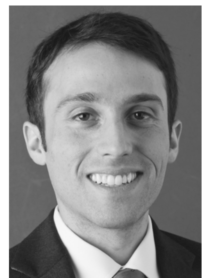
Franchise (& Distribution) Currents

C. Griffith Towle, Jennifer Dolman, and Elliot Ginsburg

ARBITRATION

Mr. Towle

Ms. Dolman



Mr. Ginsburg

***Bald v. PCPA, LLC*, Bus. Franchise Guide (CCH) ¶ 15,760, 2016 WL 1587227 (D.N.H. Apr. 19, 2016)**
A franchisor filed a statement of claim with the American Arbitration Association asserting that its franchisee and the franchisee's principal breached the parties' franchise or area development agreements, both of which contained mandatory arbitration provisions. The franchisee's principal filed suit in the U.S. District Court for the District of New Hampshire, seeking a declaratory judgment that he was not bound by the arbitration provisions because he was not a party in his personal capacity to either of the agreements. The court agreed, finding that the principal had signed the franchise agreement in his capacity as an authorized representative of the franchisee entity, not in his personal capacity. Additionally, there was no evidence that the franchisee's principal had personally guaranteed the franchisee's obligations. Therefore, the court held that the franchisee's principal was not bound by the arbitration provisions.

***In re Patwari*, Bus. Franchise Guide (CCH) ¶ 15,724, 2016 WL 1577842 (Bankr. D.N.J. Apr. 7, 2016)**
A franchisee of four Subway stores subleased from Subway Real Estate Corp. fell behind on rent. The franchisor (DAI) initiated an arbitration against the franchisee and, because she failed to appear at the final arbitration hearing, four arbitration awards were entered against her. The relief granted included termination of the franchise agreements; a requirement that she de-identify the stores; and payment of past due royalties, other fees, and

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the arbitration costs. The franchisee then filed a complaint in the New Jersey Chancery Court asking the court to enjoin the enforcement of the arbitration awards and termination of the franchise agreements on the ground that the arbitration awards violated the New Jersey Franchise Practices Act (NJFPA).

The Chancery Court issued a preliminary injunction enjoining enforcement of the arbitration awards. The franchisor then filed a complaint in the U.S. District Court for the District of New Jersey seeking a preliminary injunction preventing the franchisee from operating the franchised stores and asserted a claim for trademark infringement. The franchisee filed affirmative defenses and a counterclaim asserting that the arbitration clause was unconscionable and, therefore, unenforceable. At some point, the franchisee filed a petition for relief in the U.S. Bankruptcy Court for the District of New Jersey and the Subway entities filed a motion to dismiss the franchisee's claims.

The bankruptcy court held that the franchisee's reliance on the NJFPA and the injunction issued by the Chancery Court were misplaced because the Federal Arbitration Act precluded resorting to a state court for matters that the parties agreed to arbitrate. Accordingly, because the NJFPA was preempted, the court vacated the preliminary injunction issued by the Chancery Court. It further held that the arbitration clause was not unconscionable because the franchisee was educated in business matters and had several other food franchises to choose from if she disagreed with the terms of the arbitration provision, and there was no evidence that the agreements were presented to her on an "as is" basis.

BANKRUPTCY

Putzier v. Ace Hardware Corp., Bus. Franchise Guide (CCH) ¶ 15,727, 2016 WL 1337295 (N.D. Ill. Mar. 30, 2016)

A group of more than forty franchisees of Vision 21 Ace Hardware sought to file both a third and fourth amended complaint against the franchisor, alleging that the franchisor fraudulently induced them to purchase their franchises by knowingly providing manipulated and inflated sales projections and false historical performance numbers. The plaintiffs also moved to add a number of plaintiffs to the case, including trustees that represent the bankruptcy estates of franchisees named as plaintiffs in a prior proposed complaint. Ace objected to the proposed pleadings.

The U.S. District Court for the Northern District of Illinois held that the shareholders of the franchise entities that entered into agreements with Ace did not have standing to sue Ace and could not be added.

Although the franchisor argued that the claims of six other franchisees were barred by res judicata because their claims were compulsory counter-

claims to breach of contract suits previously brought by the franchisor, the court held that the complaint did not show that the six franchisees could have or did discover their fraud claims during the pendency of the franchisor's original lawsuits and, as such, they were not now barred from bringing those claims.

The court based its determination on the shareholder-standing rule, which the court characterized as a general principle of U.S. corporate law and Illinois law. Under this rule a shareholder of a corporation does not have an individual right of action against a third party for damages indirectly resulting to the shareholder because of injury to the corporation.

CHOICE OF FORUM

***Cambria Co. LLC v. Renaissance Marble & Tile, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,755, 2016 WL 1706101 (D. Minn. Apr. 28, 2016)**

The U.S. District Court for the District of Minnesota upheld the common law principle of freedom of contract and rejected Renaissance Marble & Tile Inc.'s argument that a provision of Iowa franchise law (Iowa Code § 523H.3) invalidated the forum selection clause and waiver to object or defend found in the venue provision in the parties' dealership agreement.

The dealership agreement between dealer Cambria Co. LLC and Renaissance, an Iowa-based manufacturer of kitchen countertops, specified that the laws of the State of Minnesota were to govern the contract and included a provision whereby both parties expressly agreed not to raise any objections or defenses with regards to the agreed-upon forum. In January 2016, Cambria commenced proceedings in Minnesota state court against Renaissance in the contractually stipulated Le Sueur County, alleging that Renaissance had breached the agreement by failing to pay outstanding amounts. Cambria brought a motion to remand pursuant to the contract's forum selection clause in response to Renaissance's removal of the case from Le Sueur County to the U.S. District Court for the District of Minnesota.

Although Renaissance did not deny the enforceability of the forum selection clause, it argued Iowa's franchise law invalidated the clause. According to the Iowa Code, proceedings may be commenced "wherever jurisdiction over the parties or subject matter exists, even if the agreement limits actions or proceedings to a designated jurisdiction."

Granting Cambria's motion and remanding the case to Le Sueur County, the court held that Iowa law did not apply to the dispute because the contract clearly stated that it was to be governed by the laws of the State of Minnesota. Accordingly, Iowa law could not invalidate the forum selection clause. Furthermore, the court found the waiver provision to be a clear and unequivocal waiver of Renaissance's right to remove, which effectively prohibited objections relating to venue.

***Cluck–U Chicken, Inc. v. Cluck–U Corp.*, Bus. Franchise Guide (CCH) ¶ 15,759, 2016 WL 1588677 (M.D. Fla. Apr. 20, 2016)**

Franchisee Cluck–U Chicken, Inc. and its guarantor (plaintiffs) filed suit against franchisor Cluck–U Corp. and its president (defendants) in the U.S. District Court for the Middle District of Florida. In response, the defendants filed a motion to transfer the action to the U.S. District Court for the District of Maryland under 28 U.S.C. § 1404(a).

The court first considered the defendants' argument that the forum selection clauses in the franchise agreement and guaranty required the parties to litigate in the District of Maryland. The court disagreed, finding that the forum selection in the franchise agreement "includes no words of command and no words of exclusion" and was, therefore, permissive, rather than mandatory, because it authorized litigation in Prince George's County, Maryland, but did prohibit litigation elsewhere. The court also noted that the parties consented to jurisdiction and venue in state court and not federal district court.

The court found that the forum selection clause in the guaranty was a "hybrid clause" because it provided for permissive jurisdiction in a forum that was mandatory upon the party being sued. In other words, a party can sue in any appropriate jurisdiction, but a party that is sued in the identified forum cannot transfer the action.

Because the forum selection clauses were permissive, the court then considered whether the interests of justice and convenience of the parties and witnesses warranted a transfer. The defendants argued that its staff and witnesses were all based in Maryland. However, the court held that the significance of the convenience of the witness is "diminished" when such witnesses are employees of a party and the party can make them available for trial. The defendants also argued that its records were in Maryland. The court was unpersuaded by this argument because the records were electronically available and could be easily transferred to Florida. The court gave little weight to the defendants' next argument—that there was pending litigation between the parties in Maryland (initiated by the defendants)—because the Maryland action was filed after the plaintiffs had filed their case in Florida. Finally, the defendants argued that the parties' franchise agreement was negotiated and "finalized" in Maryland. The court rejected this argument, observing that the defendants failed to explain the importance of litigating the dispute where the parties negotiated and signed the agreement.

Having dispensed with the defendants' arguments, the court then noted several things that the defendants had not done to advance their motion, including identifying any witnesses unwilling to attend a trial in Florida or arguing any "imbalance" in the parties' respective abilities to pursue the litigation in Florida. Accordingly, the court denied the motion to transfer.

CHOICE OF LAW

***Cambria Co. LLC v. Renaissance Marble & Tile, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,755, 2016 WL 1706101 (D. Minn. Apr. 28, 2016)**
This case is discussed under the topic heading "Choice of Forum."

***Country Visions, Inc. v. Midsouth LLC*, Bus. Franchise Guide (CCH) ¶ 15,747, 2016 WL 1614585 (E.D. Cal. Apr. 21, 2016)**
This case is discussed under the topic heading "Fraud."

CONTRACT ISSUES

***859 Boutique Fitness LLC v. Cyclebar Franchising, LLC*, Bus. Franchise Guide (CCH) ¶ 15,751, 2016 WL 2599112 (E.D. Ky. May 5, 2016)**
After a period of negotiations with a franchisor (Cyclebar Franchising), a franchisee signed a franchise agreement. The franchisor did not countersign the agreement and, two days after the franchisee signed, informed the franchisee that it would not be granted a franchise and that the franchisor would refund the fees the franchisee had paid. The prospective franchisee filed a complaint in the U.S. District Court for the Eastern District of Kentucky, alleging claims for breach of contract, promissory estoppel, breach of warranty, misrepresentation, violations of Kentucky's Consumer Protection Act, deceptive trade practices based on a violation of the FTC Franchise Rule, and punitive damages.

The court dismissed the prospective franchisee's claims. Because the franchisor had not signed the franchise agreement, the breach of contract claim was barred by the statute of frauds. The court also held that the doctrine of promissory estoppel could not be used to enforce an agreement that is otherwise unenforceable based on the statute of frauds. Additionally, there was no warranty because there was no contract and the prospective franchisee did not offer any theory for relief based on a breach of warranty under Kentucky's Uniform Commercial Code. The prospective franchisee's fraud claim did not satisfy the particularity requirements because it failed to allege damages stemming from reliance on any misrepresentations. The Kentucky Consumer Protection Act claim also failed because that statute provided a cause of action only to individuals who purchased or leased goods for personal, family, or household purposes. Finally, the deceptive trade practices claim based on violations of the FTC Franchise Rule was dismissed because the rule does not create a private right of action; the claim for punitive damages was rejected because it was not a separate cause of action.

***Beck Chevrolet Co., Inc. v. Gen. Motors LLC*, Bus. Franchise Guide (CCH) ¶ 15,752, 53 N.E.3d 706 (N.Y. May 3, 2016)**
This case is discussed under the topic heading "Statutory Claims."

***Darling's Auto Mall v. Gen. Motors LLC*, Bus. Franchise Guide (CCH) ¶ 15,729, 2016 WL 1255301 (Me. Ct. App. Mar. 31, 2016)**
This case is discussed under the topic heading "Statutory Claims."

***Lancia Jeep Hellas S.A. v. Chrysler Grp. Int'l LLC*, Bus. Franchise Guide (CCH) ¶ 15,733, 2016 WL 1178303 (Mich. Ct. App. Mar. 24, 2016)**
A car dealer sued the manufacturer in Michigan state court for fraud and breach of the duty of good faith and fair dealing for not expanding and improving the Lancia vehicle line. The distribution agreement, however, contained a clause permitting the manufacturer to alter, modify, stop production of, or withdraw from the market for all vehicles or derivative vehicles under the contract. The distributor relied on the manufacturer's representations that the particular line would be expanded and improved and claimed that absent those representations, it would not have entered into the agreement to distribute Lancia products. In ruling on the defendant's motion for summary judgment, the lower court dismissed several counts in the distributor's complaint. Upon appeal, the Michigan Court of Appeals considered only the dismissal of the distributor's fraud and breach of the duty of good faith and fair dealing claims. The court found that the distribution agreement included an integration clause that nullified any alleged misrepresentation that the Lancia product line would be expanded and developed. The appeals court also ruled that the express terms of the agreement involved in this case gave the manufacturer the right to take the actions of which the distribution complained. For that reason there was no implied duty of good faith and the appeals court upheld the lower case ruling.

***Maurice Sporting Goods, Inc. v. BB Holdings, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,779, 2016 WL 2733285 (N.D. Ill. May 11, 2016)**
The U.S. District Court for the Northern District of Illinois struck seven of the defendant's eight affirmative defenses to the plaintiff's claim for breach of contract, but declined to strike the defense that the parties' alleged agreement violated the statute of frauds.

Plaintiff Maurice Sporting Goods, Inc. and defendant BB Holdings, Inc., d/b/a Buck Bomb, were in a business relationship pursuant to which Maurice sold Buck Bomb products to retailers. After approximately eight years, Buck Bomb began selling its products directly to Maurice-supplied retailers. The parties chose to formally end their relationship and entered into a written agreement via email pursuant to which Maurice would return all Buck Bomb products in its inventory if Buck Bomb had previously provided an invoice for the product (the buyback agreement). Maurice brought an action against Buck Bomb for failing to pay $88,932.66 under the agreement.

In the alternative, Maurice alleged breach of oral contract and unjust enrichment.

In response, Buck Bomb pleaded eleven affirmative defenses, three of which were withdrawn, wherein it admitted the facts alleged but asserted alternative reasons why it was not liable. Maurice brought a motion to strike the defenses pursuant to Federal Rule of Civil Procedure 12(f). The court confirmed that affirmative defenses are assessed under the *Twombly–Iqbal* "plausibility" pleading standard and individually assessed the sufficiency of each defense as pleaded.

Buck Bomb's first affirmative defense, asserting that its breach of the buyback agreement was excused due to Maurice's prior breach of the parties' alleged distribution agreement, was struck without prejudice on the ground Buck Bomb had failed to plead any allegations that plausibly suggested the existence of an enforceable distribution agreement beyond the "ongoing business relationship" between the parties.

The court struck Buck Bomb's defense that Maurice failed to mitigate damages because Buck Bomb's allegations related to behavior occurring prior to Buck Bomb's failure to pay for the product buyback. As such, the allegations did not support a mitigation defense.

The court also struck Buck Bomb's defense that Maurice contributed to its own alleged damages by making misrepresentations about Buck Bomb and its own business practices and status, on the basis that Buck Bomb had not asserted any factual allegations to support the defense.

The court struck an unclean hands defense because Buck Bomb failed to plead any facts establishing essential elements of the defense, including bad faith behavior and a connection between the alleged misconduct and the transaction in question. The court struck defenses of estoppel and waiver on the same grounds, finding the pleadings lacked reference to the essential elements of the defenses and failed to disclose any facts that could plausibly suggest the existence of a distribution agreement or actions constituting waiver.

Buck Bomb also asserted that the buyback agreement was void on the basis that its execution was obtained through Maurice's illegal actions. The court struck this defense without prejudice on the basis that no facts supporting the allegations of illegality were pleaded.

However, the court declined to strike Buck Bomb's final affirmative defense, which asserted that the alleged agreement between the parties violated the statute of frauds. The court found that the factual basis for this defense was inferable from Buck Bomb's pleadings. Maurice had claimed damages arising from Buck Bomb's breach of the written buyback agreement or, in the alternative, breach of oral contract and unjust enrichment. However, the Illinois statute of frauds provides that "a contract for the sale of goods for the price of $500 or more is not enforceable "unless there is some writing sufficient to indicate that a contract for sale has been made between the parties. . . ." As such, the court concluded that if Maurice's written contract ar-

gument were to fail, the statute of frauds defense may be available in relation to the arguments advanced in the alternative. Furthermore, Buck Bomb had denied material elements of the written agreement on the basis of insufficient knowledge.

***Neill Corp. v. TSP Consulting, LLC*, Bus. Franchise Guide (CCH) ¶ 15,761, 2016 WL 1558778 (E.D. La. Apr. 18, 2016)**

The U.S. District Court for the Eastern District of Louisiana considered several motions to dismiss in a case involving a contractual dispute among three entities—TSP Institute, Neill Corp., and TSP Consulting—all of which shared a common owner, Thomas Petrillo. In doing so, the court confirmed that although directors and officers of a corporation owe a fiduciary duty to the corporation and its shareholders, the duty owed between contractual parties is not fiduciary in nature.

Two of the involved entities, Neill Corp. and TSP Institute, shared a long-term distributorship agreement with Aveda to sell and market Aveda beauty products. The agreement with Aveda was a crucial part of Neill Corp.'s business. In order to leverage Petrillo's industry expertise, Neill Corp. entered into a consulting agreement with TSP Institute, which shifted daily operational control of the Neill Corp. entities to Petrillo. Neill Corp. brought a claim against TSP Consulting alleging that Petrillo, as TSP Consulting's sole member/employee, had attempted to usurp control of Neill Corp.'s distributorship agreement with Aveda through the consulting agreement. In response, TSP Consulting argued that Neill Corp. was merely trying to justify premature termination of the consulting agreement.

Keeping in mind the standard for avoiding dismissal in a Federal Rule of Civil Procedure 12(b)(6) motion, namely, that the complaint must state a valid claim for relief, the court addressed various motions to dismiss arising from counterclaims and third party claims. With respect to the motion to dismiss filed by TSP Consulting and Thomas Petrillo, the court granted the motion as to claims for breach of fiduciary duty by TSP Consulting. The court held that although contracts must be performed in good faith, this standard does not reach that of a fiduciary duty. In contrast, the court denied the motion to dismiss the claims of a breach of fiduciary duty by Petrillo individually because corporate officers and directors owe a fiduciary duty to their corporations and shareholders.

The court further considered a motion to dismiss related to a third party demand filed by TSP Consulting against a principal of TSP Consulting. Because the principal had not signed the consulting agreement in his personal capacity, but had apparently done so for a side letter, the principal's motion to dismiss was granted with respect of the consulting agreement and denied as to the side letter. The court denied the remaining motions to dismiss, which related to requests for declaratory relief for breach of contract and repudiation, for tortious interference with contract, and for conversion against Petrillo personally.

***Neopharm Ltd. v. Wyeth–Ayerst Int'l LLC*, Bus. Franchise Guide (CCH) ¶ 15,746, 2016 WL 1076931 (S.D.N.Y. Mar. 18, 2016)**
This case is discussed under the topic heading "Termination and Nonrenewal."

***Ramada Worldwide Inc. v. APS Corp.*, Bus. Franchise Guide (CCH) ¶ 15,772, 2016 WL 2869057 (D.N.J. May 17, 2016)**
This case is discussed under the topic heading "Damages."

***Restored Images Consulting, LLC v. Dr. Vinyl & Assocs., LTD.*, Bus. Franchise Guide (CCH) ¶ 15,768, 2016 WL 3064142 (W.D. Mo. May 31, 2016)**
The U.S. District Court for the Western District of Missouri held that a franchisor was not liable to one of its master franchisees for allegedly violating the Texas Business Opportunity Act and breaching the parties' master franchise agreement (MFA). Although the franchisor had failed to provide the master franchisee with a Uniform Franchise Offering Circular (UFOC), the franchisor's failure did not cause the master franchisee to sustain any damages.

Dr. Vinyl & Associates owned and franchised the Dr. Vinyl brand, a business that repaired vinyl and other materials. In addition to selling franchises directly to individuals, Dr. Vinyl also sold master franchises pursuant to which master franchisees would sell new franchises and promote existing franchises but would not perform actual repair services. In 2004, Restored Images Consulting, LLC, a limited liability company of third party-defendant Christopher Collins, signed an MFA with Dr. Vinyl. Among other things, the MFA required Restored Images to sell five franchises per year for five years. In turn, the MFA required Dr. Vinyl to pay Restored Images $10,000 for each franchise it sold. Dr. Vinyl was also required to provide a UFOC for the offer of Dr. Vinyl franchises.

Restored Images brought various claims against Dr. Vinyl, including that Dr. Vinyl breached the MFA by refusing to pay Restored Images a commission for selling a franchise and that Dr. Vinyl breached both the Texas Business Opportunity Act and the MFA by failing to provide a UFOC. Dr. Vinyl also brought various claims against Restored Images and Collins. Ultimately, the only party to prevail was Restored Images, which was awarded $10,000 in unpaid commissions.

In considering Restored Images' claims regarding the failure to provide a UFOC, the court assumed, without deciding, that Dr. Vinyl's failure to provide the UFOC constituted a breach of the MFA. However, the court found there was no evidence that not receiving a UFOC prevented Restored Images from promoting, selling, or growing franchises. As such, Restored Images did not require any sum of money to make it whole for the assumed breach of the MFA. Restored Images had also sought lost profits resulting

from Dr. Vinyl's failure to provide a UFOC. Again, Restored Images' lack of evidence was fatal to its claim as there was no evidence that it had a reasonable chance of completing a franchise sale but for the lack of a UFOC.

With respect to Restored Images' claim to recover an unpaid commission, the court found the MFA required Dr. Vinyl to pay Restored Images $10,000 for each franchise sold, and Restored Images had, in fact, sold one franchise. Notably, in order to sustain its claim against Dr. Vinyl for unpaid commissions, Restored Images had to establish that it had performed its obligations under the contract. Dr. Vinyl argued that Restored Images had failed to satisfy its obligation to sell franchisees. Ultimately, the court held that Dr. Vinyl had waived this contractual provision because it had not enforced the franchise-selling requirement for over nine years nor had it terminated the MFA for non-performance. Because this section of the contract was waived, the court concluded that Restored Images had performed its obligations under the contract and found in Restored Images' favor on its claim for unpaid commissions. The court awarded damages in the amount of $10,000, placing Restored Image in the position it would have been had Dr. Vinyl performed under the MFA.

***Volvo Grp. N. Am., LLC v. Truck Enters., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,757, 2016 WL 1457926 (W.D. Va. Apr. 14, 2016)**

Several truck dealers, some of which sold both Volvo and Kenilworth trucks, entered into a stock purchase agreement with Transportation Equipment Company, Inc. (TEC) to sell all of their dealerships. Volvo, however, desired to exercise its rights of first refusal to purchase just the Volvo portions of the dual dealerships. The dealers agreed that Volvo had a right of first refusal, but insisted that if Volvo wanted to exercise its rights, it had to stand in the shoes of TEC and buy all of the dealerships for at least the price set forth in the stock purchase agreement.

Volvo filed a motion in the U.S. District Court for the Western District of Virginia to enjoin the proposed sale until the scope of its right of first refusal could be determined. The court issued the requested injunction because the dealership agreement provided that a bona fide offer giving rise to the right of first refusal may not contain proposed sales terms that are commingled with other assets of the dealer. Thus, Volvo was likely to succeed on its claim that its right of first refusal was valid and that the dealers were required to honor Volvo's rights by providing Volvo with information regarding the value of just the Volvo portions of the dual dealerships.

In finding that Volvo was likely to succeed on the merits of its claims, the court relied on a case in which the plaintiff had a right of first refusal to purchase a seventeen-acre tract of land. The plaintiff contracted with a buyer to sell the seventeen-acre tract along with another 1.9-acre parcel. There, the court was not persuaded by the plaintiff's argument that the packaged nature of the sale defeated the right of first refusal and held that specific performance in favor of the plaintiff was appropriate. The court also held that

Volvo would likely suffer irreparable harm if the proposed sale was consummated because Volvo would lose its right of first refusal or be forced to purchase the Kenilworth and other portions of the dual dealerships. Additionally, the court found that harm to dealers from the injunction requested was minimal because they could continue to own and operate the dealerships.

DAMAGES

***Mercedes–Benz USA, LLC v. Carduco, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,728, 2016 WL 1274535 (Tex. App. Mar. 31, 2016)**

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

***Ramada Worldwide Inc. v. APS Corp.*, Bus. Franchise Guide (CCH) ¶ 15,772, 2016 WL 2869057 (D.N.J. May 17, 2016)**

The U.S. District Court for the District of New Jersey entered a default judgment against a franchisee and its individual guarantors following their failure to defend an action for outstanding fees and liquidated damages after the franchisor terminated the license agreement for nonpayment.

Ramada Worldwide Inc. (RWI) entered into a license agreement with APS Corp. for the operation of a 134-room Ramada guest lodging facility. The agreement provided that RWI could terminate the license agreement with notice if APS failed to pay amounts due to RWI under the agreement or if APS failed to remedy any other default of its obligations or warranties under the agreement. In addition, the agreement provided for liquidated damages upon termination in the amount of $1,000 for each room in the facility. APS repeatedly failed to meet its financial obligations under the agreement, ultimately owing $168,416.92 in outstanding fees. RWI terminated the license agreement and sought to recover the amounts outstanding, its costs, and $134,000 in liquidated damages against APS and its guarantors. The defendants failed to defend the action, and RWI sought a default judgment.

In granting the requested default judgment, the court determined that the defendants had breached the license agreement and guarantees by failing to meet their financial obligations to RWI. The court found that RWI had performed its contractual obligations under the agreement, had properly pleaded the elements of a breach of contract claim, and put forward unchallenged facts that constituted a legitimate cause of action.

The court further found that RWI would suffer prejudice if the default judgment was denied because it had already waited nearly four years since the breach to receive the fees it was owed as well as the attorney fees and court costs. It found that APS and the individual defendants had not presented any factors or arguments to suggest they had a litigable defense for the breaches and that it was not clear if their failure to litigate was the result

of willful or bad faith conduct. Accordingly, the court determined that a default judgment was appropriate and entered judgment against APS and the individual guarantors.

***Restored Images Consulting, LLC v. Dr. Vinyl & Assocs., LTD.*, Bus. Franchise Guide (CCH) ¶ 15,768, 2016 WL 3064142 (W.D. Mo. May 31, 2016)**
This case is discussed under the topic heading "Contract Issues."

DEFINITION OF FRANCHISE

***Lofgren v. Airtrona Canada*, Bus. Franchise Guide (CCH) ¶ 15,776, 2016 WL 2753298 (E.D. Mich. May 12, 2016)**
The U.S. District Court for the Eastern District of Michigan declined to amend its judgment holding an agreement to provide equipment and training in exchange for a fee constituted a franchise agreement under the Michigan Franchise Investment Law (MFIL). Plaintiff Brian Lofgren entered into an agreement with Airtrona Canada that enabled him to operate a used car deodorizing business. Two years later, he purchased upgraded equipment from Airtrona. The business failed and Lofgren sought rescission under the MFIL, claiming his arrangement with Airtrona was a franchise agreement under the MFIL. At trial, the court concluded, among other things, that Airtrona's agreement to provide Lofgren with equipment and training to operate his business in exchange for a fee constituted a franchise under the MFIL, that Airtrona had breached its disclosure obligations, and that Lofgren was entitled to rescission. Although there was no formal written franchise contract, the court found that Lofgren's payment to Airtrona of more than the bona fide wholesale price of the equipment he purchased could be considered an indirect franchise fee for purposes of the MFIL. Airtrona and its principal Sam Barbeiro moved for the court to amend its findings.

The defendants argued that the court had erred in finding that the parties' arrangement constituted a franchise agreement because it failed to satisfy the requirement that the claimed franchisee was granted the right to engage in offering, selling, or distributing goods or services under a marketing plan or system prescribed by the franchisor. The court rejected arguments from Airtrona that the parties had begun working prior to entering into the agreement and it had already granted Lofgren the right to use its marks. The court similarly rejected Airtrona's arguments that it had erred by finding Lofgren was required to pay a franchise fee under the agreement, finding (in obiter due to procedural consideration) that the additional fee imposed by the agreement was "for the right to enter into a business under a franchise agreement."

The defendants also contended rescission was not a proper remedy because the failure to provide Lofgren with a disclosure statement was merely a technical violation of the MFIL because Lofgren "knew everything that

would have been contained in the disclosure." The court disagreed, finding the plain language of the MFIL did not require a substantial breach or intent to deceive in order to invoke the remedy of rescission. The court further found that the defendants had made no new arguments and declined to amend its judgment.

DISCRIMINATION

***KFC Corp. v. Gazaha*, Bus. Franchise Guide (CCH) ¶ 15,735, 2016 WL 1245010 (E.D. Va. Mar. 24, 2016)**
This case is discussed under the topic heading "Termination and Nonrenewal."

ETHICS

Sanford v. Maid–Rite Corp.*, Bus. Franchise Guide (CCH) ¶ 15,742, 816 F.3d 546 (8th Cir. 2016)
A franchisor's counsel moved to withdraw from a case after the franchisor failed to pay its legal fees and provide certain information related to its defense. After first determining that the district court's order was the appropriate subject for an interlocutory appeal, the Eighth Circuit held that the U.S. District Court for the District of Minnesota abused its discretion in denying the firm's motion to withdraw.

The appeals courts found that the firm met the Minnesota Rules of Professional Conduct requirements to withdraw because the defendants refused to pay and failed to provide information important to the defense, which constituted a substantial failure to fulfill an obligation to the lawyer. The firm also provided the defendants with notice of at least four weeks prior to filing its motion to withdraw, over six months prior to the close of discovery, and one year from the earliest possible trial date. Additionally, there were no immediate deadlines in the case and the defendants therefore had sufficient time to secure new counsel. Finally, there was no prejudice to the parties and the plaintiffs did not oppose the firm's motion to withdraw.

EXPERTS

***Spencer Franchise Servs. of Georgia, Inc. v. WOW Café and Wingery Franchising Account, LLC*, Bus. Franchise Guide (CCH) ¶ 15,758, 2016 WL 1545627 (E.D. La. Apr. 15, 2016)**
Denying Spencer Franchise Services of Georgia, Inc.'s motion in limine to exclude expert testimony, the U.S. District Court for the Eastern District of Louisiana clarified evidentiary requirements relating to expert qualifica-

* Mr. Ginsburg and his firm represented the plaintiff in this matter.

tions and the content of expert reports in the franchise context. At issue was a contractual provision that allegedly mischaracterized an obligation of the franchisee as one of the franchisor. The court concluded that, as a matter of law, the contractual provision contained a typo and entered summary judgment in favor of the franchisor, Wow Café and Wingery Franchising Account, LLC. The Fifth Circuit reversed the lower court's decision and remanded the case to the district court for a fact finder to determine whether the parties had made an error. On remand, Spencer filed a motion to exclude expert testimony during trial preparations.

Spencer argued that Wow's expert, who had an accounting background, lacked the appropriate qualifications to testify about the franchise industry or Spencer's franchising expert's report. In particular, Spencer argued the expert lacked academic or professional credentials in franchising, publications in franchising journals, and knowledge or expertise in operations and economics of the industry. In opposition, Wow argued that its witness was qualified as an expert in business valuation and that an expert's lack of specialization in franchise issues should affect only the weight of his testimony, rather than its admissibility. The court agreed with Wow, holding that the Federal Rule of Evidence 702 does not mandate that an expert be "highly" qualified and that a lack of specialization should go to weight of the evidence, rather than admissibility. The court also noted that the district courts in the Fifth Circuit had previously concluded that specialization in the underlying field is unnecessary for business valuation experts. On this basis, the court held the expert was properly qualified, notwithstanding a lack of specialized expertise in franchising.

The court further rejected arguments that Wow's expert's testimony was unreliable because his report lacked sufficient facts or data to support its conclusions, failed to use reliable principles and methods, and was irrelevant because it would not assist the trier of fact. Noting that Wow's expert had reviewed the underlying contracts, Spencer's expert report, and other relevant reports constituting "sufficient facts or data" and that business valuation is not a "commonsense subject" for a jury, the court held that the expert's testimony would help the trier of fact in evaluating the opinions of Spencer's expert. Further, the court rejected arguments that Wow's expert report did not contain a "complete statement of all opinions the witness will express and the basis and reasons for them," holding that a statement of opinions is not rendered incomplete in the case of expert witnesses not expressing their own opinions.

FRAUD

Country Visions, Inc. v. Midsouth LLC, Bus. Franchise Guide (CCH) ¶ 15,747, 2016 WL 1614585 (E.D. Cal. Apr. 21, 2016)

This case arose out of a franchisor's alleged inability to provide a functioning website to its franchisees for purposes of selling products. Plaintiff and

counter–defendant Country Visions, Inc. (CVI) is the franchisor of Apricot Lane franchises. Two of its franchisees, North Beach, Inc. and CC Young & Associates, LLC, created e-commerce websites for their respective businesses. CVI approached North Beach and Young about operating a website that would sell products for all Apricot Lane franchisees. During the course of the parties' discussions, CVI provided North Beach and Young with a pro forma setting forth the projected revenues and profits that could be generated from operating the CVI website. North Beach and Young subsequently formed defendant and counter–claimant Midsouth LLC, which entered into an agreement with CVI to operate the CVI website. The parties' relationship soured and litigation in the U.S. District Court for the Eastern District of California ensued. Midsouth asserted counterclaims against CVI and its CEO, Kenneth Peterson, for fraud, negligent misrepresentation, unjust enrichment, and unfair business practices pursuant to California Business & Professions Code § 17200. CVI and Peterson (counter–defendants) filed a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss Midsouth's claims. The Eastern District of California granted in part and denied part the motion.

As a threshold matter, the court first addressed the scope and enforceability of the choice of law provision in the parties' agreement, which provided that the agreement "will be governed and construed in all respects by the laws of the State of California. . . ." CVI argued that the choice of law provision was "narrow" and did not encompass Midsouth's tort claims. Relying on a California Supreme Court case involving a similar choice of law clause, the court found that Midsouth's tort claims were embraced by the choice of law provision. The court next considered whether the provision was enforceable, i.e., "whether the chosen state has a substantial relationship to the parties or their transaction, or . . . whether there is any other reasonable basis for the parties' choice of law." Because CVI was incorporated in and has its principal place of business in California, the court found there was a substantial relationship between the parties and the state and that California law would be applied. The court then turned to the substance of counter–defendants' Rule 12(b)(6) motion.

With respect to Midsouth's fraud and negligent misrepresentation claims, counter–defendants argued that the pro forma was a non–actionable statement of opinion under California law. The parties agreed that speculative statements about potential profits are non–actionable opinions and that there is a potential exception to this rule if the declarant holds himself out as being "specially qualified." CVI argued that Midsouth had not attempted to establish the applicability of this exception, given its allegations that CVI had been unable to operate a website. The court disagreed, finding that Midsouth's allegation that CVI had specialized knowledge regarding its franchisees, including their sales revenues, satisfied the exception. Accordingly, the court denied the motion as to the fraud claims.

The court next addressed Midsouth's unjust enrichment claim, which counter–defendants argued should be dismissed because there is no such claim under California law. Although the court agreed that there is no stand-alone claim for unjust enrichment, it noted that a court may construe such a claim as a "quasi–contract claim seeking restitution." The court found that the allegations in Midsouth's complaint fit within the quasi–contract theory seeking restitution and, therefore, denied counter–defendants' motion.

Finally, the court addressed Midsouth's unfair business practices claim seeking injunctive relief. Counter–defendants argued that Midsouth was not entitled to injunctive relief because it had not alleged "threatened future harm or [a] continuing violation." The court agreed, finding that Midsouth's allegation that "it will continue to be damaged" was conclusory and not supported by any allegation of ongoing injury. Therefore, the court granted counter–defendants' motion as to the unfair business practices claim.

***Kerrigan v. ViSalus, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,743, 2016 WL 892804 (E.D. Mich. Mar. 9, 2016)**

In a multi–million dollar class action, the U.S. District Court for the Eastern District of Michigan granted and denied in part motions to dismiss the plaintiffs' eleven asserted claims. The plaintiffs, a group of affected creditors, alleged that weight loss shake retailer ViSalus, Inc., along with several other associated individuals and entities, violated or conspired to violate the Racketeer Influenced and Corrupt Organizations Act (RICO), federal securities laws, the Michigan Consumer Protection Act, the Michigan Franchise Investment Law (MFIL), and Michigan common law.

The plaintiffs claimed that they were induced at ViSalus-hosted events into paying to enroll in the ViSalus program, which allegedly misled consumers to enroll in its weight loss system to earn commissions by recruiting other consumers. The plaintiffs alleged that the system, which was pitched as a viable and attractive "business opportunity," amounted to a fraudulent pyramid scheme and that they lost all of the money paid to ViSalus.

The court allowed actions to proceed against the company and its cofounders for mail or wire fraud under RICO Section 1962(c) as well as conspiracy under § 1962(d) against several distributors of ViSalus' materials. In addition, it held the plaintiffs had sufficiently pleaded ViSalus' role in creating, structuring, funding, and controlling the scheme to proceed with claims under Rule 10b–5b of the Securities Exchange Act of 1934.

The plaintiffs claimed the defendants violated Section 5 of the MFIL, having employed a "device, scheme, or artifice to defraud" in connection with the filing, offer, sale, or purchase of any franchise by engaging in a scheme to sign them up for the ViSalus program. The court found, however, that Section 5 was limited to persons who offer or sell a franchise and did not contain its own private right of action authorizing a private plaintiff to sue for its violation; only Section 31, which authorizes a private civil action

against a person who sell or offers a franchise in violation of Section 5, authorized such an action. Because ViSalus was the only defendant that offered or sold an alleged franchise to the plaintiffs, the Section 5 claim failed as to all the other defendants.

***Lancia Jeep Hellas S.A. v. Chrysler Grp. Int'l LLC*, Bus. Franchise Guide (CCH) ¶ 15,733, 2016 WL 1178303 (Mich. Ct. App. Mar. 24, 2016)**
This case is discussed under the topic heading "Contract Issues."

***Mercedes–Benz USA, LLC v. Carduco, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,728, 2016 WL 1274535 (Tex. App. Mar. 31, 2016)**
The Texas Court of Appeals upheld a finding of fraud in the inducement and negligent misrepresentation based on Mercedes–Benz USA's failure to disclose that it intended to allow the addition of a new dealership in the McAllen area prior to its approval of a prospective dealer's takeover of an existing dealership and relocation to the same area. Although the judgment was upheld, a punitive damages award was reduced from $115 million to $600,000.

Carduco, Inc. bought the assets of an existing Mercedes dealer with the intent to move the dealership to McAllen. There was evidence the previous dealer had received permission from Mercedes to relocate to McAllen, and Mercedes was aware of Carduco's intent to do the same. The court found that Mercedes intentionally did not inform Carduco about Mercedes' approval of a new dealership in the same area, that Mercedes knew the region could only support one dealership, and that Mercedes intentionally reassigned affluent areas to the new McAllen dealership. The court found that this was done in malice with an intent to negatively affect Carduco's business. Two months following execution of the dealer agreement, Mercedes appointed a new dealership to McAllen and rejected Carduco's relocation request.

The court rejected Mercedes' arguments that Carduco had agreed in the dealer agreement that it was not relying on any oral representations outside the contract. The court noted that the jury had found Carduco was fraudulently induced into entering into both the asset purchase agreement and dealer agreement. Because only the dealer agreement contained an alleged disclaimer of reliance, Mercedes had not shown that Carduco "clearly and unequivocally" disclaimed reliance on the oral representations. The court also rejected Mercedes' argument that there was no duty to disclose because there was evidence that Mercedes led Carduco into believing it was authorized to relocate to McAllen. The court found the evidence at trial was sufficient to support findings of malice and fraud and upheld the trial court's judgment. However, the damages award was found to be unconstitutionally excessive and disproportionate to the severity of the offence and was therefore reduced.

***Yumilicious Franchise, L.L.C. v. Barrie*, Bus. Franchise Guide (CCH) ¶ 15,725, 819 F.3d 170 (5th Cir. 2016)**

The Fifth Circuit upheld a lower court decision summarily dismissing a franchisee's counterclaims. Yumilicious Franchise, L.L.C. sued Why Not LLC and others for breach of the parties' franchise agreement after Why Not closed one of its stores in South Carolina without notice and stopped paying royalties. Why Not counterclaimed for breach of contract, fraud, negligent misrepresentation, and violations of the Texas Deceptive Trade Practices Act and FTC Franchise Rule on the grounds that Yumilicious' failure to disclose start-up costs constituted deceptive trade practices. The counterclaims were summarily dismissed on the grounds that the franchisee had failed to set forth a cause of action.

During negotiations, Yumilicious had made oral representations to Why Not that it was in negotiations to create a national supply chain that would make it economical to supply stores in South Carolina. These negotiations ultimately failed. The court held that this did not make Yumilicious' initial representations false. Accordingly, the representations could not form the basis for a negligent misrepresentation claim. The court noted that Why Not had not alleged Yumilicious knew any details about the start-up costs, financial performance, or other items discussed in the FDD that it allegedly failed to disclose and that there could be no liability for a failure to disclose unknown costs. The court similarly rejected allegations that Why Not was fraudulently induced to enter into the franchise agreement by the CEO of Yumilicious, finding Why Not had failed to introduce evidence that Yumilicious made false statements or material omissions. The court accordingly upheld the lower court's summary dismissal. In its decision, the court commented on the frivolity of the counterclaims, observing that the "saccharine swirl of counterclaims suggests that litigants, like fro-yo fans, should seek quality over quantity."

INJUNCTIVE RELIEF

***AAMCO Transmissions, Inc. v. Dunlap*, Bus. Franchise Guide (CCH) ¶ 15,726, 2016 WL 1275004 (3d Cir. Apr. 1, 2016)**

James Dunlap was a longtime franchisee of AAMCO Transmissions, Inc. After the expiration of his franchise agreement, Dunlap continued to operate his repair center using the AAMCO marks. AAMCO filed suit in the U.S. District Court for the Eastern District of Pennsylvania seeking to enjoin Dunlap's continued use of the AAMCO name and signage. In response, Dunlap argued that the franchise agreement had not terminated. After discovery and a hearing, the district court found that the agreement had terminated and issued a preliminary injunction. The lawsuit was stayed pending arbitration, after which the arbitrator found that the franchise agreement had expired. Dunlap did not appeal the arbitrator's ruling.

Thereafter, AAMCO filed a motion in the district court to convert the preliminary injunction into a permanent injunction. After a hearing, the district court granted AAMCO's motion. In doing so, the court considered the traditional four injunctive relief factors. As to the first factor that the moving party succeeded on the merits, the court found that AAMCO had prevailed on its claims and the arbitrator's ruling that the franchise agreement had expired was binding. With respect to the second factor, whether the moving party would suffer irreparable harm absent the requested injunctive relief, the court found that AAMCO's business reputation and goodwill might be harmed in the event Dunlap's customers were unsatisfied with his services. With regard to the third factor, whether the granting of a permanent injunction would result in even greater harm to the defendant, the court found that requiring Dunlap to "de-identify" and not hold himself out to the public as an AAMCO franchisee would not harm him. Finally, the court found that "the injunction would be in the public interest" because the public would benefit from the injunction in that it would prevent customer confusion and deception.

Dunlap appealed to the Third Circuit. In a per curiam opinion, the Third Circuit upheld the district court, finding that it had not abused its discretion; without explanation, the district court "essentially" embraced the lower court's reasoning and findings.

***Ervin Equip. Inc. v. Wabash Nat'l Corp.*, Bus. Franchise Guide (CCH) ¶ 15,774, 2016 WL 2892132 (N.D. Ind. May 17, 2016)**

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

***H&R Block Tax Servs. LLC v. Clayton*, Bus. Franchise Guide (CCH) ¶ 15,736, 2016 WL 1247205 (W.D. Mo. Mar. 24, 2016)**

The U.S. District Court for the Western District of Missouri granted H&R Block's motion to enjoin a former franchisee from operating a competing tax service. Block terminated the franchisee after the franchisee failed to pay royalties and other sums owed. Upon termination, the franchisee was obligated to deliver its client list and records to Block, discontinue using Block's trademarks, return all franchise materials, and execute documents to assign its business phone numbers to Block. The agreement also contained a post-termination covenant not to compete that prohibited the franchisee from operating a competitive business within a 25-mile radius of the formerly franchised territory.

The court held that Block had met its burden of showing a likelihood of success on the merits because the franchisee's failure to pay fees was good cause for termination and the franchisee had breached its post-termination obligations. The court also held that Block would suffer irreparable harm absent a preliminary injunction because the operation of a competing tax service would inhibit its ability to refranchise the territory. The court further held that the balance of harms weighed in Block's favor because it would suf-

fer irreparable harm absent an injunction, while the franchisee's harm could be remedied by an award of damages if it was ultimately determined that the injunction was wrongfully issued. Finally, the court held that the public interest was served by granting an injunction because of the benefits of enforcing reasonable noncompetition covenants and preserving the enforceability of contractual relationships.

***Family Wireless #1, LLC v. Auto. Techs., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,749, 2016 WL 2930887 (D. Conn. May 19, 2016)**

The U.S. District Court for the District of Connecticut refused to grant injunctive relief to a group of Wireless Zone cellular franchisees. Thirty-five of the forty-two plaintiff franchisees moved for an injunction with respect to their claims against the franchisor, Automotive Technologies, Inc. (ATI), for breach of contract, unjust enrichment, and unfair trading practices.

At issue was a change to ATI's business model, including the imposition of a new five percent royalty payable to ATI and withholding of that royalty from payments due from ATI to franchisees. The plaintiffs moved to enjoin ATI from implementing and withholding the royalty. The court determined the franchisees had failed to demonstrate they would suffer irreparable harm if the injunction was not granted. Specifically, the franchisees did not appear to be at risk of substantially losing all of their respective businesses because the payments at issue constituted approximately two percent of their gross revenues.

In rendering its judgment, the court made it clear that parties seeking interlocutory injunctions must meet a very high threshold. The court noted that preliminary injunctions are rarely granted in breach of contract actions unless damages are difficult to measure or there is a risk of loss of goodwill, reputation, or business opportunities. The court found that neither circumstance was present and therefore denied the franchisees' motion.

***Get In Shape Franchise, Inc. v. TFL Fishers, LLC*, Bus. Franchise Guide (CCH) ¶ 15,738, 2016 WL 951107 (D. Mass. Mar. 9, 2016)**

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

***Miller Constr. Equip. Sales, Inc. v. Clark Equip. Co.*, Bus. Franchise Guide (CCH) ¶ 15,750, 2016 WL 2626803 (D. Alaska May 6, 2016)**

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

***Organo Gold Int'l, Inc. v. Ventura*, Bus. Franchise Guide (CCH) ¶ 15,753, 2016 WL 1756636 (W.D. Wash. May 3, 2016)**

In this case, the U.S. District Court for the Western District of Washington considered whether to enforce a covenant not to compete against a former distributor of Organo Gold Int'l, Inc., a multi-level marketing (MLM) company that sells ganoderma-based coffee products. Defendant Luis Ventura had prior experience in the MLM industry and began working with Organo

as an independent distributor in 2009. Several years after he began working with Organo, Ventura and his wife signed an independent distributor application that included a covenant not to "participate in any other opportunity that directly competed with Organo Gold in offering ganoderma-based products" for a twelve-month period after terminating his relationship with Organo. Organo's policies and procedures also prohibited any distributor from "compet[ing] with [Organo] or any of its affiliates by soliciting existing customers of the Company to any ganoderma or healthy beverage business similar to the Company in a multi-level marketing setting or its equivalent, for a period of twelve (12) months" after the termination of the distribution relationship.

Ventura's relationship with Organo terminated in February 2016 and he went to work for Total Life Changes, LLC (TLC), another MLM company, which sells a variety of products, including coffee infused with ganoderma. Ventura discussed TLC with Organo distributors and allegedly attempted to recruit them to join TLC. In response, Organo filed a complaint against the Venturas and their company, L&A Ventura, and sought a temporary restraining order against L&A Ventura based on its breach of contract and tortious interference claims.

The court first addressed Organo's breach of contract claim and whether it was likely to succeed on the merits. L&A Ventura raised a series of procedural arguments: (1) Organo had failed to participate in a pre-dispute mediation as required by the relevant documents, (2) the noncompete clauses were not supported by adequate consideration, and (3) the clauses were unreasonable under Washington law. The court found that the policies clarified that Organo was entitled to seek injunctive relief before initiating an arbitration and therefore it was not required to first participate in a mediation. The court next found that the noncompete clauses were supported by independent consideration because, among other things, they were part of agreements that were renewed on an annual basis and a "fixed term of employment" constitutes independent consideration under Washington law. The court had little difficulty finding that the noncompete clause in the policies was necessary and reasonable because it was limited to protecting use of Organo's "most valuable assets," i.e., its customer base. The court ultimately concluded that the noncompete clauses in the distributor application were also reasonably necessary, finding that Ventura's "insight into [Organo's] employer guidelines may unfairly advantage him in recruiting for a competing MLM firm." The court then considered the scope of the noncompete clauses. The court quickly found that the duration (twelve months) and geographic scope (nationwide) of the clauses were reasonable given the nature of the MLM business. Finally, the court was unpersuaded by Ventura's argument that the noncompete clauses were overly broad in that they prevented him from "directly competing" and encompassed both the ganoderma and "healthy beverage" business, focusing on the differences in scope and application of the clauses.

With respect to the merits of Organo's breach of contract claim, the court found that Ventura had breached the distributor application by soliciting other Organo distributors to join him at TLC and because TLC sells products made with ganoderma. As to Organo's tortious interference claim, the court found that Organo had not shown that it was likely to succeed on this claim because it had not established that the alleged interference was "wrongful" and that L&A Ventura was "motivated by an improper purpose."

The court next turned to L&A Ventura's arguments that Organo had not established the requisite irreparable harm. The court rejected L&A Ventura's argument that Organo had unreasonably delayed in seeking injunctive relief because the "delay" was only six weeks. The court was equally unpersuaded by L&A Ventura's argument that Oregano had suffered only monetary damages, finding that the potential loss of distributors resulting from Ventura's solicitation "may cripple Organo's viability as a going concern" because of the nature of the MLM business model. The court also found that there was evidence suggesting significant distributor attrition following Ventura's communications with Organo distributors. Accordingly, the court found that Organo had demonstrated irreparable harm.

The court found the balance of the equities favored Organo because the potential consequences to Organo absent the injunction were significant, Ventura was still permitted to work in the MLM industry provided it did not involve ganoderma-based products, and the injunction was for only one year. Finally, the court held that the public interest in enforcing "reasonable and necessary non-compete agreements" would be served by issuing the requested injunction.

Finally, the court turned to the issue of whether Organo should post a bond and, if so, the amount. Organo argued that no bond was required, although L&A Ventura argued that a bond in the "realm" of $1 million was warranted. Because the court had some doubts as to the "substantive merits" of Organo's claims and believed the defendants would suffer some harm as a result of the injunction, the court concluded that a $100,000 bond was appropriate.

***Volvo Grp. N. Am., LLC v. Truck Enters., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,757, 2016 WL 1457926 (W.D. Va. Apr. 14, 2016)**

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

JURISDICTION

***Baskin–Robbins Franchising LLC v. Alpenrose Dairy, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,763, 825 F.3d 28 (1st Cir. 2016)**

The First Circuit overturned a district court decision dismissing a franchisor's action against its franchisee for lack of in personam jurisdiction, finding it had specific jurisdiction based on the franchisee's ties to Massachusetts.

Alpenrose Dairy, Inc. entered into a franchise agreement and a series of renewals over several decades with Baskin–Robbins Franchising LLC for franchises in Washington, Oregon, Montana, and Idaho. During the course of the parties' relationship, Baskin–Robbins moved its headquarters from California to Massachusetts. Following a dispute over whether Alpenrose had properly exercised its renewal right leading up to the expiration of the final agreement, Baskin–Robbins filed suit in the U.S. District Court for the District of Massachusetts for a judicial declaration that Alpenrose's rights as a franchisee would terminate upon expiry of the agreement. Alpenrose moved to dismiss the suit for lack of personal jurisdiction, arguing the proper venue was Washington. The district court dismissed the case and Baskin–Robbins appealed to the First Circuit, asserting that there was specific jurisdiction permitting the court to hear the case because it "relates sufficiently to, or arises from, a significant subset of contacts between the defendant and the forum."

In reversing the district court's decision, the First Circuit considered a three-part test for determining if there is in personam jurisdiction: (1) whether the claim "directly arise[s] out of, or relate[s] to, the defendant's forum state activities; (2) whether the defendant's in-state contacts represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the defendant's involuntary presence before the state's courts foreseeable; and (3) whether the exercise of jurisdiction is reasonable."

Regarding the first condition, the court found that a series of letters pertaining to the non-renewal and expiration of the franchise agreement that were sent to Baskin–Robbins' offices in Massachusetts had set the controversy in motion, thus creating a sufficient nexus to the forum.

With respect to the second condition, the court found—on the basis of fourteen years of contacts between Alpenrose and Baskin–Robbins' Massachusetts offices as well as a constant reciprocal flow of payments between the parties—that Alpenrose deliberately targeted the Massachusetts economy and should have reasonably foreseen the involvement of a Massachusetts court in the event a controversy developed.

Finally, the court found the exercise of jurisdiction was reasonable after analyzing five factors: (1) the defendant's burden of appearing in the forum state, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the judicial system's interest in obtaining the most effective resolution of the controversy, and (5) the common interests of all sovereigns in promoting substantive social policies. In particular, the court found that the parties were of substantial means and accustomed to cross–country travel for business and, as such, would struggle to establish the inconvenience required to meet the first factor. As to the second and third factors, the court found the state generally has an interest in providing its residents with a convenient forum for redressing injuries by out-of-state actors. Finding that the third

and fourth factors were neutral, the court held that this condition was satisfied and Massachusetts was an appropriate forum. In regards to the fifth factor, the court concluded that although a Washington statute would determine any compensation owed to Alpenrose in connection with the expiration of the agreement, a federal court sitting in Massachusetts is fully capable of applying Washington law and, therefore, Washington's interest in the matter does not trump that of Massachusetts.

***Express Servs., Inc. v. King*, Bus. Franchise Guide (CCH) ¶ 15,762, 2016 WL 3172911 (W.D. Okla. June 6, 2016)**

In this case, the U.S. District Court for Western District of Oklahoma considered whether it had personal jurisdiction over one of the owners of a franchisee of Express Services, Inc. and a company owned by the other owner of the franchisee. Express is an Oklahoma-based company that provides staffing, recruiting, and human resources services to customers through its network of franchisees. Southern Staffing, Inc. is a Georgia corporation owned by Don and Emily King. In 1998, Express and Southern entered into a franchise agreement under which Southern operated an Express franchise in Georgia. The franchise agreement, which included a forum selection clause, was signed by Mr. King on behalf of Southern. Express and Mr. King subsequently entered into a developer agreement pursuant to which Mr. King agreed to develop franchisee prospects on behalf of Express and consult/advise existing Express franchisees. A few years later, Express and Southern signed an amendment to the franchise agreement, extending the term of the franchise agreement for an additional five years. At the same time, both the Kings signed a guarantee that was part of the amendment. Generally coterminous with the franchise and developer agreements, Express was providing services to Impact Outsourcing Solutions, which was partially owned by Mr. King. Ms. King had no ownership interest and was not an officer or director of Impact. In 2011, Mr. King, on behalf of Southern, solicited Express about a "collaborative business relationship" in Oklahoma that did not come to fruition.

The parties' relationship deteriorated and Express filed suit against Southern, the Kings, and Impact alleging that Mr. King (1) used Express's confidential information obtained during the course of the parties' discussions regarding the potential collaborative business relationship to solicit Express's clients and "steer" its employees to Impact, (2) used Express's intellectual property, and (3) otherwise breached the franchise agreement and developer agreement. Although Southern and Mr. King agreed they were bound by the forum selection clause in the franchise agreement and consented to jurisdiction, Ms. King and Impact argued that the court lacked personal jurisdiction as to them.

With respect to Ms. King, the primary issue was whether she had consented to jurisdiction by signing the guarantee that was part of the amendment. Express argued that the franchise agreement, including the forum

selection clause, was incorporated by reference in the amendment. Applying Oklahoma's three-prong test for determining whether a contract incorporates an extrinsic document by reference, the court held that it did. First, the court found that the amendment made "clear reference" to the extrinsic document, i.e., the franchise agreement. Second, the court found that the "identity and location" of the extrinsic document was "ascertainable beyond a doubt." Third, the court found that Ms. King had knowledge of and consented to the incorporation even though she did not recall signing the guarantee or agreeing to be bound by the forum selection clause in the franchise agreement.

Ms. King also argued that enforcing the forum selection as to her would be "unfair and unreasonable" for a variety of reasons, including that she (1) was not a party to and did not negotiate the franchise agreement, (2) did not negotiate the forum selection clause, and (3) had a policy of refusing to sign agreements between Southern and Express. The court rejected these arguments, noting that Ms. King had a fifty percent ownership interest in Southern, signed the guarantee, was "aware" of the franchise agreement, and had "bargaining power" with respect to transactions between the parties as evidenced by the fact that she did not sign other agreements and documents relevant to the parties' business relationship.

The court then turned to the issue of whether it had personal jurisdiction over Impact. Express argued that the court had specific jurisdiction over Impact and therefore was required to establish Impact had "purposefully directed its activities at residents" of Oklahoma and that its "injury arose from those purposefully directed activities." With respect to the purposeful direction factor, the court found Express was essentially arguing that Impact committed an intentional act that was "expressly aimed" at Oklahoma simply because Express has its principal place of business in Oklahoma. Following the U.S. Supreme Court's holding in *Walden v. Fiore*, 134 S. Ct. 1115 (2014), the court rejected this argument, noting that the defendant's contacts with the forum state, not the plaintiff's, are relevant for purposes of establishing personal jurisdiction. The court further found that even if Express could establish the purposeful direction prong, it had not made a prima facie showing that its injuries were the direct result of the activities that allegedly formed the basis for jurisdiction. Finally, the court rejected Express's request to conduct jurisdictional discovery, finding that it had not identified any specific issue that would be "clarified" by discovery or explained what additional facts were necessary to the court's determination regarding jurisdiction.

***Get In Shape Franchise, Inc. v. TFL Fishers, LLC*, Bus. Franchise Guide (CCH) ¶ 15,738, 2016 WL 951107 (D. Mass. Mar. 9, 2016)**

TFL Fishers, LLC and its owner, Rosalyn Harris, entered into a franchise agreement with Get in Shape Franchise, Inc. (GISFW) to operate a GISFW fitness studio for women in Fishers, Indiana. In June 2015, Harris formed Fit Chicks, LLC (Fit Chicks) and sold the assets of her GISFW stu-

dio to Fit Chicks for $1. Thereafter, the former GISFW studio was operated under the name "Fit Chicks." Harris claimed that her sister, who lived in Georgia where she worked full-time as an accountant, owned Fit Chicks. Harris's sister had no background in the fitness industry and did not spend any time in the Fit Chicks studio, although she allegedly spent ten hours per week working remotely on Fit Chicks matters. Harris served as the volunteer manager of the Fit Chicks studio and ran its day-to-day operations.

GISFW filed suit in the U.S. District Court for the District of Massachusetts against TFL Fishers, Harris, and Fit Chicks, asserting various claims, including breach of contract and trademark infringement. GISFW also filed a motion to enjoin the defendants from operating a competing business at the site of the former franchised GISFW studio. Harris, the only defendant who appeared, argued that the court should dismiss the case for lack of subject matter jurisdiction, lack of personal jurisdiction, and improper venue. In the alternative, Harris argued that the motion for injunctive relief should be denied because GISFW had not established it was likely to succeed on the merits or would suffer irreparable in the absence of the requested injunction.

The court first addressed Harris's argument that GISFW did not have subject matter jurisdiction. Based on GISFW's trademark infringement claim under the Lanham Act, the court found that it had federal question jurisdiction. The court also found that it had diversity jurisdiction after determining the amount in controversy exceeded $75,000.

The court next addressed Harris's personal jurisdiction arguments. Harris claimed that the court lacked personal jurisdiction over her and TFL Fishers because she does not live in Massachusetts, the franchised business was located in Indiana, she spent only five days in Massachusetts for training, it would be financially burdensome for her to appear in Massachusetts, and the Indiana Deceptive Franchise Practices Act (IDFPA) governed some aspects of the case. Relying on the Supreme Court's decision in the factually analogous *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), the court rejected Harris's first three arguments. With respect to the argument that the IDFPA was applicable to the case (presumably TFL Fisher and Harris's prospective claims), the court found that did not render jurisdiction in Massachusetts unconstitutional. Finally, the court found that Harris's claimed financial burden argument was properly addressed in the context of her venue arguments. Accordingly, the court held that it had personal jurisdiction over Harris and TFL Fishers. The court found, however, that GISFW was unable to meet its burden of establishing that the court had personal jurisdiction over Fit Chicks because there was no evidence that Fit Chicks or its owner, Harris's sister, had any dealings with GISFW or the state of Massachusetts.

The court then considered Harris's argument that venue was improper in Massachusetts. The court held that venue was proper in Massachusetts with

respect to GISFW's breach of contract claim, which the court found to be the "center of the dispute," and the motion for injunctive relief, but not for the trademark infringement claims because any customer confusion occurred in Indiana where the Fit Chicks studio is located.

The court then turned to GISFW's motion for a preliminary injunction. Based on its rulings that the court had personal jurisdiction over Harris and TFL Fishers and that venue was only proper with respect to the contract claims, the court only considered entering an injunction to enforce the covenant not to compete in the franchise agreement.

As a threshold matter, the court first analyzed whether the covenant was necessary to protect a "legitimate business interest," reasonably limited in scope and duration, and "consonant with the public interest." The court found the covenant was intended to protect GISFW's trade secrets, confidential information, and customer goodwill and, therefore, protected legitimate business interests. The court also found the covenant was "reasonable in both temporal and geographic scope" under Massachusetts law because it was limited to two years and only prohibited Harris from engaging in or being employed by "any fitness center, health club, personal training studio, or any other business concepts that directly compete" with GISFW within an eight-mile radius of the former franchised business or any other GISFW studio location. Finally, the court found that enforcing enforceable agreements was consonant with the public interest.

The court had little difficulty in finding that GISFW was likely to succeed on its breach of contract claims because it was undisputed that Harris had failed to comply with the franchise agreement's post-termination provisions in a variety of respects and violated the covenant not to compete by, at a minimum, assisting in starting Fit Chicks and working at the Fit Chicks studio as the volunteer manager. Although Harris argued that GISFW was unlikely to succeed on its contract claims because it had materially breached the franchise agreement, thereby excusing Harris's non-performance of the post-termination provisions and covenant not to compete, the court found that Harris had not submitted sufficient evidence to support this argument.

The court then addressed the remaining injunction factors. With respect to the irreparable harm factor, the court found that GISFW had established it would suffer irreparable harm absent the requested injunctive relief because a competing studio at the location of the former GISFW studio would harm its goodwill and make it difficult for GISFW to establish another studio in Fishers. The court found that the balance of equities weighed in GISFW's favor: it was effectively precluded from establishing a new GISFW in Fishers because of Harris's involvement with Fit Chicks and failure to turn over customer and other business information and because Harris received no compensation as the volunteer manager of the Fit Chicks, although she occasionally received small amounts for providing personal training services. Finally, the court found that the public interest was served by enforcing a valid covenant not to compete. Therefore, the court enjoined

Harris from volunteering for, consulting for, working at, or assisting Fit Chicks for a two-year period.

The court then considered whether the case should be transferred to Indiana pursuant 28 U.S.C. § 1404(a), even though Harris had not technically moved to transfer under § 1404(a). GISFW argued that the case should not be transferred because the franchise agreement contained a valid forum selection clause, there is a presumption in favor of the forum chosen by a plaintiff, and Harris had not submitted evidence that overcomes this presumption. Following the U.S. Supreme Court's decision in *Atlantic Marine Construction Co. v. U.S. District Court of the Western District of Texas*, 134 S. Ct. 568 (2013), the court held that the private interest factors weighed "entirely in favor" of the Massachusetts forum because the franchise agreement included a forum selection clause. However, the court found that the public interest factors weighed strongly in favor of transferring the case to Indiana because a substantial portion of the relevant events occurred at the at the studio in Fishers, venue as to the trademark claims was proper in Indiana because any customer confusion would have occurred there, Indiana had a strong interest in deciding the case because the Act applied, and the court lacked jurisdiction over Fit Chicks. Accordingly, the court transferred the entire matter to the Southern District of Indiana.

LABOR AND EMPLOYMENT

Washington Dep't of Labor & Indus. v. Lyons Enters., Inc., Bus. Franchise Guide (CCH) ¶ 15,775, 2016 WL 2910245 (Wash. May 19, 2016)

Franchisees of a janitorial service regional franchisor that did not have employee subordinates were "workers" subject to the requirements of Washington's workers' compensation statute and Industrial Insurance Act (IIA), making the regional franchisor liable to pay workers' compensation premiums on behalf of the franchisees. The Washington Supreme court held that franchisees that did not hire employee subordinates met the IIA's definition of "worker" because the essence of the franchise agreement is the franchisees' personal labor, making them workers as defined in the IIA. However, where franchisees hire workers, the franchisees' personal labor is no longer the essence of the agreement.

Reed v. Friendly's Ice Cream LLC, Bus. Franchise Guide (CCH) ¶ 15,777, No. 15-CV-0298, 2016 WL 2736049, (M.D. Pa. May 11, 2016)

Former workers in Friendly's Ice Cream restaurants sufficiently alleged that the franchisor and its franchisees were joint employers for purposes of maintaining claims under the Fair Labor Standards Act (FLSA). Two of the named plaintiffs in the class action were employed as servers at a restaurant owned by the franchisor and another named plaintiff was employed at a fran-

chisee's restaurant. The plaintiffs alleged that both the franchisor and franchisees violated the FLSA by requiring servers to perform work off the clock during unpaid meal breaks and after clocking out at the end of shifts; by not paying servers who worked more than forty hours per week at overtime rates; and not paying servers the non-tipped minimum wage for the twenty percent of their time spent on tasks, such as cleaning and restocking that were not part of their tip serving duties. The plaintiffs alleged that the franchisor oversaw day-to-day operations of all Friendly's restaurants, created and enforced all policies related to employees' wages and work tasks, and operated as a joint employer and integrated enterprise with its franchisees due to its high level of oversight and involvement with each restaurant.

In considering motions to dismiss, the U.S. District Court for the Middle District of Pennsylvania applied a multi-factor test to determine whether the franchisor and franchisees were joint employers, including: (1) the authority to hire and fire relevant employees; (2) the authority to promulgate work rules and assignments and set conditions of employment such as compensation, benefits, and hours; (3) involvement in day-to-day employee supervision, including discipline; and (4) control of employee records, including payroll, insurance, and taxes. The plaintiffs alleged that the franchisor was engaged in the day-to-day operations of all Friendly's restaurants, including those owned by franchisees; that it set policies for all restaurants, including policies related to hiring, training, work hours, overtime, time keeping, and compensation; that Friendly's provided ongoing operational support to franchisees through a franchise business consultant; that it had the authority to hire and fire employees and inspect and supervise their work through quality assurance visits; and that the franchisor used the same payroll system at all restaurants. The court agreed with the plaintiff's arguments and the motions to dismiss were denied.

***Wright v. Mt. View Lawn Care, LLC*, Bus. Franchise Guide (CCH) ¶ 15,741, 2016 WL 1060341 (W.D. Va. Mar. 11, 2016)**

Plaintiff Lisa Wright filed suit in the U.S. District Court for the Western District of Virginia asserting Title VII Claims against her former employer, Mountain View Lawn Care, LLC and its franchisor, U.S. Lawns, Inc. Wright claimed that U.S. Lawns was her joint employer or, in the alternative, that U.S. Lawns and Mountain View were a single, integrated employer. U.S. Lawns filed a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss Wright's claims. The court permitted Wright to conduct limited discovery and the parties filed supplemental briefs. Because the parties submitted evidence outside of the pleadings, the court converted the motion to dismiss to a motion for summary judgment. The court granted the motion and dismissed Wright's claims.

In reaching its decision, the court considered the Fourth Circuit's recently articulated factors for determining whether there is a joint employer relationship. Although none of the factors is dispositive and the element of

control remains the "principal guidepost," the Fourth Circuit identified the three factors that it believes are most important. The court considered these factors first.

With respect to the first factor, the authority to hire and fire the putative employee, the court found there was no evidence suggesting that U.S. Lawns had such authority and the evidence established that Mountain View's partners made the decision to hire and terminate Wright. As to the second factor, responsibility for day-to-day supervision and employee discipline, the court found there was no evidence that U.S. Lawns "played any role whatsoever" in supervising or disciplining Wright and relevant personnel records were signed by one of Mountain View's partners and state that Mountain View was the employer. The third factor, whether the alleged employer furnished equipment used at the place of work, also did not support a finding of joint employment because U.S. Lawns did not provide the equipment that Wright used (e.g., lawn mowers and other tools necessary for landscape maintenance) or the place of her employment. Although Wright wore a U.S. Lawns uniform and the trucks/trailers she used included U.S. Lawns signage, the court found that this was because she worked for Mountain View, which does business as U.S. Lawns of Roanoke, and its franchise agreement with U.S. Lawns requires "such branding." The court also noted that Wright worked with Mountain View employees and customers. Accordingly, the court found that the most important factors did not militate in favor of finding that Wright was jointly employed by Mountain View and U.S. Lawns.

The court then analyzed the remaining factors, holding that they too did not support finding a joint employer relationship: (1) U.S. Lawns did not maintain possession of and was not responsible for Wright's personnel records (fourth factor); (2) The fifth factor—"the length of time during which the individual has worked for the putative employer"—was not applicable because the "fundamental question" was whether she was ever employed by U.S. Lawns; (3) U.S. Lawns did not provide any training to either Mountain View or Wright (sixth factor); (4) Wright's duties were not "akin" to a regular U.S. Lawns employee's duties (seventh factor); and (5) Wright was not assigned to any extent, let alone "solely," to U.S. Lawns (eighth factor). The court found that the only factor that potentially supported Wright's claim—whether the individual employee or alleged employer intended to enter an employment relationship (ninth factor)—was of "minimal value" because the parties' subjective intentions are typically of "minimal consequence."

The court next addressed Wright's overarching argument that U.S. Lawns exercised significant control over Mountain View. The court found this argument to be irrelevant because the central issue is the extent to which the purported employer controls the employee, not the joint employer. Because the court found that the evidence "does not suggest that U.S. Lawns exerted any control over Wright's employment," it held that

U.S. Lawns was not a joint employer and therefore could not be liable under Title VII pursuant to the joint employer doctrine.

The court then turned to Wright's alternative argument that U.S. Lawns was liable under the single, integrated theory of employer liability. As an initial matter, the court noted that this theory is typically applied in the parent/subsidiary and franchisor/franchisee context, but that the existence of such a relationship does not, in and of itself, establish liability. Rather, the court must consider a "non-exhaustive," four-prong test. Like the test for determining whether there is a joint employer relationship, the key factor is control.

As to the first and second factors, common management and interrelation between operations, the court found there was no evidence of common management of day-to-day operations or that U.S. Lawns had any involvement in employment decisions. The court similarly found there was no evidence supporting the third and fourth factors, centralized control of labor relations and common ownership/financial control. As a result, the court rejected Wright's single, integrated theory of employer liability.

Finally, the court addressed Wright's argument that Mountain View was U.S. Lawns' apparent agent, as a result of which Wright believed U.S. Lawns controlled Mountain View's operation. As support for this argument, Wright relied on a Fourth Circuit case involving Holiday Inns in which the question of whether Holiday Inns was liable for injuries sustained by guests at one of its franchised locations was permitted to go to a jury. The court found this case to be inapposite and questioned whether an apparent agency relationship could form the basis for a Title VII claim against the purported principal. However, assuming that such a theory was viable, the court found that Wright could not establish the existence of an apparent agency because there was no evidence suggesting that she relied on the U.S. Lawns marks in deciding to work for Mountain View. Further, there was evidence that should have caused Wright to know that she was working for an independently owned franchise (Mountain View) and not its franchisor.

NONCOMPETE AGREEMENTS

***Domino's Pizza Franchising, LLC v. VTM Pizza, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,771, 2016 WL 2907966 (E.D. Mich. May 19, 2016)**

The U.S. District Court for the Eastern District of Michigan enjoined a former Domino's pizza franchisee from operating a new pizza business at the site of the former Domino's restaurant. The post-termination provision in the franchise agreement prohibited the defendants from operating any pizza business within ten miles of their Domino's store for a period of one year. Despite this provision, the defendants began operating a new pizza business at the same location, using the same phone number as the former Domino's restaurant.

The court granted Domino's request for injunctive relief after determining Domino's would suffer irreparable harm absent an injunction, that it was likely to succeed on the merits of its breach of contract claims, that the injunction would not result in any great harm to the defendants in light of their failure to respond to the complaint, and that it was in the public interest to enjoin the defendants' continued operation of a pizza restaurant.

Domino's subsequently filed a motion for contempt because the former franchisee continued to operate a pizza restaurant at the former Domino's location using the same phone number as the prior Domino's pizza business, both of which violated the injunction. The court determined that a sanction of $100 per day against each defendant was necessary to compel compliance with the injunction and that, after twenty-one days, a $300 per day sanction would be sufficient to compel compliance.

STATUTE OF LIMITATIONS

Trafon Group, Inc. v. Butterball, LLC, Bus. Franchise Guide (CCH) ¶ 15,754, 2016 WL 1732742 (1st Cir. May 2, 2016)

A poultry wholesaler sued a poultry manufacturer under Puerto Rico's Dealers' Contracts Law (Law 75). The wholesaler alleged that the manufacturer violated Law 75, which provides that the principal or granter may not directly or indirectly act detrimentally to the established relationship. The wholesaler alleged that it had an exclusive contract with the manufacturer in Puerto Rico and that the manufacturer violated Law 75 by selling directly and through other wholesalers. The wholesaler originally contacted the manufacturer in 2009 about reported violations of the exclusive distribution agreement. The manufacturer responded that there was no exclusive distribution agreement, but agreed to continue doing business with the wholesaler on a nonexclusive basis. The manufacturer continued to sell its product through other wholesalers in Puerto Rico and subsequently began making direct sales to various retailers in Puerto Rico. As a result, the wholesaler filed a claim for violations of Law 75.

The U.S. District Court for the District of Puerto Rico denied the wholesaler's motion for injunctive relief and dismissed the case, finding that the three-year statute of limitations under Law 75 started when the wholesaler received notice in 2009 that the manufacturer did not consider the relationship to be exclusive. The court found that because the manufacturer's letter sent in 2009 to the wholesaler advised that the manufacturer did not intend to treat its relationship with the wholesaler as exclusive, it put the wholesaler on notice that the manufacturer could begin working with other distributors at any time and the three-year statute of limitations period began to run. Accordingly, because the wholesaler did not file its lawsuit until four years after receiving the letter, the claims were barred.

On appeal the First Circuit agreed that the manufacturer's 2009 letter was a "detrimental act" under Law 75, triggering the statute of limitation. In upholding the district court's ruling, the First Circuit also rejected the wholesaler's argument that the manufacturer's statute of limitations arguments should be barred on equitable estoppel grounds and that the parties had a de facto exclusive relationship after the 2009 letter. The appellate court noted that the wholesaler had not raised these issues before the lower court.

STATUTORY CLAIMS

***7–Eleven, Inc.* v. *Sodhi*, Bus. Franchise Guide (CCH) ¶ 15,765, No. cv-13-3715(MAS) (JS), 2016 WL 3085897 (D.N.J. May 31, 2016)**

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

***Andy Mohr West v. Indiana Sec'y of State*, Bus. Franchise Guide (CCH) ¶ 15,764, 2016 WL 3090189 (Ind. June 2, 2016)**

Three Indiana automobile dealers lacked standing under the Indiana Motor Vehicles Dealer Law to seek declaratory relief for a manufacturer's alleged encroachment in their territory, according to a recent decision by the Indiana Supreme Court. Three dealers filed a declaratory judgment action with the State Auto Dealer Services Division, seeking a determination whether good cause existed for the manufacturer's proposed relocation of a dealer to a site near the three dealers. The Division held that the dealers lacked standing because they were outside of the relevant statutory market area, which was a six-mile radius around the proposed location. On appeal, the Indiana Supreme Court held that because the statute reflects a legislative determination that relocating more than six miles from another dealership in a densely populated area does not trigger the protections offered to dealers by the law, the dealers lacked standing to challenge the manufacturer's proposed relocation of the competing dealership.

***Beck Chevrolet Co., Inc. v. Gen. Motors LLC*, Bus. Franchise Guide (CCH) ¶ 15,752, 53 N.E.3d 706 (N.Y. May 3, 2016)**

The New York Court of Appeals found a performance standard that failed to take into account local brand popularity violated Section 463(gg) of the New York Franchised Motor Vehicle Dealer Act, but that a unilateral change to the dealer's territory was not a violation of Section 463(ff).

Beck Chevrolet Co., a long-time Chevrolet dealer for General Motors, operated under a dealer agreement requiring it to achieve a specified level of sales performance within its designated territory. The methodology for measuring sales performance relied on statewide data and some local variances, but failed to account for local brand popularity. After falling short of the performance standards, GM advised Beck that any extension of the

agreement was contingent on meeting the designated benchmarks. GM then sent a separate letter informing Beck that it was unilaterally modifying Beck's territory. Beck filed suit, alleging violations of the Dealer Act.

Beck first argued that the performance standard was contrary to Section 463(gg), which makes it unlawful for any franchisor to use "an unreasonable, arbitrary or unfair sales or other performance standard in determining a franchised motor vehicle dealer's compliance with a franchise agreement." The court agreed, finding that it is unlawful to measure sales performance by a standard that fails to consider the desirability of the brand itself when measuring the dealer's sales performance. The court reached this conclusion even though GM's methodology in calculating sales performance was consistent with industry practice. Despite recognizing that industry norms are important because they are "borne of experience," the court noted that it is important to be particularly cautious in an industry such as franchising because of the inherent inequality in bargaining positions. Accordingly, the court held GM could not rely on an unreasonable or unfair standard merely because it was industry practice, particularly within an industry regulated by the legislature.

Beck next argued that GM's unilateral modification of its territory was an unfair modification within the meaning of Section 463(ff), which prohibits changes in a motor dealership franchise without proper notice setting forth the specific grounds for the modification. Beck argued the new area increased its sales territory, thereby increasing its targets and facility requirements and violating Section 463(ff). The court disagreed, finding that the Dealer Act did not prohibit such a change. Although noting that the provision was not limited to changes in the franchise agreement because other documents may be constituent parts of the parties' written arrangement, the court found the provision was concerned only with modifications that "may substantially and adversely affect the new motor vehicle dealer's rights, obligations, investment or return on investment." Because a change in territory could be beneficial, the court found the change increasing Beck's sales territory was not a prohibited one. The court held that the applicability of Section 463(ff) needs to be assessed on a case-by-case basis, keeping in mind the impact of the revision on the dealer's position.

***Braatz, L.L.C. v. Red Mango FC, LLC*, Bus. Franchise Guide (CCH) ¶ 15,731, 2016 WL 1253679 (5th Cir. Mar. 30, 2016)**

The Fifth Circuit affirmed a decision of the U.S. District Court for the Northern District of Texas granting Red Mango FC, LLC's motion to dismiss a claim by one of its franchisees, Braatz, L.L.C., that Red Mango violated Wisconsin franchise law by failing to comply with Wis. Stat. § 553.51(1). Section 51(1) requires that an "offering circular" be given to potential franchisees at least fourteen days before the franchise agreement is signed or the franchisor accepts payment.

Braatz had been provided with a franchise disclosure document (FDD) containing a "franchisee questionnaire" that it was asked to fill out and return to Red Mango. A month later, when Braatz requested that Red Mango provide any documents necessary to sign to purchase a franchise, it was sent documents identical to the earlier FDD. Red Mango instructed Braatz to wait at least seven days before returning the signed franchise documents, including the questionnaire, which it did a week later. Shortly afterward, Red Mango sent Braatz a fresh copy of the questionnaire and requested it to change two answers, which Braatz did.

Following closure of its store two years later due to financial difficulties, Braatz brought a claim against Red Mango alleging it violated the fourteen-day rule by orally instructing Braatz to change its answers to the questionnaire without allowing fourteen days before accepting a response. It argued that when a revision was made to the franchise questionnaire, the prospective franchisee must receive an additional fourteen days to review the documents under the rule. Red Mango moved to dismiss for lack of standing under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim under Rule 12(b)(6). The district court denied Red Mango's motion to dismiss for standing, but granted dismissal for failure to state a claim.

In upholding the district court's judgment that Braatz had standing, the Fifth Circuit agreed that Braatz had established the necessary injury in fact, causation, and redressability. The court found that a violation of the fourteen-day rule created a "concrete" and "particularized" legal right, the injury was directly traceable to Red Mango's alleged conduct in violating the rule, and redressability existed because the fourteen-day rule makes rescission possible.

However, the court also upheld the district court's dismissal for failure to state a claim, holding that although the fourteen-day rule did not specifically define the term "offering circular," other provisions in Chapter 553 made it clear that the phrase referred to disclosure documents required to be filed with the state. Contrary to Braatz's submissions, the court concluded the language of the rule did not entitle a franchisee to fourteen days to consider, for example, "any new information" about the franchise agreement. It accordingly held that the revised questionnaire was not subject to the fourteen-day rule and upheld the district court's decision to grant Red Mango's motion to dismiss.

***Darling's Auto Mall v. Gen. Motors LLC*, Bus. Franchise Guide (CCH) ¶ 15,729, 135 A.3d 819 (Me. 2016)**

Darling's Auto Mall is a General Motors (GM) dealer in Maine. Pursuant to the terms of its dealer sales and service agreement, Darling's performs warranty work on qualified GM cars and is reimbursed by GM for labor and parts. Under the Maine Business Practices Between Motor Vehicles Manufacturers, Distributors and Dealers Act, GM is required to reimburse Darling's for replacement parts used in the warranty work at its established

markup rate. A dispute arose whether "core charges" also must be reimbursed at the established markup rate. A core charge is essentially a deposit the dealer pays to the manufacturer for the replacement parts, which is refunded when the dealer returns the defective part. Although GM's Services Policies and Procedures Manual specifically provides that core charges are not subject to markup for reimbursement, Darling's claimed the Dealers Act requires GM to pay a markup.

Darling's filed two small claims actions in Penobscot County District Court, asserting that GM was obligated to pay the established markup on the core charges. The court ruled in Darling's favor, finding that Darling's was required to pay "one amount of dollars" in order to obtain the necessary part although such amount consisted of both the cost of the part itself and the core charge. GM appealed to the Penobscot County Superior Court and requested a jury trial de novo. The court consolidated Darling's claims and granted the requested jury trial de novo on the ground there was a disputed material fact as to "what the price of the parts were as charged." The court held a jury trial and gave a contested jury instruction regarding the core charges. The jury found that the price Darling's paid for parts excluded the core charges and judgment was entered in GM's favor. Darling's filed a post-trial motion for judgment as a matter of law, which was denied. It then appealed to the Maine Supreme Court.

The court rejected Darling's first argument—that the superior court erred in granting the jury trial de novo because there was no dispute "that the price paid by Darling's is the total price shown on the invoice"—on the ground that a decision to grant a jury trial de novo is not appealable. Rather, the appealable issue is whether the verdict is supported by the evidence.

Darling's second argument was that the denial of its motion for judgment as a matter of law was in error. The court reviewed whether there was any reasonable view of the evidence and justifiable inferences from such evidence that supported the jury's verdict. The court concluded that because the Dealers Act did not explicitly address core charges, the issue of whether such charges were subject to the mandatory markup could not be resolved without determining whether the core charges factor into the price paid for the replacement parts and how the industry treats such charges. The court noted that there was evidence the customer did not actually pay the core charges (because the customers were simultaneously debited and credited the amount of the core charge) and that GM automatically refunded the core charge to the dealer once the defective part was returned. Thus, the court concluded there was sufficient evidence to support the jury's verdict that the price paid for the replacement parts excluded the core charges.

Darling's final argument was that the jury instructions were deficient because they did not reference the Dealers Act and, therefore, "prevented the jury from determining whether statute requires a markup on the core charge." The court rejected this argument, holding that instructing the

jury on the warranty reimbursement statute would have invited the jury to interpret the statute, which is the court's responsibility.

Accordingly, the Maine Supreme Court denied Darling's appeal and upheld the judgment.

***Ervin Equip. Inc. v. Wabash Nat'l Corp.*, Bus. Franchise Guide (CCH) ¶ 15,774, 2016 WL 2892132 (N.D. Ind. May 17, 2016)**

Ervin Equipment, Inc. entered into a dealership agreement with Wabash National Corp. to sell semitrailers. Ervin's area of responsibility (AOR) under the agreement included parts of Texas and all of Mexico. In July 2015, Wabash sent a letter to Ervin advising that it intended to terminate the dealership agreement on December 31, 2015. The basis for the termination was unclear, but appears to have been because Ervin was selling semitrailers outside of its AOR and not paying invoices on a timely basis. Although Ervin claims to have responded to the notice of termination both verbally and in writing, it failed to take any formal action until late November when it filed an action in the U.S. District Court for the Northern District of Indiana, asserting (1) violations of the Indiana unfair practices statute based on Wabash's termination of the dealership agreement without good cause and the required detailed notice; (2) violations of the Indiana Franchise Act based on Wabash's termination or failing to renew the dealership agreement without good cause; and (3) breach of contract because the provisions in the distribution agreement permitting termination without cause violated the Indiana Franchise Act and therefore were unenforceable. Ervin also filed a motion to enjoin the termination, and Wabash filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

The court first addressed Wabash's motion to dismiss. With respect to the unfair practices claim, the court reviewed a number of statutory definitions in finding that the dealership agreement granted Ervin a franchise and that Ervin was a franchisee within the meaning of Indiana's unfair practices statute. The court then turned to the issue of whether the statute requires both good cause and detailed notice to the franchisee of the termination. Based on the language and intent of the statute, the court found that both were required. Because the issues of whether Wabash had good cause to terminate and had provided the required notice regarding the termination were questions of fact for a jury to decide, the court denied Wabash's motion to dismiss Ervin's unfair practices claims. As to the claim for wrongful termination under the Indiana Franchise Act, the court found that Ervin was not a franchisee as defined by the Act because there no "marketing plan or system [of operation] prescribed in substantial part" by Wabash; therefore, the motion to dismiss was granted as to this claim.

The court next addressed Ervin's motion for a preliminary injunction. The court found that Ervin had established that it had more than the required "negligible" chance of prevailing, but expressed doubts as to whether Ervin could ultimately prevail given that it was admittedly selling Wabash

semitrailers outside of its AOR and had not submitted any evidence regarding the payment issues. With respect to whether Ervin would have an adequate remedy at law, the court found that money damages would be an adequate remedy because any lost profits or consequential damages could be computed. The court also found that Ervin had failed to establish that it would suffer irreparable harm absent an injunction, noting that it had submitted no evidence regarding any efforts to mitigate its claimed damages or why it would be unable to do so in the future. Finally, the court found that the balance of harms favored Wabash because granting the requested injunction would amount to granting Ervin a "nationwide dealership." This would undermine Wabash's other dealers and force it to continue doing business with Ervin even though it believed that Ervin was acting in a manner that was contrary to its interests and in breach of the dealership agreement. Accordingly, the court denied Ervin's motion for a preliminary injunction.

***Kerrigan v. ViSalus, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,743, 2016 WL 892804 (E.D. Mich. Mar. 9, 2016)**
This case is discussed under the topic heading "Fraud."

***Lofgren v. Airtrona Canada*, Bus. Franchise Guide (CCH) ¶ 15,776, 2016 WL 2753298 (E.D. Mich. May 12, 2016)**
This case is discussed under the topic heading "Definition of Franchise."

***Miller Constr. Equip. Sales, Inc. v. Clark Equip. Co.*, Bus. Franchise Guide (CCH) ¶ 15,750, 2016 WL 2626803 (D. Alaska May 6, 2016)**
Miller Construction Equipment Sales, Inc. was a dealer of Doosan equipment under a series of annual written agreements that it entered into with defendant Clark Equipment Co. (Doosan). Miller claimed that Doosan terminated the parties' agreement. Although Doosan disputed the claim, it ultimately "accepted" Miller's "resignation." A further dispute arose whether Doosan was required to buy back three pieces of heavy equipment under Alaska's statute governing distributorships. Miller filed an action in Alaska state court asserting various claims under the distributorships law and contract claims. Doosan removed the case to the U.S. District Court of Alaska and asserted counterclaims for breach of contract, violations of the Lanham Act, violation of Alaska's Unfair Trade Practices and Consumers Protection Act (UTPA), and breach of contract. Miller subsequently filed a motion for summary judgment on its claim that the distributorships law required Doosan to repurchase the equipment and Doosan's first three counterclaims.

The central issue with respect to Miller's claim that Doosan was required to repurchase the equipment under the distributorships law was whether the buyback obligation extended to "gently" used equipment. The statute provides that the equipment must be "unused," which is defined as being "unopened merchandise in the original factory packaging or container." Miller

argued that in this context, "unused" means having less than 300 hours of use because it was undisputed that heavy equipment was delivered with little or no packaging and that equipment with less than 300 hours of use was considered new under the parties' agreement. This was consistent with industry custom. Because the Alaska Supreme Court had not applied the distributorships law in similar circumstances, the court predicted how the Alaska State Supreme Court would decide the issue. Relying on a Delaware state court case interpreting a Delaware statute that is similar to the distributorships law, the court found that if the equipment was never in packaging, "unused" means "never commercially used." Here, because the equipment had been used to some degree, it was not "unused" and Doosan was not required to repurchase it under the distributorships law. Accordingly, the court denied Miller's motion for summary judgment on its claim with respect to the equipment repurchase.

The court then turned to the defendants' counterclaims, starting with the breach of contract claim. Miller argued that the claim failed because the parties' agreement was an unenforceable contract of adhesion. The court disagreed, finding that Miller had the opportunity to negotiate and modify the terms of the agreement. Miller also argued that Doosan's contract claim failed because Miller had not breached the agreement by selling competitive equipment. The court found that even if Miller had breached the agreement as alleged, the claim failed because Doosan did not provide Miller with the contractually required written notice of the breach and an opportunity to cure. The court next considered Miller's motion with respect to Doosan's claim for injunctive relief and trademark infringement under the Lanham Act. Although it was undisputed that Miller continued to use the Doosan marks for at least six weeks after its resignation was accepted, the court held that no reasonable trier of fact could find that Doosan had suffered irreparable harm as a result of the infringement and, therefore, granted Miller's motion for summary judgment as to Doosan's claim for injunctive relief. However, the court denied Miller's motion with respect to the trademark infringement claim, finding that there was a question of fact whether Doosan sustained damages as a result of Miller's continued use of Doosan's marks. Finally, the court denied the motion as to Doosan's UTPA claim because the allegedly unfair act upon which the claim was based—Miller's use of the trademarks after it no longer had the right to do so—remained an issue for the trier of fact to consider because it also formed the basis for the trademark infringement claim that survived.

***Recovery Racing, LLC v. State of Florida*, Bus. Franchise Guide (CCH) ¶ 15,767, 2016 WL 3065645 (Fla. Dist. Ct. App. June 1, 2016)**

Recovery Racing, LLC is a franchised Maserati dealer in Broward County, Florida. Rick Case Weston, LLC proposed establishing a new Maserati dealership seventeen miles away from Recovery's dealership. In response, Recovery filed a petition with the Florida Department of Safety and Motor Vehi-

cles objecting to the proposed dealership. The Department is responsible for administering various statutes governing the licensing of automobile dealerships in Florida, including a statute that permits an existing dealer to protest a proposed new or relocated dealership if it "can establish that during any 12-month period of the 36-month period preceding the filing of the licensee's application for the proposed dealership, such dealer or its predecessor made 25% of its retail sales of new motor vehicles to persons whose registered household addresses were located within a radius of 12.5 miles of the location of the proposed additional or relocated motor vehicle dealer" (the 25% test). Recovery claimed that it had standing under this statute to object to the proposed dealership and that the community was already "receiving adequate representation for the Maserati line" of cars. The proposed dealership and Maserati North America, Inc. filed a motion with the Department seeking a hearing on the issue of whether Recovery had standing to object. An administrative law judge (ALJ) granted the motion and further held that it was Recovery's burden to establish that it had standing to object to the proposed dealership.

At the hearing, Recovery's expert economist, Edward Stockton, opined that Recovery met the criteria for standing under the 25% test. The proposed dealership and Maserati argued that Stockton's conclusions were based on a misinterpretation of the statute and "manipulated data" and that no more than 14.2% of Recovery's retail sales during any twelve-month period were made to registered household addresses within 12.5 miles of the proposed dealership's location. The ALJ agreed. The ALJ rejected Mr. Stockton's definition of "registered household address" as being "the primary home address" of the "ultimate beneficiary" of the sale and instead found that it meant the address where the car was registered. The ALJ also rejected the expert's interpretation of the term "retail sales" on the ground that it was essentially subjective. Finally, the ALJ rejected his definition of a "12-month period" as beginning on any day of any month and ending twelve months later, finding that the twelve-month period must be based on whole calendar months. The Department adopted the ALJ's recommendations and Recovery appealed to the Florida District Court of Appeal.

Recovery argued that the Department incorrectly required Recovery to prove that it had standing and misconstrued the applicable statute. As a threshold matter, the court noted that the Department's interpretation of the statute was entitled to "great weight" and would not be overturned "unless clearly erroneous." The court disagreed with Recovery's argument that the proposed dealership and Maserati bore the burden of proving that Recovery lacked standing, finding instead that the "plain language of the statute places the burden squarely on the existing dealer to show standing." The court then turned to Recovery's claim that the Department misinterpreted the statute, starting with Recovery's argument regarding the meaning of the term "registered household addresses." The court found that Recovery's interpretation of this term essentially "ignore[s] the implications of the word

'registered' as used in the statute." Because the court found that its holding regarding the meaning of this term was dispositive, it did not address Recovery's other interpretation arguments and affirmed the Department's ruling.

***Smith v. FCA US LLC*, Bus. Franchise Guide (CCH) ¶ 15,732, 2016 WL 1158789 (D. Ariz. Mar. 24, 2016)**

In this case, the U.S. District Court for the District of Arizona considered cross motions for summary judgment in a dispute between Chrysler and one of its alleged dealers in Arizona. The parties or related entities entered into several contracts evidencing their relationship. Pursuant to those agreements: (1) Alonzo Smith acquired a minority ownership interest and nonvoting stock in the Chrysler dealership; (2) Chrysler owned the majority interest and all of the voting stock in the dealership; (3) Smith agreed to purchase Chrysler's shares in the dealership over time; (4) Smith was hired by the dealership as its general manager; and (5) Chrysler had the "absolute right" to remove Smith as a director and employee of the dealership.

The dealership was initially profitable and Smith used portions of his annual bonus to buy Chrysler shares. Beginning in 2007, the dealership's sales decreased dramatically. The dealership returned to profitability in 2011 and 2012. However, in October 2012, Chrysler terminated Smith as a director and general manager of the dealership without prior written notice, ostensibly as a result of the dealership's low sales, Smith's slow purchase of Chrysler's stock in the dealership, and alleged operational deficiencies at the dealership. At the same time, Chrysler offered to purchase Smith's shares in the dealership at book value. At the time of the termination, Smith owned a majority of the dealership's stock. Smith filed a lawsuit asserting claims for breach of the implied duty of good faith and fair dealing, violations of the federal Automobile Dealers' Day in Court Act (Federal Dealers Act) and several Arizona statutes protecting automobile dealers. Both parties sought declaratory relief.

The court first analyzed whether Smith was a "dealer" operating a "franchise" within the meaning of the Federal Dealers Act and the Arizona statutes. Chrysler argued that the dealership, and not Smith, was the dealer and, therefore, the federal and state statutes did not apply. In addressing this issue, the court relied on *Kavanaugh v. Ford Motor Co.*, 353 F.2d 710 (7th Cir. 1965), which it found to involve "remarkably similar" facts to those at issue in this case. The court rejected Chrysler's "formalistic" arguments, noting that the federal act and Arizona statutes were intended to protect dealers and that Chrysler's theory would essentially insulate it from liability because it controlled the dealership and, therefore, the dealership would sue Chrysler only if Chrysler wanted it to. The court then turned to the question of whether Smith was a "dealer," focusing on whether he was "essential" to the dealership's operation. In determining that he was essential to the dealership's operation and, therefore, the dealer, the court was persuaded by several factors: (1) Smith applied for the dealership as an individual; (2) Chrysler

entered into the agreement with the dealership in reliance on Smith's anticipated involvement with the dealership; and (3) at the time that he was terminated, Smith has been the dealership's general manager for ten years and owned a majority of its stock. Finally, the court noted that if Smith was not the dealer, Chrysler's "arrangement" with the dealership would have been illegal under Arizona law because an automobile manufacturer is prohibited from having an ownership interest in a dealership unless that ownership is temporary and the manufacturer is in a relationship with a person who makes a substantial investment in the dealership and is expected to acquire full ownership of the dealership within a reasonable period of time.

Having determined that Smith was a dealer, the court then addressed whether summary judgment was warranted as to each of Smith's claims. Smith's claim under the Federal Dealers' Act was that Chrysler had not acted in "good faith" as defined by the statute (i.e., freedom from actual or threatened coercion or intimidation). As the court noted, in cases involving a termination, there must be a "causal connection" between the termination and the coercion/intimidation. The court found there was evidence supporting each party's theory regarding the requisite causal connection and, therefore, denied their respective motions as to the Federal Dealers Act claim.

The court then turned to Smith's two claims under the Arizona state statutes: (1) that Chrysler did not give the required written notice of its intent to terminate the franchise and, therefore, Smith was precluded from exercising his procedural rights to, among others, demand a good cause hearing; and (2) that Chrysler's ownership interest in the dealership was illegal because it had the absolute right to terminate Smith and, therefore, he was not able to "expect" to acquire full ownership in the dealership. With respect to Smith's first claim, the court granted summary judgment in favor of Smith because it was undisputed that Chrysler had not provided notice of its intention to terminate the franchise. As to Smith's second claim, the court agreed that the dealership arrangement was unlawful, but deferred ruling on whether Chrysler's violation of the statute caused or contributed to Smith's injury.

The court next considered Smith's common law claim for breach of the implied duty of good faith and fair dealing regarding the termination. Predictably, the parties advanced different theories as to why Smith was terminated. The court found that there was a triable issue of fact regarding this claim because evidence in the record supported each party's theories.

TERMINATION AND NONRENEWAL

7–Eleven, Inc. v. *Sodhi*, Bus. Franchise Guide (CCH) ¶ 15,765, 2016 WL 3085897 (D.N.J. May 31, 2016)

Karamjeet Sodhi was a long-time operator of six 7–Eleven convenience stores in New Jersey. 7–Eleven, Inc. terminated Sodhi's franchise agree-

ments based on numerous financial irregularities discovered during the course of an audit and subsequent investigation. 7–Eleven filed an action in the U.S. District Court for the District of New Jersey seeking a declaration that Sodhi's franchise agreements had been properly terminated. Sodhi and others filed counterclaims asserting violations of the New Jersey Franchise Practices Act (NJFPA), breach of the implied duty of good faith and fair dealing, violations of the Fair Labor Standards Act (FLSA), and violations of the New Jersey Law Against Discrimination (NJLAD). 7–Eleven filed a motion for summary judgment on its declaratory relief claim and the defendants' counterclaims.

The court first addressed the defendants' claim that 7–Eleven violated the NJFPA by imposing unreasonable standards on Sodhi's stores and attempting to terminate the franchise agreements without good cause. The defendants failed to submit any evidence of 7–Eleven's "unreasonable standards" or even respond its arguments, and the court granted 7–Eleven's motion as to this counterclaim based on a failure of proof. The defendants' second NJFPA claim was that 7–Eleven failed to provide sufficient notice and an opportunity to cure the alleged breaches of the franchise agreements and that the termination was based on "racial bias and other animus." The court found that 7–Eleven provided the requisite sixty days' notice and, based on Sodhi's admission that he did not cure the defaults, any ulterior motive was irrelevant. Thus, the court found there was good cause for the termination and granted summary judgment on this claim.

The court then turned to the breach of implied covenant of good faith and fair dealing claim. Because the implied duty does not "preclude a party from exercising its express contractual rights" and based on its finding that there was good cause for terminating the franchise agreements, the court held that 7–Eleven was entitled to summary judgment on this claim.

The FLSA claim was premised on Sodhi being an employee of 7–Eleven. In analyzing whether Sodhi was an employee, the court considered six factors and concluded that five of them supported a finding that he was not an employee and one was neutral. Among other things, the court found that the evidence established that 7–Eleven did not control the "manner in which [Sodhi] performed his 7–Eleven business."

Finally, the court reviewed the defendants' claim that 7–Eleven violated the NJLAD by either discriminating against Sodhi as an employee or, if he was not an employee, by refusing to do business with or terminating him as an independent contractor. The court disposed of the defendants' first theory based on its prior finding that Sodhi was not a 7–Eleven employee. The court rejected the defendants' second theory because, although the NJLAD makes it unlawful for a party to refuse to do business with someone on the basis of race, it does not prohibit "discrimination during the ongoing execution of the contract" and the defendants' allegations related to the parties' ongoing business relationship and not any refusal on the part

of 7–Eleven to do business with the defendants. Accordingly, the court found that the NJLAD claim also failed as a matter of law.

***Ervin Equip. Inc. v. Wabash Nat'l Corp.*, Bus. Franchise Guide (CCH) ¶ 15,774, 2016 WL 2892132 (N.D. Ind. May 17, 2016)**
This case is discussed under the topic heading "Statutory Claims."

***KFC Corp. v. Gazaha*, Bus. Franchise Guide (CCH) ¶ 15,735, 2016 WL 1245010 (E.D. Va. Mar. 24, 2016)**
Nabil Gazaha and his company, NAYAA, LLC (collectively, Gazaha) entered into a franchise agreement with KFC Corp. to operate a KFC restaurant in Baltimore. Gazaha is African American. KFC terminated Gazaha's franchise after the location received four food and safety violations within a six-month period. Notwithstanding the termination, Gazaha continued to operate the location as a KFC restaurant. After the termination, Gazaha sold non-approved products, ceased paying royalties and advertising co-op fees, and posted signs at the restaurant accusing KFC of racial discrimination.

KFC filed an action in the U.S. District Court for the Eastern District of Virginia and sought to enjoin Gazaha's continued use of the KFC marks. The court granted KFC's motion. Gazaha subsequently filed counterclaims, alleging the franchise was wrongfully terminated, intentional racial discrimination, and wrongful termination in violation 42 U.S.C. § 1981. Gazaha sought damages and reinstatement of the franchise. KFC filed a motion for summary judgment, which the court granted.

With respect to Gazaha's wrongful termination/breach of contract claim, KFC argued that Gazaha could not establish damages, a necessary element of a breach of contract claim under Kentucky law, because Gazaha's restaurant lost money between 2011 and 2015. Gazaha attempted to rebut the financial evidence by claiming that a number of personal expenses were run through the business and, therefore, the "book losses" did not accurately reflect the restaurant's profitability. The court rejected this argument, noting that the purported personal expenses were actually related to the operation of the restaurant, including, for example, a mortgage secured by Gazaha's personal residence that was used to purchase and operate the restaurant. Gazaha also submitted evidence of alleged offers to purchase the restaurant and the opinion of his expert that the restaurant was worth approximately $750,000. The court found, however, that this evidence had no probative value because there was no evidence establishing what the restaurant was worth before the termination. Accordingly, the court held that Gazaha had failed as a matter of law to present any evidence that it had sustained damages as a result of the termination of the franchise.

KFC also argued that Gazaha's alternative request for reinstatement of the franchise failed as matter of law. In opposition to this argument, Gazaha relied on *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970),

and other cases in which courts have enjoined the termination or closure of a franchise before the termination had become effective. The court found that these cases were inapposite because the termination of Gazaha's franchise had already occurred and Gazaha had, among other things, "long since ceased all operations as a KFC franchisee" and operated the restaurant in a manner that was "inconsistent with his claim for equitable relief in the form of reinstatement."

Gazaha's discrimination and § 1981 claims fared no better. KFC argued that Gazaha could not present any direct evidence of discrimination or satisfy the applicable burden-shifting framework for purposes of establishing discrimination. The court found that the only evidence submitted by Gazaha of discrimination—statements by a third-party health inspector and an unnamed KFC employee that the neighborhood in which the restaurant was located was not "safe" and statistical evidence establishing that KFC franchises owned by African Americans were terminated at a higher rate than those owned by Caucasians—was neither "direct" nor of sufficient probative value to defeat summary judgment. The court found that the alleged statements were isolated and of "zero to exceedingly marginal" probative value and, importantly, were not made by anyone with the authority terminate the franchise. The court rejected the statistical evidence on the basis that such evidence cannot, by itself, establish a racial discrimination claim and that Gazaha had not submitted any evidence that he was targeted for termination because of his race. The court further held that, even if he could make out a prima facie case of racial discrimination, KFC had offered evidence of a "legitimate, non-discriminatory reason" for the termination (i.e., failure of numerous health inspections). As such, the burden shifted back to Gazaha to submit evidence raising an inference that the reasons for the termination were pretexual and the court noted that he had failed to present any such evidence.

***L.A. Ins. Agency Franchising Funding, LLC v. Montes*, Bus. Franchise Guide (CCH) ¶ 15,740, 2016 WL 922948 (E.D. Mich. Mar. 11, 2016)**

The U.S. District Court for the Eastern District of Michigan granted leave to a franchisee to amend and supplement counterclaims brought in response to a franchisor's action filed after the franchisee's early termination of a franchise agreement. L.A. Insurance Agency Franchising Funding, LLC (LAIF) sued various franchisee corporations and their owner, Claudia Montes, for breach of contract, trademark infringement, and unfair competition, alleging that Montes unilaterally terminated a franchise location and opened a competing insurance agency.

The defendants sought leave to add and supplement counterclaims for, among other things, breach of contract, breach of the covenant of good faith and fair dealing, fraud, deceptive trade practices, breach of fiduciary duty, and unspecified "injunctive relief." The proposed counterclaims alleged the franchise agreements were unenforceable based on purported

misrepresentations and because the revised franchise agreements had been forced upon her. More specifically, the defendants alleged that the revised franchise agreements were unconscionable adhesion contracts "foisted upon" them and that LAIF fraudulently induced Montes into signing the franchise agreements, Montes was not provided the requisite 14 days' notice period to review the franchise agreements, and the revised franchise agreements were unenforceable because they were not supported by consideration.

The court granted the defendants' request on the ground that, if proven in court, the alleged facts would render the franchise agreements unenforceable. It rejected LAIF's argument that the defendants' allegations were false because factual considerations were an issue for trial. The court also rejected LAIF's arguments that the defendants had "failed to explain" their assertion that the agreements were forced upon them and that the claims would not survive summary dismissal because they were barred by integration clauses in the franchise agreements. Finally, the court rejected LAIF's arguments that, as a matter of law, franchise agreements do not give rise to a fiduciary relationship, citing case law finding such a relationship exists.

***Neopharm Ltd. v. Wyeth–Ayerst Int'l LLC*, Bus. Franchise Guide (CCH) ¶ 15,746, (S.D.N.Y. Mar. 18, 2016)**

The U.S. District Court for the Southern District of New York ruled in favor of Neopharm Ltd., an Israeli distributor of medical products, after manufacturer Wyeth–Ayerst International LLC ended the parties' long-term contractual relationship. Both parties moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), requesting that the court determine whether their distribution agreement allowed Wyeth to unilaterally terminate the agreement without cause. In concluding that unilateral termination was not permitted under the circumstances, the court also granted Neopharm's motion to dismiss Wyeth's counterclaim that it lawfully terminated the agreement for cause.

With Wyeth's consent, Neopharm entered into an agreement to supply the Israeli Ministry of Health with a vaccine. Following this, Neopharm and Wyeth amended the termination provision (section 7.1) in their original distribution agreement, which had allowed the parties to terminate without cause upon three years' notice, to require that three years' notice to be given after all business with the Ministry had been concluded. The contract also included a provision (section 7.5) allowing for the payment of three years' damages in lieu of notice. Arguing the termination provisions in the agreement operated independently and section 7.5 could be invoked before Neopharm's supply of the vaccine to the Ministry ceased, Wyeth terminated the agreement one year prior to Neopharm's business with the Ministry ended.

The court disagreed, interpreting language in section 7.1, such as "full force and effect," "for an indefinite period," and "unless section 7.2 is invoked for cause or the parties give mutual written consent," as excluding

other possibilities for termination beyond those explicitly mentioned in the provision. It further held that Wyeth's interpretation of section 7.5 was unreasonable given the plain language of the contract as a whole and the context. The court held that Wyeth's interpretation was also inconsistent with section 7.5 because the section would be rendered "meaningless" without being read in conjunction with section 7.1.

The court rejected a counterclaim from Wyeth that Neopharm had willfully made material false or untrue statements or representations contrary to a contractual provision. The court found Neopharm's statements, made in an email pitching new business, did not amount to "material false or untrue statements," holding that nothing suggested that the statements in question were either materially false or made in the performance of Neopharm's obligations under the agreement.

TRADEMARK INFRINGEMENT

***G 6 Hosp. Franchising LLC v. HI Hotel Group, LLC*, Bus. Franchise Guide (CCH) ¶ 15,737, 2016 WL 1109216 (M.D. Pa. Mar. 22, 2016)**

The U.S. District Court for the Middle District of Pennsylvania denied a franchisor's request for treble damages, finding that a former franchisee's continued use of the franchisor's marks following rebranding and termination did not constitute "counterfeiting" under 15 U.S.C. § 1117.

HI Hotel Group, LLC, a former G 6 Hospitality Franchising LLC franchisee operating as a Motel 6, had previously breached its franchise agreement by failing to pay monthly fees and maintain brand standards. The motel was rebranded as a Travel Inn, but continued to use the Motel 6 name and marks. G 6 Hospitality filed an action against HI Hotel, a sham successor, and its members for breaching the franchise agreement by failing to pay required fees and maintain brand standards, and for trademark infringement under the Lanham Act based on HI Hotel's continued use of the Motel 6 marks. A jury awarded $125,000 in damages to G 6 Hospitality.

G 6 Hospitality subsequently filed a petition for treble damages, attorney fees and costs, and prejudgment interest, claiming it was entitled to treble damages under § 1117 based on HI Hotel's use of counterfeit marks. Although the court granted G 6 Hospitality's request for attorney fees and costs, it declined to award treble damages, relying on *United States Structures, Inc. v. J.P. Structures, Inc.*, 130 F.3d 1185 (6th Cir. 1997), as well as § 1117's legislative history. In that case, the Sixth Circuit held that where a holdover franchisee continued to use the franchisor's trademark after the franchise has been terminated, it was not using a counterfeit mark within the meaning of § 1117 because the mark in the case of a holdover franchisee is genuine and authentic, although the use is unauthorized. As such, HI Hotel's continued use of the Motel 6 marks did not constitute use of counterfeit marks under the Act.