFA was to "protect the public *from the negative impact of harmful franchise practices* by automobile manufacturers." Without saying as much, the court clearly did not believe that GMC's conduct was "harmful."

***E.A. Hakim Corp. v. New WinCup Holdings, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,077; No. 11-1232 (JAG), 2013 WL 2896867 (D.P.R. June 11, 2013)**

This action arose out of a terminated brokerage agreement. Hakim sought relief from WinCup under both the Puerto Rico Sales Representative Act (Law 21) and its Dealers' Contracts Act (Law 75). WinCup filed a motion for summary judgment arguing that the parties' relationship was not exclusive, making Law 21 inapplicable, and that the parties lacked the type of established relationship that constituted a dealership contract under Law 75.

The U.S. District Court for the District of Puerto Rico agreed with WinCup that Hakim was not an exclusive sales representative and granted summary judgment on the Law 21 claim. The court determined there were genuine issues of material fact regarding whether the parties' relationship was a dealership contract under Law 75 and initially denied Wincup's motion for summary judgment on this issue. WinCup filed for reconsideration of that decision.

In its argument for reconsideration, WinCup asserted that the relationship between Hakim and WinCup continued despite the termination of the brokerage agreement. WinCup noted that Hakim continued to purchase approximately the same amount of products from WinCup as it did before the termination of the brokerage agreement. WinCup noted that Hakim claimed its alleged dealer relationship had been impaired, giving rise to a Law 75 claim, because Hakim no longer had exclusivity in selling WinCup's products and no longer received commissions for purchases for its own account. WinCup argued that because the court granted summary judgment to WinCup on the exclusivity issue, Hakim's only possible impairment was its loss of commissions. WinCup said these commissions were paid under the brokerage agreement and had nothing to do with the alleged dealer relationship.

The best argument that Hakim could muster was that the parties' brokerage agreement and dealer relationship "existed parallel" to one another. The court sided with WinCup's argument that the alleged dealer relationship had not been impaired for purposes of Law 75. Importantly, the court noted that Hakim had not responded to WinCup's motion for reconsideration, leaving WinCup's arguments against the Law 75 claim unanswered. Convinced by WinCup's arguments the second time around, the court dismissed the Law 75 claim.

***King Coal Chevrolet Co. v. General Motors LLC*, Bus. Franchise Guide (CCH) ¶ 15,084; No. 2:12-5992, 2013 WL 2285969 (S.D. W. Va. May 23, 2013)**

This case arose out of a dispute between General Motors and a Chevrolet dealership in West Virginia in the aftermath of the restructuring of the General Motors (GM) dealer network following its Chapter 11 case. As part of its restructuring efforts, GM discontinued its franchise relationship with Lewis Automotive Group which, like King Coal, sold Chevrolets in the Beckley, West Virginia, area. GM later determined it wanted another dealer in the Beckley area and solicited applications. Lewis was not a candidate for the new dealership and GM selected Mid-State Chevrolet, which operated as Crossroads Chevrolet.

Crossroads was located within the same "relevant market area" as King Coal, as that term is defined in the West Virginia statute commonly known as the Dealer Act, but GM did not provide King Coal with the statutory notice required by the Dealer Act to enable King Coal to seek declaratory relief against the new dealer location. When King Coal demanded that GM provide this notice, GM responded that it was exempted from the notice requirement because the new dealership was the "reopening" of the Lewis dealership, which had been closed within the past two years. The Crossroads dealership was located within four miles of the former Lewis location as required for the exemption. The court noted there was no association between the Lewis and Crossroads dealerships and that Crossroads had a new location, logo, and management. Contending that Crossroads was not a reopening of the Lewis dealership, King Coal filed this action in the U.S. District Court for the Southern District of West Virginia, seeking to enjoin GM from permitting the operation of a Chevy dealership within King Coal's relevant market area and to compel GM to provide King Coal with the required statutory notice.

In reviewing the applicable statutes, the court noted that a manufacturer must give notice to an existing dealer before establishing or relocating a new dealer in the relevant market area of the existing one. The court also noted that the statute relied on by GM provides that the section requiring notice does not apply to the reopening within a relevant market area of a dealership closed or sold within the preceding two years if the new dealership is within four miles of the closed or sold dealership. King Coal argued that Crossroads was an entirely new dealership created after the closing of Lewis Automotive and constituted the establishment of a new dealership under the statute. GM, on the other hand, argued that the facts in this case support the conclusion that the opening of the Crossroads dealership was a reopening.

GM contended that the court should focus on the fact that the new location operated within the time and geographic parameters set forth in the relocation statute, which is more important than the identity of the dealer. The court said GM's argument seemed to beg the ultimate question of whether a "reopening" has the same meaning as a "replacement," "successor," or similar term such that a new dealer could use the safe harbor provision to come into a market without giving notice to a nearby dealer.

After reviewing and appearing to express some skepticism regarding GM's arguments to treat Crossroads as a reopening, the court certified the question to the West Virginia Supreme Court of Appeals of whether the circumstances in this case permit GM to avail itself of the safe harbor provision of the West Virginia statute or whether it must provide statutory notice of the opening of the new dealership. Having decided to certify this question, the court determined that it could not at this stage rule on King Coal's motion for a preliminary injunction. Likewise, the court declined to consider GM's arguments that King Coal's claims were barred by estoppel and laches and required a reading of the statute that was at odds with both the federal and state constitutions.

TERMINATION AND NONRENEWAL

BSD, Inc. v. Equilon Enters., LLC, Bus. Franchise Guide (CCH) ¶ 15,111; No. C10-05223 SBA, 2013 WL 3944483 (N.D. Cal. July 29, 2013)

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

Domino's Pizza LLC v. Deak, Bus. Franchise Guide (CCH) ¶ 15,107; No. 12-2654, 2013 WL 4034508 (3d Cir. Aug. 9, 2013)

Robert Deak obtained exclusive rights to develop Domino's Pizza franchises in certain counties in Pennsylvania and Maine under franchise agreements entered into with the predecessor of Domino's Pizza LLC in 1980 and 1984. In 2005, Domino's informed Deak it did not intend to renew these agreements in the same form and that Domino's would begin accepting franchise applications in these areas from third parties. Domino's sought a declaratory judgment that the franchise agreements had expired; Deak filed a counterclaim alleging that an oral agreement with Domino's guaranteed him the right to continue to renew the franchise agreements under the same terms.

In March 2007, the U.S. District Court for the Western District of Pennsylvania dismissed Deak's counterclaim but gave him the opportunity to file an amended counterclaim. Deak filed an amended counterclaim, which the court again dismissed in March 2008. Deak did not refile his counterclaim but filed an appeal to the U.S. Court of Appeals for the Third Circuit, which the Third Circuit dismissed under Federal Rule of Appellate Procedure 42(b). In November 2008, Domino's filed a motion for judgment on the pleadings, which the court granted, finding the parties to be no longer bound by their franchise agreements. Deak appealed and in 2010 the Third Circuit vacated the decision and remanded it to the district court.

Domino's moved voluntarily to dismiss its case on May 4, 2012. Deak objected arguing that under Federal Rule of Civil Procedure 41, the district court could not grant a voluntary dismissal over Deak's objection where it had pleaded a counterclaim. However, in the absence of a pending counterclaim when Domino's sought dismissal, the court granted Domino's motion to dismiss the entire case. The court denied Deak's request for reconsideration of the closing of the case, finding Deak had adequate opportunity to reassert the counterclaim while the case was open but failed to do so. Deak appealed.

The Third Circuit noted that Deak had moved for reconsideration of the closing of the case under Federal Rule of Civil Procedure 60(b)(6). Although that rule contains language allowing the court to relieve a party from a final judgment for "any other reason that justifies relief," the court noted that this language requires "extraordinary circumstances." Deak did not argue extraordinary circumstances but relied on the broad standards of Federal Rule of Civil Procedure 15(a)(2) directing courts to freely give leave to amend pleadings. The Third Circuit rejected this argument, stating that qualifying for leave to amend under Rule 15(a)(2) does not provide the extraordinary circumstances required by Rule 60(b)(6). The court noted that it rarely found extraordinary circumstances when a judgment "resulted from the party's deliberate choices," and Deak had more than four years in which he could have reasserted this counterclaim. The court also rejected Deak's argument that the district court abused its discretion by not allowing him to amend to reassert his counterclaim, finding that at some point a party's delay becomes "undue" delay.

The court concluded that the district court did not abuse its discretion in failing to allow amendment because Deak had ample opportunity to amend while the case was open, that Domino's would have been prejudiced by amendment after the case closing, and that issues of judicial economy and finality favored upholding the district court decision.

***ERA Franchise Sys., LLC v. Hoppens Realty, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,112; No. 12-cv-594-slc, 2013 WL 3967869 (W.D. Wis. July 31, 2013)**

ERA Franchise Systems brought this action against a terminated franchisee, Hoppens Realty, Inc. and its owner, Michael Hoppens, alleging that defendants breached the franchise agreement and violated trademark laws by continuing to use ERA's trademarks post-termination. Defendants responded with a counterclaim alleging "breach of contract, conversion, unjust enrichment, misrepresentation, and violation of the Wisconsin Fair Dealership Act (WFDL)." The matter came before the U.S. District Court for the Western District of Wisconsin on ERA's motions for a judgment on the pleadings regarding the counterclaim and leave to file a motion for summary judgment.

When Hoppens met with a representative of ERA in late 2007 about becoming an ERA franchisee, the representative indicated that the franchisor's support mechanisms included extensive sales training programs, onsite visits, and Internet support and online training. In its opinion, the court would characterize the representations regarding training and support as "untrue, known to be untrue or made in reckless disregard of their truth, and made with the intent to deceive and induce Hoppens and Hoppens Realty to enter into the Franchise Agreement." However, in March 2008 ERA and Hoppens entered into a ten-year franchise agreement. The agreement described certain services to be provided by ERA and contained a detailed integration clause, but did not specially refer to onsite support. Planning to take advantage of ERA's onsite program, Hoppens spent approximately $5,000 on facilities for onsite training but shortly after Hoppens Realty became a franchisee, ERA eliminated the program. When ERA failed to provide onsite training after repeated requests, Hoppens Realty stopped making payments required by the franchise agreement. Consequently, in their counterclaim defendants sought a minimum of $38,808 for amounts paid to ERA, the amount spent to build the training room, and related costs.

With respect to the counterclaim, ERA filed for a judgment on the pleadings under Federal Rule of Civil Procedure 12(c). The court determined this motion was premature, however, treating it as a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). In doing so, the court noted that defendants' counterclaim alleged that ERA breached the franchise agreement by failing to provide certain promised training and support, but that ERA sought dismissal relying on cases holding that a party may not stop performance, as did defendants here, and continue to receive the benefits of the contract. The cases cited by ERA centered on whether a franchisor's pretermination breaches could defeat a claim for trademark infringement, but the court distinguished those cases from ERA's dispute, noting that there was evidence that defendants had stopped using ERA's trademarks after being notified of the termination of the franchise agreement.

Although it rejected ERA's argument for dismissal of the breach of the contract counterclaim, the court found other problems with defendants' breach of contract claim. One issue is that defendants had not identified specific provisions of the franchise agreement that ERA allegedly breached, instead appearing to rely solely on the alleged oral misrepresentations of ERA's representative. The court also determined that evidence of the breach of contract claim was "unlikely to survive application of the franchise agreement's integration clause." The court further noted that defendants at least indirectly sought rescission of the franchise agreement, raising issues under contract law principles that allow a party that discovers alleged fraud to affirm the contract and sue for damages or disaffirm the contract and seek rescission but not do both. The court even suggested that defendants may have waived their right to rescind by continuing to use ERA's names and marks for almost two years after learning of the alleged misrepresentations. However, the court refused to dismiss the breach of contract counterclaim at such an early stage of the case, noting it could be raised on a motion for summary judgment by ERA or decided at trial.

Defendants also included a tort claim for conversion in their counterclaim, alleging that ERA accepted payments but failed to perform under a settlement agreement entered into by the parties. On this issue, the court agreed with ERA that application of the economic loss rule, which precludes a party from pursuing a tort claim for purely economic or commercial losses related to a contractual relationship, barred defendants' claim.

In making its ruling on the tort claim, the court first had to wade into a choice of law dispute. The franchise agreement provided that it was governed by New Jersey law and that for Wisconsin residents the WFDL would supersede any contrary provisions in the franchise agreement. Defendants asserted that such language superseded the New Jersey choice of law provision while ERA instead contended that this language added certain requirements imposed by the WFDL to the agreement. The distinction was important: although both New Jersey and Wisconsin law use the economic loss rule, Wisconsin does not apply it to contracts for services. As a practical matter, the economic loss rule would apply only if New Jersey law governed the agreement. The court applied New Jersey law to the extent not inconsistent with the WFDL, reasoning that defendants did not cite any authority that the WFDL was intended to displace choice of law provisions in a franchise agreement.

The counterclaim also included a claim for unjust enrichment based on ERA's acceptance of franchise fees and a payment under the settlement agreement while failing to provide certain services allegedly it had agreed to provide. Although ruling that it could not dismiss the claim on a motion for judgment on the pleadings, the court found that defendants' claims of unjust enrichment and breach of contract claims were inconsistent and they would be required to select one or the other if both claims proceeded to trial.

The court concluded its decision by granting ERA's motion to permit it to file a motion for summary judgment. This motion, if filed, will enable the court to consider certain additional evidence related to defendants' breach of contract claim. Although the defendants' claims, characterized as "weak" by the court, survived, their future appears to be uncertain at best.

***Jackson Hewitt, Inc. v. Dupree-Roberts*, Bus. Franchise Guide (CCH) ¶ 15,108; No. 13-00388, 2013 WL 4039021 (D.N.J. Aug. 7, 2013)**

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

***KFC Corp. v. Kazi*, Bus. Franchise Guide (CCH) ¶ 15,086, No. 3:11-CV-00475-M, 2013 WL 2257606 (W.D. Ky. May 22, 2013)**
This case is discussed under the topic heading "Contract Issues."

***Lift Truck Lease & Serv., Inc. v. Nissan Forklift Corp.*, Bus. Franchise Guide (CCH) ¶ 15,080; No. 4:12-CV-153 CAS, 2013 WL 3154012 (E.D. Mo. June 12, 2013)**
This decision from the U.S. District Court for the Eastern District of Missouri involved an attempt by Nissan to exclude a dealer's expert witness from testifying in a case involving whether Nissan had good cause to terminate certain dealer agreements. Nissan and the dealer, referred to in the opinion as ADL, entered into three agreements in January 2010 that made ADL the exclusive dealer of Nissan and Barrett forklift and industrial truck products in certain counties in Missouri and Illinois. The agreements contained certain performance obligations. Nissan notified ADL by letter on January 10, 2012, that it would allow the agreement to expire on February 1, 2012. Nissan characterized the letter as a "90-day notice of non-renewal and termination" and said that ADL would no longer be a dealer of Nissan and Barrett Products as of April 15, 2012. ADL sued, alleging that Nissan's actions constituted termination without good cause under the Missouri Power Equipment Act (MPEA).

ADL designated Ron Schuster as an expert witness. Schuster retired in 2010 after a thirty-eight year career in which he held sales and managerial positions with forklift and construction equipment dealers and manufacturers. In his report, Schuster opined that ADL substantially achieved the required sales goals, Nissan treated ADL differently than similarly situated dealers, and the termination of ADL "did not conform to forklift industry custom and practice." In seeking to exclude Schuster's opinions, Nissan argued that his sales opinion failed to consider a number of relevant factors, he provided no "methodological basis" for his opinion on differential treatment, and the relevant Missouri statute "does not require a termination to conform to industry custom and practice."

Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), a court must make a preliminary determination whether the reasoning or methodology underlying expert testimony is scientifically valid and can be properly applied to the facts in issue. Courts in the Eighth Circuit consider three factors in determining whether expert witness testimony is admissible evidence under Federal Rules of Evidence 702. First, evidence based on specialized knowledge must be useful to the finder of fact in deciding relevant issues. Second, a "witness must be qualified to assist the finder of fact." Third, evidence must be "reliable or trustworthy in an evidentiary sense" so that if a finder of fact finds the evidence to be "true, it provides the assistance the finder of fact requires." The court noted that Rule 702 favors admissibility if the evidence "will assist the trier of fact." Applying these factors, the court determined that Schuster would be permitted to testify that ADL had substantially achieved the required sales goals and that there was disparate treatment of ADL compared to other dealers, but would not be permitted to testify that ADL's termination did not conform to industry custom and practice.

On the issue of meeting sales quotas, Schuster testified in his deposition that ADL substantially achieved its 2011 sales goals for the two most important categories of products in the forklift industry. ADL argued that Schuster's opinion on this issue satisfied the third prong of the Rule 702 test for admissibility because he based his opinion on Nissan's own reports, which were reliable and trustworthy in an evidentiary sense. ADL also argued that Schuster's opinion met the first and second prongs of the test for admissibility, requiring that the opinion is useful and that the witness is qualified, because the ultimate issue was whether Nissan had good cause to terminate. The MPEA defines good cause as a failure to substantially comply with essential and reasonable requirements. ADL argued that because neither the statute nor case law defined substantial compliance, testimony by an industry expert could assist the jury in understanding the subject matter. Nissan countered that Schuster's opinion merely adopted ADL's version of the facts and lacked foundation. The court rejected this argument, noting that it went to the credibility of Schuster's testimony, not its admissibility.

Nissan sought to exclude Schuster's disparate treatment opinion, attacking his methodology in selecting comparable dealers and arguing that his opinion was conclusory and unreliable. ADL defended the opinion, contending that Schuster based it on Nissan's reports of actual dealer sales in its Southwest region, making it reliable and trustworthy in an evidentiary sense. Furthermore, ADL asserted that Schuster was qualified to comment on the differing treatment of dealers based upon his substantial experience in the industry. ADL also pointed to the statutory good cause language referencing a dealer's treatment compared to similarly situated dealers. Again, the court sided with ADL, finding that Nissan's arguments went to credibility rather than admissibility.

The court refused to allow Schuster to testify that the termination was inconsistent with industry custom and practice. Nissan attacked Schuster's opinion as relying solely on experience and anecdotal evidence. Further, Nissan claimed Schuster's opinion was irrelevant because the statute does not require that terminations follow industry custom and practice. The court found that Schuster's experience was irrelevant because the parties' contract specified a term as well as sales goals, and termination was subject to statutory limits. The court also relied on the fact that the statute makes no mention of industry custom and practice.

***North Star Int'l Trucks, Inc. v. Navistar, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,085; No. A12-1524, 2013 WL 2149949 (Minn. Ct. App. May 20, 2013)**

Issues of res judicata and collateral estoppel predominate in this unpublished opinion from the Minnesota Court of Appeals involving an ongoing dispute between North Star, an International Trucks dealer that owned two dealerships in the Twin Cities, and its manufacturer. North Star filed suit against Navistar in December 2009 after Navistar removed fifty-one zip codes from North Star's area of responsibility and notified the dealerships that Navistar considered them to be in breach of their dealer agreements. North Star's action had eight claims based on violations of the Minnesota Motor Vehicle Sale and Distribution Act (MVSDA) and the Heavy and Utility Equipment Manufacturer and Dealer Act (HUEMDA).

In Count 1 of its 2009 action, North Star alleged bad faith and threatened termination of its franchises, and the court ruled this claim was not ripe because no termination had yet occurred. North Star demonstrated liability on some of its other claims but did not recover any damages. The trial court denied injunctive relief, finding that Navistar's illegal conduct had ceased and that damages provided an adequate remedy. The trial court found that Navistar had breached the covenant of good faith and fair dealing in the dealer agreements by discriminating in the prices charged to the dealers for new trucks, but that Navistar had ceased this discrimination. The jury found that Navistar had changed North Star's competitive circumstances under HUEMDA, but did not specify how this occurred and found that Navistar had good cause to change the competitive circumstances. North Star appealed and the court of appeals affirmed the judgment.

Shortly after the trial court's ruling on post-trial motions, Navistar sent North Star a letter stating its intention to terminate North Star's franchise effective June 12, 2012, for failure to meet truck sale requirements and to provide required financial statements in a timely manner. North Star responded by filing a six-count complaint alleging that Navistar lacked good cause to terminate, did not uniformly apply performance standards, and served a termination notice in violation of the dealer agreement. Navistar moved to dismiss the first five counts, arguing they were barred by res judicata and collateral estoppel, and North Star dismissed the sixth claim. The trial court granted Navistar's motion to dismiss based on res judicata and collateral estoppel and dismissed North Star's motion for summary judgment on the termination count. On appeal, the appeals court reversed the trial court's judgment dismissing North Star's action and remanded the case to the trial court.

The appeals court noted that res judicata, sometimes known as claim preclusion, is broader than collateral estoppel and is intended to preclude a "party from relitigating claims arising from the original circumstances, even under new legal theories." Collateral estoppel, also known as issue preclusion, "applies to specific legal issues that have been adjudicated." In reviewing the elements of res judicata, the court said that the only element at issue here was whether the two cases "involved the same set of factual circumstances." With respect to this element, the court noted that res judicata did not apply to a claim that had not arisen at the time of the prior action. The court also noted that collateral estoppel is intended to preclude relitigation of issues already litigated and essential to the prior judgment. In reviewing the elements of collateral estoppel, the court noted that the only element that applied here is whether the issue is identical to an issue in the prior case.

The court determined that none of North Star's claims were barred by res judicata. The foundation for the court's decision appeared to be its determination that the first action focused on the legality of actions taken by Navistar to alter North Star's franchise and the second action focused on the legality of the termination of that franchise. Count 1 of Navistar's claim involved whether Navistar had terminated the franchise without good faith or good cause under MVSDA. The court concluded that res judicata did not apply because this count could not have been asserted in the previous case, and collateral estoppel did not apply because the second action involved different facts, legal standards, and burdens of proof. The court applied a similar analysis to reject Navistar's res judicata and collateral estoppel arguments on the remaining claims. A common theme in rejecting these arguments was that the second action involved different time periods, conduct, and statutes. Applying this reasoning, the court refused to dismiss claims based on failure to uniformly apply performance standards, termination based on factors beyond North Star's control, termination without good cause in violation of HUEMDA, and termination without proper notice.

This case provides a good read for all lawyers who navigated their way through civil procedure in law school without fully understanding the difference between res judicata and collateral estoppel, with the added bonus of what appears to be wise application of these principles to distinctly different aspects of an ongoing dispute between a franchisor and franchisee.

***Novus Franchising, Inc. v. Dawson*, Bus. Franchise Guide (CCH) ¶ 15,110; 725 F.3d 885 (8th Cir. 2013)**
This case is discussed under the topic heading "Noncompete Agreements."

***Noya v. Frontier Adjusters, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,070; No. WDQ-13-0965, 2013 WL 2490360 (D. Md. June 7, 2013)**
This case is discussed under the topic heading "Injunctive Relief."

TRADEMARK INFRINGEMENT

***Choice Hotels Int'l, Inc. v. Patel*, Bus. Franchise Guide (CCH) ¶ 15,066; 940 F. Supp. 2d 532 (S.D. Tex. 2013)**
As permitted under the franchise agreement, Choice Hotels elected to terminate its franchise agreement with defendant franchisee effective on the fifteenth anniversary of the commencement date. The notice stated that defendant franchisee was to cease all use of Choice Hotels trademarks and proprietary marks no later than April 8, 2009. Although defendant made some efforts to remove the trademarks from the hotel premises, he did not completely de-identify the hotel. Based on defendant's failure to comply

with the de-identification requirements, Choice Hotels sent defendant two cease and desist letters. When defendant continued to use the marks, Choice Hotels filed a lawsuit for trademark infringement, among other related claims. Choice Hotels moved for summary judgment as to both liability and relief, which the court granted in part and denied in part.

To succeed on a claim of trademark infringement, a plaintiff must show that the mark is legally protectable and that an infringement has occurred because there is a likelihood of confusion. Choice Hotels owns the federal registrations for the marks at issue; therefore, the court's analysis focused on the likelihood of confusion. By not removing the external signs containing Choice Hotel's trademarks and not removing the trademarks from its credit card receipts or Wi-Fi connection, defendant was found to have used the trademarks in the advertising or sale of services. The court identified a number of factors used in determining the likelihood of confusion as a result of defendant's use of the marks. After examining the facts of this case (including, defendant's use of Choice Hotels exact marks, defendant's concession that the marks are nationally and internationally known, that the products provided by Choice Hotels and defendant are similar, and Choice Hotels presentation of evidence of actual confusion by customers), the court found that there was a likelihood of confusion. Therefore, the court found defendant liable for trademark infringement. As to defendant's wife who was also a party to the franchise agreement, because she had not been involved in the business following the termination date, the court found that a genuine issue of material fact existed as to her liability for trademark infringement. Therefore, the court denied the motion for summary judgment as related to her.

Choice Hotels also moved for summary judgment for permanent injunctive relief and an award of damages. As to the motion for summary judgment seeking a permanent injunction, Choice Hotels was required to satisfy a four part test to obtain such relief. The court found that Choice Hotels satisfied that test and was entitled to a permanent injunction based on the following findings:

1. Hotel franchisors are particularly susceptible to irreparable injury as a bad experience at one hotel may deter a customer from staying at other hotels of the same brand;
2. Money damages would not be sufficient to compensate Choice Hotels for loss of control over its brand standards;
3. The hardship on Choice Hotels of not issuing a permanent injunction outweighs the hardship on defendant of issuing the permanent injunction; and
4. A permanent injunction serves the public interest by protecting the public from deception or confusion.

Although the court found granting the motion for summary judgment appropriate as to injunctive relief, it denied the motion for summary judgment as to damages because questions of material fact remained. As to an accounting of profits, the court examined a number of factors in determining whether it was appropriate to grant a motion for summary judgment. One factor on which the court placed significant weight was defendant's intent to confuse or deceive. Because defendant went to great lengths to remove the Choice Hotels marks from most places on the premises, the court found there was an issue of material fact as to his intent. The court also examined whether any sales had been diverted from a Choice Hotel to defendant's hotel based on the defendant's infringing conduct; insufficient evidence was provided by Choice Hotels to prove that to be the case. The court looked at whether reasonable royalties during the period of trademark infringement was appropriate and determined that the issue was not appropriate for decision on motion for summary judgment. The court referred to another hotel case in which another court in the same circuit found it proper to grant damages based on royalties to the extent the infringement was accountable for defendant's business. In this case, it is not clear how much of defendant's business resulted from the infringement. Therefore, an issue of material fact remains. The court also declined to grant a motion for summary judgment for treble damages. noting that issues of fact remain as to whether defendant intentionally infringed on the marks and whether extenuating circumstances exist making treble damages proper.

***Just Tacos, Inc. v. Zezulak*, Bus. Franchise Guide (CCH) ¶ 15,114; No. CV-11-00663-JMS/KSC, 2013 WL 3731065 (D. Haw. July 12, 2013)**

This case addressed the issue of whether the "uses in commerce" language in Lanham Act § 1125 is a jurisdictional predicate or an element of the claim for relief. Just Tacos, Inc. entered into a franchise agreement with Michael Zezulak and related entities. After the agreement was terminated, defendants allegedly continued to use the Just Tacos trademark, trade dress, recipes, and the like. As a result, Just Tacos filed suit in the U.S.District Court of Hawaii asserting claims for, among others, unfair competition by false designation of origin under the Lanham Act. Defendants filed a motion to dismiss on the ground that the court lacked subject matter jurisdiction because the claims pertained "solely to economic activity within the State of Hawaii."

The central issue in this case was whether the requirement in § 1125 that the trademark at issue be "used in commerce" is a jurisdictional requirement or an element of a plaintiff's claim. In reaching its decision, the district court relied on the U.S. Supreme Court's decision in *Arbaugh v. Y & H Corp.*, which addressed the dichotomy between jurisdiction and substantive merits.

In *Arbaugh*, the Supreme Court held that "unless Congress has 'clearly stated[d]' that a statutory limitation is jurisdictional, 'courts should treat the restriction as nonjurisdictional in character.' " The Court further held that a district court's analysis should focus on the " 'text, context and relevant historical treatment' " in analyzing whether the statutory provision in question is jurisdictional. In the Ninth Circuit, in deciding whether a statutory provision is jurisdictional or an element of a claim, district courts consider whether: "(1) the provision is clearly labeled jurisdictional; (2) the provision is located in a jurisdiction-granting provision; and (3) [whether] other reasons necessitate that the provision be construed as jurisdictional."

The district court started its analysis by noting three relevant provisions within the Lanham Act: (1) Section 1125, which includes the "uses in commerce" language; (2) Section 1127, which defines commerce as "all commerce which may lawfully be regulated by Congress"; and (3) Section 1121, which provides that district courts have original jurisdiction of all claims arising under the Lanham Act. Applying the first of the *Arbaugh* factors, the court found that neither § 1125 nor § 1127 were "clearly labeled jurisdictional provisions" and that the "uses in commerce" language was included in the portion of the statute setting forth the elements of a § 1125 claim. With respect to the second factor, the court held that the "uses in commerce" language requirement did not appear in § 1121, which is the Lanham Act's "jurisdiction granting provision." Finally, as to the third factor, the court concluded that it could not "discern" any reason that would "necessitate" that the "uses in commerce" language should be construed as jurisdictional. In addressing this factor, the court noted that although there was some potential ambiguity in § 1127's definition of commerce, the ambiguity "falls short" of the requirement that the statute "clearly state" that a provision is jurisdictional.

Accordingly, the district court denied defendants' motion to dismiss and overturned an earlier Ninth Circuit decision holding that the "uses in commerce" language was jurisdictional.

***RPC Acquisition Corp. v. J&D World Corp.*, Bus. Franchise Guide (CCH) ¶ 15,091; No. CV-13-1400-DWF/LIB, 2013 WL 3338784 (D. Minn. July 2, 2013)**

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

VICARIOUS LIABILITY

***Courtland v. GCEP-Surprise, LLC*, Bus. Franchise Guide (CCH) ¶ 15,101; No. CV-12-00349-PHX-GMS, 2013 WL 3894981 (D. Ariz. July 29, 2013)**

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

***Depianti v. Jan-Pro Franchising Int'l, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,069; 990 N.E.2d 1054 (Mass. 2013)**

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