Franchising & Distribution Currents

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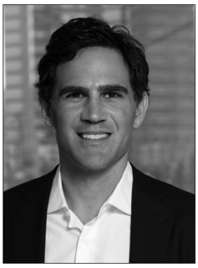
Mr. Towle



Mr. Gruenberg

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ANTITRUST

***Ogden v. Little Caesar Enterprises, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,474, 393 F. Supp. 3d 622 (E.D. Mich. 2019)**

In this case, the U.S. District Court for the Eastern District of Michigan held that a former Little Caesar's manager failed to state an antitrust claim against the franchisor based on the "no poaching" provision in the Little Caesar franchise agreements.

Plaintiff Christopher Ogden alleged that Little Caesar franchisees "contracted, combined, and/or conspired to not solicit, poach, or hire each other's management employees." As evidence, he pointed to paragraph 15.2.3 of Little Caesar's franchise agreements, which states that franchisees should not "[e]mploy or seek to employ, directly or indirectly, any person serving in a managerial position who is at the time or was at any time during the prior six (6) months employed by Little Caesar or its affiliates, or a franchisee of any restaurant concept franchised by Little Caesar or its affiliates, without the prior written consent of the thencurrent or prior employer."

Ogden grew frustrated with his position as a General Manager of a Little Caesar restaurant and began to look for a different job. He claimed that, because of Little Caesar's no-poaching provision, his only options were to either stay at his current job, or quit and start over at an entry-level job in another business. He chose to do the latter by taking a lower-paying job at Taco Bell.

Ogden alleged that defendants violated Section 1 of the Sherman Act by creating an agreement among

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Little Caesar franchisees to restrict competition, which unjustly suppressed management wages and unreasonably restrained trade. Ogden alleged the no-poaching provision restricted lateral hiring of current employees within the Little Caesar's system. The complaint broadly claimed that no-poaching and non-compete agreements have had a widespread negative impact on the mobility and wages of low-paid workers in the fast-food industry. Ogden argued that because he quit his job and took a lower-paying position, the no-poaching agreement suppressed his wages, limited his employment mobility, and narrowed his job opportunities.

The court started by reviewing the basic principles regarding Section 1 of the Sherman Act, which prohibits every contract, combination, or conspiracy that creates an unreasonable restraint on trade or commerce. Some restraints are *per se* unreasonable "because they always or almost always tend to restrict competition and decrease output." Typically, only "horizontal" restraints qualify as unreasonable *per se*. Horizontal restraints are those imposed by agreement between competitors. Most restraints, though, are not *per se* unreasonable. These restraints are analyzed under the more lenient "rule of reason," which "requires courts to conduct a factspecific assessment of market power and market structure to assess the restraint's actual effect on competition." The goal of this analysis is to distinguish between restraints with an anticompetitive effect that are harmful to the consumer versus those that stimulate competition in the consumer's best interest. Vertical restraints—those imposed by agreement between companies at different levels of distribution—are rarely *per se* unreasonable and thus are analyzed under the rule of reason.

The Sixth Circuit has adopted a third approach for analyzing a Section 1 Sherman Act claim known as the "quick look," which is an abbreviated form of the rule of reason analysis in which "the requirements for the definition of the relevant market are relaxed." The Sixth Circuit typically applies the "quick look" analysis in situations where an observer with even a basic understanding of economics "could conclude that the arrangements in question would have an anticompetitive effect on customers and the market."

The court began by analyzing whether the franchise agreements in question were vertical or horizontal. The court found that the agreements were at least partially horizontal because they restricted competition among franchisees in hiring fast-food employees.

Next, the court analyzed whether the claims should be evaluated under the *per se* approach. The court held that, although the agreements were partially horizontal, Ogden failed to establish that his claims should proceed under a *per se* analysis because he did not allege that the defendants engaged in any explicit agreement to fix wages or divide the labor market into exclusive territories. The court explained that, because the agreements had some vertical component, they were complex and not amenable to the simplified *per se* approach. The fact that the agreements prohibited only intrabrand hiring, and even then did allow for crosshiring if the former employer consented, weighed in favor of applying the rule of reason analysis.

Even if a *per se* approach could be applied, the court found Ogden failed to sufficiently allege explicit, comprehensive wage-fixing that would sustain a *per se* antitrust violation. The court explained that the complaint merely alleged in a general fashion that no-poaching agreements had a broad effect in depressing fast-food employees' wages on a macro scale. Ogden did not allege that franchisees in any market actually met to fix wages or establish uniform wages. Thus, the complaint failed to show that the no-poaching provisions were *per se* unreasonable.

The court next analyzed whether Ogden satisfied the "quick look" standard, finding that he fell short of that mark as well. The court noted that there were no allegations of an onerous non-compete that prevented Ogden from seeking alternate employment. Ogden did not allege that he was denied employment by another Little Caesar franchisee due to the no-poaching provision or that another employer would have hired him but for the no-poaching clause. As such, the court found the alleged antitrust violation was not obvious enough to warrant a "quick look" analysis.

Finally, the court reviewed Ogden's claims under the rule of reason. The court applied the rule's three-step, burden-shifting framework. Under this framework, the plaintiff has the initial burden of proving the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff carries its burden, the burden then shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant makes the showing, the burden shifts back to the plaintiff to demonstrate that the procompetitive effects could be reasonably achieved through less anticompetitive means. The court found that Ogden fell far short of satisfying the rule of reason because he failed to define any relevant market or show that any anticompetitive effects of the agreements could not be negated by the pro-competitive effects on interbrand competition.

Finally, the court found that Ogden also failed to demonstrate any antitrust injury. The court stated that Ogden's allegations did not offer any facts showing that the no-poaching clause caused him any specific wage or opportunity loss. The court found this deficiency contrasted with the facts in other antitrust cases involving no-poaching clauses that appeared in franchise agreements. In these other cases, the plaintiffs pointed to specific instances where they were refused a higher-paying job at another franchisee's business specifically due to a no-poaching provision. As a result, they were forced to take a lower-paying job with a different employer. Ogden made no such allegations. As such, the court found that he did not sustain an antitrust injury.

Thus, the court held Ogden failed to state a plausible claim for relief since he failed to plead facts establishing a prima facie violation of Section 1 of the Sherman Act, or any antitrust injury, and, accordingly, granted Little Caesar's motion to dismiss.

***Security Data Supply, LLC v. Nortek Security & Control LLC*, Bus. Franchise Guide (CCH) ¶ 16,465, 2019 WL 3305628 (N.D. Tex. July 22, 2019)**

Granting in part and denying in part defendants' motions to dismiss, the U.S. District Court for the Northern District of Texas found that the franchisee plaintiffs had standing to bring a price discrimination claim against the manufacturer defendant because, although they were indirect purchasers, they had the functional equivalent of a cost-plus contract with the franchisor.

Plaintiff Security Data Supply, LLC (SDS) and its franchisees (SDS Franchisees, and together with SDS, Plaintiffs) are wholesale distributors of CCTVs, fire alarms, intrusion alarm systems, and home automation systems, operating in Texas and Louisiana. Plaintiffs alleged that Nortek Security and Control LLC (Nortek), Earnest Bernard (Bernard), and Wave Electronics Inc. (Wave) (collectively, Defendants) tortiously interfered with existing contracts, prospective business relationships, and existing business relationships, and violated anticommercial bribery laws. Plaintiffs further alleged that Nortek and Wave violated federal antitrust law.

Nortek manufactures home automation and personal security systems, and it is the sole manufacturer of a residential intrusion system called 2GIG. Nortek distributes its products, including 2GIG products, through wholesale distributors such as SDS. Wave, a competitor of Plaintiffs, also distributed security systems, including Nortek's 2GIG product. Plaintiffs alleged that Wave and Nortek entered into a special pricing scheme (the Four Star Program), which allowed Wave to sell 2GIG systems for up to forty percent below the wholesale price that Nortek charged its other distributors. The Four Star Program allegedly involved special rebates to Wave's customers and a kickback to Wave, increasing its profit on sales. Further, Nortek employees allegedly provided the discount, along with the names of Plaintiffs' customers, to Wave, in exchange for payments and American Express gift cards.

Plaintiffs contacted Nortek seeking to enter into a similar pricing arrangement; however, Nortek denied the program's existence. Bernard, a Nortek employee, allegedly told Plaintiffs that they were receiving the best price on purchased items. Soon thereafter, Bernard resigned, and other employees involved in the scheme were terminated when Nortek discovered its employees' activities. Plaintiffs alleged that Wave nonetheless continued to receive preferential treatment allowing Wave to maintain its competitive advantage. For example, Nortek allowed Wave's top thirty dealers to continue operating under the Four Star Program.

Although the Four Star Program ended and Wave eventually entered into a special pricing program with Quolsys, another manufacturer, Plaintiffs claimed that its customers began to purchase Quolsys products, rather than 2GIG products, causing Plaintiffs to lose a large number of customers and suffer an estimated $9,575,000 in annual losses.

Although Plaintiffs' sales increased when Nortek began offering Plaintiffs the special pricing program, Nortek later pulled its products from Plaintiffs without providing notice as required under the contract. In response to Nortek's suit to collect past-due invoices, Plaintiffs counterclaimed, alleging that Nortek and Wave had violated the Robinson-Patman Act (RPA), 15 U.S.C. §§ 13(a) and 13(f). Plaintiffs further alleged that Defendants engaged in in commercial bribery in violation of RPA and tortuously interfered with existing contracts, prospective business relationships, and existing business relationships.

Defendants argued that SDS Franchisees' claims should be dismissed for lack of standing. The court disagreed, finding that SDS Franchisees were proper plaintiffs. The court analyzed whether SDS Franchisees met the standing requirements for a private antitrust action, specifically whether the plaintiffs adequately showed injury-in-fact, antitrust injury, and proper plaintiff status. The court found that plaintiffs adequately pleaded injury-in-fact and antitrust injury as the complaint alleged that the Four Star Program caused Plaintiffs to lose fifty-nine clients and $9,575,000 in annual revenue.

Next, the court analyzed whether SDS Franchisees were "proper plaintiffs." Defendants argued that SDS Franchisees were not proper plaintiffs because they indirectly received their products from Nortek. The court disagreed. Although generally only direct purchasers have standing to pursue a claim for price discrimination, there is a "cost-plus" contract exception when a "purchaser commits to buy a fixed quantity regardless of price, such that the effect of the overcharge is essentially determined in advance without reference to the interaction of supply and demand." Relying on a Fifth Circuit decision, the court noted that a "purchaser can plead the functional equivalent of cost-plus contracts by showing that the price was determined by strictly applying certain formulate to the wholesale price." Although SDS Franchisees were indirect purchasers, the court found that Plaintiffs had adequately pleaded the functional equivalent of a cost-plus agreement because the complaint stated that the SDS Plaintiffs and SDS were parties to an agreement under which SDS franchisees were required to purchase all of their products from SDS for an amount based on a standard markup of the wholesale price SDS received from a manufacturer.

The court then considered the commercial bribery claim, finding that commercial bribery may be a violation of RPA § 2I. Turning to the sufficiency of Plaintiffs' allegation for each Defendant separately, the court sets forth the requirements for a commercial bribery claim: "(1) the giving or offering of something of value; (2) to an agent or fiduciary; (3) without the consent to the principal; (4) with the intent to influence the conduct of the agent or the fiduciary." Plaintiffs did not allege that Nortek offered or accepted any bribes and, as a result, the court dismissed Plaintiffs' direct bribery claim. However, the court accepted Plaintiffs' argument that Nortek could be held vicariously liable for commercial bribery and, therefore, denied Defendants' motion as to vicariously liability.

Bernard and Wave also challenged the sufficiency of Plaintiffs' commercial bribery pleading. Bernard contended that Plaintiffs failed to adequately plead with specificity their commercial bribery claim. Wave argued that the allegations "ma[de] no sense" because there would be no reason to bribe Bernard if Nortek would freely give the discount. Wave also argued that Plaintiffs failed to plead that Nortek's employees acted for Nortek. The court found Bernard's and Wave's arguments unpersuasive and denied each party's motion as to the commercial bribery claim.

Next, the court addressed Defendants' motion to dismiss the claims for tortious interference with existing contracts, prospective business relationships, and existing business relationships. The court granted Defendant's motion to dismiss the tortious interference with contract claim on the ground that Plaintiffs failed to state facts showing that Defendants caused a party to breach an existing contract. However, the court permitted them to replead.

Denying Defendants' motions to dismiss the tortious interference with prospective business relations claim, the court determined that Plaintiffs adequately pleaded tortious interference because the complaint stated that "Plaintiffs had a long, ongoing relationship with Nortek; that due to Bernard and Wave's rebate program, Plaintiffs lost market share of Nortek's products; and that Nortek pulled other related product lines from Plaintiffs."

Last, the court denied Defendants' motion to dismiss the civil conspiracy allegations, finding that the complaint adequately alleged facts that are "facially plausible and sufficient to show the Defendants conspired to commit one or more unlawful, overt acts, which harmed Plaintiffs."

ARBITRATION

CK Franchising, Inc. v. SAS Services, Inc., Bus. Franchise Guide (CCH) ¶ 16,459, 398 F. Supp. 3d 163 (E.D. Ky. 2019)

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

Defina by Defina v. Go Ahead & Jump 1, LLC, Bus. Franchise Guide (CCH) ¶ 16,447, 2019 WL 2622074 (N.J. Super. Ct. App. Div. June 13, 2019)

Sky Zone Franchise Group was unable to compel arbitration of an action brought against it and the franchisee of one of its trampoline parks by a customer who was injured at the park. The New Jersey Appellate Division found the arbitration clause at issue was unenforceable under New Jersey law because it failed to clearly and unambiguously inform the customer that he was giving up his right to bring claims in a court of law and have a jury trial.

Plaintiff Alexander Defina (Defina) participated in a game of trampoline dodgeball at Sky Zone Indoor Trampoline Park (SZITP). Before plaintiff gained access to the facility, his father signed a document entitled "Participant Agreement, Release and Assumption of Risk" (the Agreement). The Agreement contained an arbitration clause, which stated:

> If there are any disputes regarding this [A]greement, I on behalf of myself and/or my child(ren) hereby waive any right I and/or my child(ren) may have to a trial and agree that such dispute shall be brought within one year of the date of this Agreement and will be determined by binding arbitration before one arbitrator to be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures. I further agree that the arbitration will take place solely in the state of Texas and that the substantive law of Texas shall apply. If, despite the representations made in this [A]greement, I or anyone on behalf of myself and/or my child(ren) file or otherwise initiate a lawsuit against SZITP, in addition to my agreement to defend and indemnify SZITP, I agree to pay within 60 days liquidated damages in the amount of $5,000 to SZITP. Should I fail to pay this liquidated damages amount within the 60 day time period provided by this Agreement, I further agree to pay interest on the $5,000 amount calculated at 12% per annum.

The court found that the arbitration clause "did not clearly and unambiguously inform plaintiff that he was giving up his right to bring claims arising out of the participation in activities at SZITP in a court of law and have a jury decide the case." The court focused on the fact that the arbitration clause did not contain the word "trial" or "jury." The court also noted that the Agreement did not explain how arbitration differs from a proceeding in a court of law.

The court came to this decision despite the Supreme Court's 2017 decision in *Kindred Nursing Centers Ltd. Partnership v. Clark*, which held that a Kentucky rule requiring that a power of attorney specifically state that the attorney-in-fact is authorized to enter into an arbitration agreement violated the Federal Arbitration Act's (FAA) requirement that arbitration agreements be placed "on equal footing with all other contracts."

In September 2017, the franchisor defendants filed a motion to compel arbitration and stay further trial court proceedings, arguing that the prior ruling by the New Jersey Appellate Court refusing to compel arbitration was no longer valid after *Kindred Nursing*. The trial court rejected this argument and denied the motion. Defendants appealed, but the appellate court affirmed the trial court's order.

The franchisor filed petitions for certification with the New Jersey Supreme Court. The New Jersey Supreme Court granted the franchisor's petitions for certification and remanded the matter for reconsideration in light of two New Jersey decisions: *Kernahan v. Home Warranty Administrator Florida, Inc.*, 236 N.J. 301, ___ A.2d ___ (2019), and *Atalese v. U.S. Legal Services. Group, LP*, 219 N.J. 430, 336, 99 A.3d 306 (2014).

Ultimately, the New Jersey Appellate Division decided that the arbitration clause was not enforceable under *Atalese* and *Kernahan*. The court explained that, under *Atalese* and *Kernahan*, there must be mutual assent by the parties to submit their dispute to arbitration. Since arbitration involves the waiver of the right to pursue the claims in court, the arbitration clause must show that the party waiving the right did so clearly and unambiguously. Although no magic words are needed to render an arbitration clause enforceable, the contract "must explain that the plaintiff is giving up her right to bring her claims in court or have a jury resolve the dispute."

In the present case, the arbitration clause referred to a waiver of any right to "a trial" but did not explain that the person signing the Agreement was giving up his right to bring claims in court or have a jury resolve the dispute. Furthermore, the arbitration clause did not explain arbitration or how it differs from a proceeding in court. On that basis, the court found the arbitration clause could not constitute a knowing waiver of the right to sue in court.

The franchisor argued that the arbitration clause should be enforced because it was not substantially different from the arbitration clause upheld in another New Jersey decision: *Martindale v. Sandvik, Inc.*, 173 N.J. 76, 800 A.2d 872 (2002). However, the court found that the two clauses were distinguishable. The clause in *Martindale* stated that as a condition of employment, the plaintiff agreed to "waive" her "right to a jury trial" in any action or proceeding relating to her employment. The court found that this reference to a waiver of a jury trial sufficiently informed the plaintiff that she was giving up her right to bring her claims in court or have a jury resolve the dispute as required under *Atalese*.

The defendants also argued that the discussion in *Kernahan* of the *Atalese* standard demonstrated that *Atalese* violates the "equal-footing" principle in the FAA as interpreted in *Kindred Nursing*. They theorized that *Atalese* establishes a subjective standard for mutual assent that is not applied to other contracts. The court disagreed, finding that *Atalese* did not single out arbitration clauses "for more burdensome treatment than other waiver-of-rights clauses under state law." The court held that *Atalese* did not establish a subjective test for mutual assent for arbitration agreements. Instead, *Atalese* requires courts to examine the relevant contractual language and, based on that language, determine whether mutual assent has been achieved. Therefore, the court determined that *Atalese* did not establish a standard for mutual assent that applies only to arbitration agreements and does not violate the FAA's "equal-footing" principle as interpreted in *Kindred Nursing*. Accordingly, based on its interpretation of *Atalese* and *Kernahan*, the court held that the arbitration agreement signed by plaintiff's father was unenforceable.

***Doctor's Associates, Inc. v. Alemayehu*, Bus. Franchise Guide (CCH) ¶ 16,482, 934 F.3d 245 (2d Cir. 2019)**

In this case, the Second Circuit Court of Appeals vacated a district court's decision denying Doctor's Associates, Inc.'s (DAI) claims to compel arbitration of a prospective franchisee's claims.

Defendant-Appellee Girum Alemayehu (Alemayehu) sought to purchase an existing Subway franchise in Colorado. The application process included an online application, which contained a provision requiring the applicant to submit any claims arising out of the application process to binding arbitration in Bridgeport, Connecticut. Alemayehu checked a box confirming that he had read this provision. The application could not be submitted without the box being checked and typing a name into the signature box below it. DAI denied Alemayehu's application.

Alemayehu filed a lawsuit in the U.S. District Court for the District of Colorado claiming, among other things, that DAI and its agent had discriminated against him on the basis of his race in violation of 42 U.S.C. § 1981. DAI responded by initiating an action in the U.S. District Court for the District of Connecticut (district court) and filing a motion to compel arbitration. Although Alemayehu had not raised the issue, the district court on its own requested briefing on the question of consideration. The district court found that the application "contain[ed] only unilateral promises made by [Alemayehu]" and did not require anything in exchange from DAI. Accordingly, the district court concluded there was no consideration and, therefore, the parties had not agreed to arbitrate. DAI appealed.

On appeal, DAI advanced two primary arguments. First, the issue of whether the agreement to arbitrate was supported by adequate consideration should have been decided by the arbitrator. Second, the arbitration agreement was supported by adequate consideration and, therefore, the agreement is enforceable.

The appellate court first addressed the question of whether the district court or the arbitrator should decide the consideration question. Under the FAA, the general rule is that threshold questions of arbitrability are for the court to decide. Although the parties can agree to arbitrate certain arbitrability questions, the parties may not delegate to an arbitrator "the fundamental question of whether they formed the agreement to arbitrate in the first place." Thus, the question of contract formation, as distinct from questions regarding the enforceability or scope of an arbitration agreement, must be resolved by the district court. The court noted that this result is consistent with basic contract law principles. An agreement that was not properly formed is not just "unenforceable"; it "is not a contract at all" and, therefore, may not be the basis for compelling arbitration.

Analyzing both Connecticut and Colorado law, the court concluded that consideration is "a necessary element of contract formation" and, therefore, whether a promise was supported by adequate consideration must be decided by the court.

The court then turned to the question of whether the agreement to arbitrate was supported by consideration. The court found that the district court's conclusion that DAI did not make a legally enforceable promise to consider Alemayehu's application because the application did not include any language obligating DAI to consider the application, provide applicants with additional information, or respond to every party who submits an application was incorrect. The court concluded that under both Colorado and Connecticut law, consideration may consist of either performance or a return promise. The court then went on to examine the circumstances regarding DAI's review of Alemayehu's application, finding that this review constituted bargained-for performance. The court further found that, in reviewing the application, DAI provided Alemayehu with a "benefit" in exchange for his promises, one of which was his agreement to arbitrate any disputes arising out of the application process.

The court also addressed Alemayehu's slightly different argument that DAI provided something that was somehow materially different from what Alemayehu bargained for and, therefore, there was no contract. The court rejected this argument, finding that DAI provided the "exact performance" that Alemayehu sought (*i.e.*, to consider his application to own a Subway franchise).

Although the court vacated the district court's decision, it remanded the matter to the district court to consider Alemayehu's other arguments that had not been previously been addressed.

CHOICE OF FORUM

CK Franchising, Inc. v. SAS Services, Inc., Bus. Franchise Guide (CCH) ¶ 16,459, 398 F. Supp. 3d 163 (E.D. Ky. 2019)

The U.S. District Court for the Eastern District of Kentucky found that CK Franchising, Inc. (CKFI), a national franchisor of inhome, nonmedical care services, was entitled to a declaration that the forum selection component of the alternative dispute resolution (ADR) provision in its franchise agreement was valid and enforceable.

Defendant SAS Services, Inc. (SAS) began operating a CKFI franchise in Kentucky in 2007. Before entering the franchise agreement, the owners of SAS, Mary Perkins (Perkins) and Sarah Short (Short), reviewed the contract and accompanying Offering Circular and consulted with an attorney about the documents and prospective business. Short and Perkins are both educated and have experience in the home-care industry.

The 2007 franchise agreement mandated certain ADR procedures that would occur "in Dayton, Ohio or if [CKFI] has moved its principal place of business, in the city where [CKFI]'s principal place of business is located."

The agreement had a ten-year term and was subject to an optional renewal in 2017. In April 2017, Short and Perkins received a letter regarding renewing the franchise, which enclosed the new franchise agreement and directed SAS (if renewing) to return the executed new agreement to CKFI. The 2017 franchise renewal agreement (the Agreement) contained forum selection clauses within the ADR section that closely resembled the 2007 language. The Agreement provided that "mediation must take place in the city where CKFI's principal place of business is then located." SAS did not discuss the 2017 Agreement with an attorney. Nor did it seek to negotiate any provisions with CKFI.

In December 2017, after SAS entered the Agreement, CKFI announced that it was relocating its corporate headquarters from Dayton, Ohio, to Irvine, California. Thereafter, SAS initiated the ADR process to address an issue regarding an encroaching CKFI franchise, and CKFI sought to enforce the forum selection clause. The parties were unable to agree on the ADR location, and CKFI sought a declaratory judgment that the ADR forum selection clause was valid and enforceable.

First, the court determined that the Federal Arbitration Act (FAA) governed the Agreement's ADR provisions, despite arguments by SAS that the Kentucky Uniform Arbitration Act controlled. The court explained that, absent an ADR provision's clear intent otherwise, "the FAA generally preempts inconsistent state laws and governs all aspects of arbitrations concerning transaction[s] involving commerce."

In the parties' 2007 franchise agreement, the "Governing Law" provision expressly provided that Ohio law governed all parts of the contract *except* the ADR portion. In the 2017 version, however, the "Governing Law" provision made no exception for the ADR clause. Nevertheless, the court found that the 2017 Agreement's general "Governing Law" section—which applied Ohio law to the Agreement as a whole—was insufficient to establish that the parties unambiguously intended to displace the FAA as applied to the ADR provisions. The court indicated that state law would only preempt the FAA in situations where the contract specifically provides that state law, *rather than* the FAA, applies to an arbitration clause.

SAS also argued that, even if the FAA applied, the forum selection clause was both procedurally and substantive unconscionable. The court first examined SAS's procedural unconscionability argument. In finding that the provision was not procedurally unconscionable, the court looked at several relevant factors, including "the bargaining power of the parties, the conspicuousness and comprehensibility of the contract language, the oppressiveness of the terms, and the presence or absence of a meaningful choice." The court found that SAS was a sophisticated entity rather than an unwitting consumer. Further, the court noted that SAS had unlimited opportunity to consult with legal counsel prior to signing the Agreement. The court was also persuaded by the fact that the Agreement's ADR provision was not buried within the document. In addition, the court found the provision to be clear, direct, and without legalese.

SAS argued that the ADR provision contradicted language within the Franchise Disclosure Document (FDD) accompanying the franchise renewal contract. The court rejected this contention, pointing out that the FDD began by emphasizing the importance of reviewing the actual franchise agreement carefully, ideally with counsel. Despite one risk factor in the FDD stating that disputes would be resolved only in Ohio, the court found that in several other places, the FDD accurately alerted potential franchisees to the precise ADR requirements. Thus, the court found that nothing in the Agreement itself or in the contract review process (including SAS's receipt of the FDD) supported a finding of procedural unconscionability.

The court also held that the ADR forum requirement was not substantively unconscionable, explaining that Kentucky law directs that a forum selection clause be enforced as *prima facie* valid unless its opponent presents evidence of "countervailing circumstances that would render the clause unreasonable." In assessing reasonableness, the court considered: "the inconvenience created by holding the trial in the specified forum; the disparity of bargaining power between the two parties; and whether the state in which the incident occurred has a minimal interest in the lawsuit."

The court found that a balancing of the preceding factors weighed in favor of CKFI. First, the court explained that SAS's concerns regarding the ability to effectively present witness proof to a mediator/arbitrator in California were unfounded because the FAA confers upon arbitrators the ability to compel witness attendance. Furthermore, the JAMS Arbitration Rules allow parties to depose and examine witnesses in any location and submit the deposition transcript for the arbitrator's consideration.

The court also found that SAS failed to show any likelihood that it would incur exorbitant expenses if compelled to participate in the ADR process in California. SAS asserted, without evidence, that it would incur significant costs due to travel, lodging, and childcare costs. The court was not persuaded, though, by SAS's conclusory assertions of increased costs because there was no itemization, supporting documentation, or calculations underlying SAS's assertion that ADR in California would cost a significant sum of money.

Next, the court looked at the relationships of the parties and found that their relative bargaining power was not so unequal as to warrant invalidating the clause. The court explained that the parties were sophisticated corporate entities and dealt at arms' length in executing the Agreement. Thus, the court found nothing in the record to support the notion that the parties' unequal bargaining power rendered the ADR forum clause unreasonable.

Finally, the court considered Kentucky's interest in the substance of the parties' dispute. Although the court noted that the subject matter of the underlying franchise territory controversy took place entirely in Kentucky and that Kentucky had an interest in the issue, the court concluded that the contract dispute issue ultimately was between a national franchisor and a franchisee that just happened to be located in Kentucky. As such, the court found that this factor did not outweigh the other factors, all of which favored enforcement of the ADR forum selection clause.

CONTRACT ISSUES

Howard Johnson International, Inc. v. Manomay, LLC, Bus. Franchise Guide (CCH) ¶ 16,467, 2019 WL 3214165 (D.N.J. July 17, 2019)

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

Khorchid v 7-Eleven, Inc., Bus. Franchise Guide (CCH) ¶ 16,484, 2019 WL 3812472 (D.N.J. Aug. 14, 2019)

In this case, plaintiff Bassel Khorchid (Khorchid) alleges that defendant 7-Eleven, Inc. (7-Eleven) repeatedly violated their franchise agreement, which ultimately forced Khorchid to surrender his store. Khorchid's amended complaint asserts that 7-Eleven breached the franchise agreement, breached the covenant of good faith and fair dealing under New Jersey law, and violated the

New Jersey Franchisee Protection Act (NJFPA) by attempting to constructively terminate Khorchid's franchise. Khorchid also asserts claims for unjust enrichment and unconscionability. The U.S. District Court for the District of New Jersey granted in part and denied in part 7-Eleven's motion to dismiss Khorchid's claims and granted 7-Eleven's motion to stay the claims that were arbitrable in accordance with the terms of the franchise agreement.

Khorchid alleged two separate breaches of the franchise agreement. First, that 7-Eleven failed to provide necessary maintenance after Khorchid's store was damaged by Hurricane Sandy. Second, that 7-Eleven failed to treat Khorchid as an independent contractor as required by the franchise agreement, because it ordered merchandise that Khorchid did not authorize and forced Khorchid to writeoff unsold merchandise at a loss. Assuming all factual allegations Khorchid asserted as true, the court denied 7-Eleven's motion with respect to the breach of contract claim, finding that Khorchid had pled sufficient facts to set forth a cause of action. Relying on the same reasoning, the court denied 7-Eleven's motion to dismiss the breach of the covenant of good faith and fair dealing claim.

Khorchid's third count alleged that 7-Eleven breached the NJFPA. The parties agreed that the NJFPA applied to their franchisee-franchisor relationship. However, because Khorchid's pleading failed to identify which section(s) of the NJFPA 7-Eleven had allegedly violated, the court granted 7-Eleven's motion to dismiss this claim.

Khorchid's fourth claim alleged that 7-Eleven was unjustly enriched because Khorchid paid increased maintenance charges to 7-Eleven. To plead an unjust enrichment claim, a plaintiff must allege that the other party received a benefit from the plaintiff and that it would be inequitable for the defendant to retain the benefit. The court found that Khorchid had failed to plead the required facts and granted 7-Eleven's motion to dismiss this count. The court also granted 7-Eleven's motion to dismiss the unconscionability claim, finding that there is no such affirmative cause of action.

The court next addressed 7-Eleven's argument that Khorchid's claim that 7-Eleven did not make every effort to obtain the lowest cost products and service from its suppliers to maximize profits should be submitted to arbitration. The court agreed, finding that these claims were arbitrable and stayed them pending the completion of arbitration. Finally, having determined that there was overlap between the arbitrable and non-arbitrable claims, and that the resolution of the arbitrable claims may facilitate the "progression" of the non-arbitrable claims, the court exercised is discretion to administratively terminate the action without prejudice pending the completion of the arbitration.

***Tim Hortons USA, Inc. v. Tims Milner LLC*, Bus. Franchise Guide (CCH) ¶ 16,442, 2019 WL 2515006 (S.D. Fla. June 17, 2019)**

In this case, the U.S. District Court for the Southern District of Florida granted plaintiff and cross-defendant Tim Hortons USA, Inc.'s (Tim

Hortons) motion for a preliminary injunction and denied defendants and counter-plaintiffs' (Tims Milner) cross-motion for injunctive relief.

Tim Hortons is the franchisor of Tim Hortons restaurants. Tims Milner is a collection of business entities, as well as their owners and guarantors. Tim Hortons and Tims Milner entered into franchise agreements and lease agreements pursuant to which Tims Milner was granted the right to operate seven Tim Hortons restaurants in Michigan. Pursuant to the lease agreements, Tims Milner was required to pay rent calculated as a percentage of monthly gross sales, as well as other charges, including taxes, utilities, and common area maintenance (CAM) charges. Tims Milner claims that the rent provision of the leases was amended by a verbal agreement, which, according to Tims Milner, required them to only pay rent based on a flat percentage of gross sales and not the other charges.

Throughout the course of the parties' relationship, Tims Milner was concerned about the accuracy of Tim Hortons' accounting and billing procedures. Allegedly due in part to this, Tims Milner attempted to sell their franchise locations. However, the franchise agreements gave Tim Hortons the right to approve any sale before it could be finalized. Tim Hortons conditioned its approval of the sale upon Tims Milner's payment of all past due amounts, including the disputed rent. Tims Milner did not pay the disputed rent, and the prospective purchaser chose not move forward with the sale.

The parties' relationship deteriorated, and Tim Hortons ultimately terminated the franchise and lease agreements. Tim Hortons filed suit, and the parties each filed a motion seeking injunctive relief. Tim Hortons sought an order prohibiting Tims Milner from using the Tim Hortons trademarks and from representing its restaurants as genuine Tim Hortons franchises. Tims Milner sought an order allowing them to continue operating the restaurants as authorized Tim Hortons' franchises, and requiring Tim Hortons to continue supplying the restaurants with approved products.

The court started by setting forth the common law test for granting injunctive relief, which requires the moving party show (1) a substantial likelihood of success on the merits of the case; (2) that irreparable injury will be suffered unless the injunction is issued; (3) that the threatened injury to the party seeking the order outweighs the damage the proposed injunction may cause the other party; and (4) if ordered, that the injunction would not be adverse to the public interest. The court found in favor of Tim Hortons on all four of these requirements. Most notably, the court stated that when a franchisor seeks a preliminary injunction against a former franchisee on a claim of trademark infringement, the franchisor must demonstrate that it properly terminated the contract, thus resulting in the unauthorized use of the trademarks by the franchisee.

Although it was disputed whether the monthly rental amount owed had been amended by the alleged oral agreement, Tims Milner argued that Tim Hortons had not established that the termination was proper because the past due rent was disputed, although Tims Milner did not contest that the additional rent in dispute was in excess of $225,000. With respect to Tims Milner's argument that the lease agreements had been verbally amended, the court held that Florida law prohibits evidence of prior agreements being used to vary the unambiguous language of a valid contract. Therefore, the court found in favor of Tim Hortons and granted its motion for a preliminary injunction, prohibiting Tims Milner from continuing to operate the restaurants and using the Tim Hortons' marks. The court denied Tims Milner's motion because it failed to show a likelihood of success on the merits of its claim that Tim Hortons breached the franchise agreements by terminating Tims Milner without good cause.

DAMAGES

***Auto Driveaway Franchise System, LLC v. Corbett*, Bus. Franchise Guide (CCH) ¶ 16,453, 928 F.3d 670 (7th Cir. 2019)**

In this case, the Seventh Circuit affirmed in part a district court's preliminary injunction against a former franchisee of Auto Driveaway Franchise System, LLC (Auto Driveaway). The injunction prevented the franchisee from operating a competitive business anywhere Auto Driveaway operates for a period of two years pursuant to the terms of a noncompetition provision in the franchise agreement. Although the court affirmed the injunction's limits on competition, the court remanded the case to the district court to consider imposing a larger security bond to protect the franchisee's interest if he were to ultimately prevail in the litigation.

Auto Driveaway is a franchisor of commercial vehicle transportation services. Jeff Corbett (Corbett) was one of its franchisees. Through his company, Auto Driveaway Richmond, LLC (AD Richmond), Corbett operated Auto Driveaway franchises in Richmond, Nashville, and Cleveland. The businesses were governed by separate, but substantively identical, franchise agreements. Each agreement contained a non-compete clause and a nondisclosure clause, and each agreement expired in 2016. The expiration dates came and went, but both parties continued dealing as though the contracts were still in place.

In late 2017, Auto Driveaway learned that Corbett was developing an app to compete against the app that Auto Driveaway had hired Corbett to build. Auto Driveaway suspected Corbett was using Auto Driveaway's proprietary work product to assist in developing his own app. In addition, Corbett was set to launch his own app through a new company, InnovAuto, that also provided auto transportation services in direct competition with Auto Driveaway. Auto Driveaway filed a lawsuit in the U.S. District Court for the Northern District of Illinois seeking to stop Corbett and InnovAuto from selling or using the app. One month later, Auto Driveaway formally terminated its relationship with Corbett and AD Richmond.

Several months after filing its complaint, Auto Driveaway discovered that Corbett had another competitive auto transport business, Tactical Fleet.

Although Tactical Fleet was not named in the original complaint, Auto Driveaway asked the district court to enjoin Corbett from operating that company too. After a brief hearing, the district court granted Auto Driveaway's motion for injunctive relief based on evidence that Corbett was harming consumer goodwill and taking Auto Driveaway's customers through his competing businesses. The district's court order prohibited Corbett from engaging in any conduct that might violate the non-compete clause in the franchise agreements and required Auto Driveaway to post a $10,000 bond as security for the injunction.

On appeal, the Seventh Circuit began by resolving procedural challenges to the claims. On the merits, the court noted that Auto Driveaway could not have been expected to know facts (specifically regarding Tactical Fleet) that Corbett was deliberately keeping from it.

Next, the court found that the district court failed to comply with Federal Rule of Civil Procedure 65(d), which requires that every order granting an injunction must (1) state the reasons why it was issued; (2) state its terms specifically; and (3) describe in reasonable detail the act or acts restrained or required. The court interpreted Rule 65(d) as requiring that an injunction be embodied in a stand-alone separate document, which must contain enough information to render its scope clear. Here, the lower court issued a single order styled as a "Preliminary Injunction Order." Because it was not a stand-alone separate document that spelled out within its four corners exactly what the enjoined parties must or must not do, the court found it did not comply with Rule 65(d).

Despite this error, the court decided it still had proper appellate jurisdiction. The court stated it could review injunctions that contain enough content to permit effective enforcement and have the practical effect of an injunction. In fact, as the court noted, to decide otherwise would defeat the purpose of Rule 65(d), and appellate review, because Rule 65(d) is intended to protect the party against which an injunction is issued by requiring clear notice as to what the party must do or not do. Citing a recent Supreme Court decision, the court held that "[w]here a vague injunction does not comply with Rule 65(d), the aggrieved party has a particularly strong need for appellate review. It would be odd to hold that there can be no appeal in such a circumstance." The court found that the practical effect of the injunction was that it prevented Corbett from operating his business and required Auto Driveway to secure the order with a bond. The court stated this was "ample" for purposes of appellate jurisdiction and did not remand the case on this issue.

The court then turned to the question of whether the district court abused its discretion when it entered the preliminary injunction. The court stated that the district court found that Auto Driveaway was likely to succeed on the merits on several key points, including the enforceability of the restrictive covenants in the agreement, the existence of an implied-in-fact contract, and the breach of that contract. The lower court also found that harm to consumer goodwill and loss of customer relationships are irreparable harms. The Seventh Circuit took no issue with these findings; however, the court found that the district court failed to satisfy two requirements to justify an injunction.

First, the lower court did not explain why a remedy at law, such as an award of damages, was inadequate. Second, the lower court imposed the modest amount of $10,000 for the security bond. When setting the amount of security, the Seventh Circuit has instructed district courts to "err on the high side." The court found that $10,000 was too low given the sweeping nature of the injunction. The court noted that, because the injunction was broad both in geographic scope and its prohibitions against Corbett and AD Richmond, the security bond likely needed to be much higher. The Court remanded the issue of the security bond to the district court.

***Choice Hotels International, Inc. v. A Royal Touch Hospitality, LLC*, Bus. Franchise Guide (CCH) ¶ 16,490, 2019 WL 4017247 (W.D. Va. Aug. 26, 2019)**

In this case, the U.S. District Court for the Western District of Virginia granted Choice Hotels International, Inc.'s (Choice Hotels) motion for summary judgment on its claims that defendants continued using Choice Hotels' trademarks after the parties' franchise agreement was terminated. The court also granted Choice Hotels' motion for summary judgment on its claims that A Royal Touch Hospitality, LLC (VA), a related non-franchisee, used Choice Western's trademarks without permission.

Choice Hotels, the owner of a family of trademarks that it uses in connection with its lodging franchise business, entered into a franchise agreement with defendant A Royal Touch Hospitality, LLC (NC), Ujas Patel, and Ketki Patel, for the operation of a QUALITY INN®, a Choice Hotels hotel in Virginia. One week after executing the franchise agreement, Ketki Patel created a new limited liability company in Virginia, A Royal Touch Hospitality, LLC (VA), and identified the franchise location as its registered office, even though this new company was not a party to the franchise agreement or the subsequently executed reinstatement agreement.

Choice Hotels terminated the franchise agreement. Shortly thereafter, and unbeknownst to Choice Western, A Royal Touch (NC) was administratively dissolved. Choice Hotel subsequently entered into a reinstatement agreement with the Patels and what it thought was A Royal Touch (NC).

Choice Hotels ultimately terminated the reinstatement agreement when defendants defaulted on their payment obligations. Choice Hotels then filed suit asserting claims for trademark infringement and unfair competition under the Lanham Act and common law, claiming that the defendants continued using Choice Hotel's trademarks without authorization after the reinstatement agreement was terminated.

Choice Hotels moved for summary judgment, requesting (1) a permanent injunction prohibiting defendants from continuing to use the QUALITY®

trademark; (2) damages; and (3) attorneys' fees. Although Choice Hotel's motion was unopposed, the court carefully reviewed each of Choice Hotel's claims to determine the existence of any potentially disputed issues of material fact.

To establish a claim for trademark infringement under the Lanham Act, the moving party must prove that (1) it owns a valid trademark; (2) the defendant used the mark "in commerce" and without the moving party's authorization; (3) the defendant used the mark (or an imitation of it) in connection with the sale, offering for sale, distribution or advertising of goods or services; and (4) the defendant's use of the mark is likely to confuse customers. The court concluded that Choice Hotels had presented evidence in support of each of these elements and, therefore, granted summary judgment on the federal trademark infringement claim. The court also found that Choice Hotels was entitled to judgment as a matter of law on its Lanham Act unfair competition claim because it and federal trademark infringement are "measured by identical standards." The court, noting that the test for trademark infringement under the common law is effectively the same as federal trademark infringement under the Lanham Act, also granted summary judgment on Choice Hotel's common law trademark infringement claim.

The court then turned to Choice Hotel's requested relief. The court granted a permanent injunction, finding that Choice Hotels suffered an irreparable injury, the remedies available at law were inadequate, the balance of hardships favored Choice Hotels, and the public interest would not be disserved by the injunction. As to the requested damages of almost $2.5 million in infringer profit damages plus over $200,000 in actual damages (trebled to in excess of $600,000), the court requested supplemental briefing from Choice Hotels due to the large amounts being sought. Finally, with respect to the requested attorneys' fees, the court found that because the defendants admitted Choice Hotels' material allegations during discovery, litigated the case in an unreasonable manner, and essentially abandoned their defense, that this was an exceptional case justifying an award of attorneys' fees and directed Choice Hotels to submit a lodestar petition.

***H Guys LLC v. Halal Guys Franchise, Inc.* Bus. Franchise Guide (CCH) ¶ 16,470, 2019 WL 3337116 (N.D. Ill. July 25, 2019)**

The U.S. District Court for the Northern District of Illinois denied plaintiff franchisee H Guys LLC's motion to enjoin the termination of its franchise agreement with The Halal Guys Franchise, Inc. (THG).

THG is in the business of selling franchises for the operation of restaurants that primarily serve chicken and gyro over rice. Plaintiff H Guys LLC (plaintiff) operated two Halal Guys restaurants in Chicago and was the first THG franchisee outside of New York. In addition to operating its two franchises, plaintiff owned the exclusive rights to operate Halal Guys restaurants in some of the "most valuable and desirable" areas in Chicago.

Shortly after opening in 2016 and 2017, THG became concerned about improperly handled food and sanitation issues at plaintiff's restaurants. In

April 2018, THG's then Director of Franchise Operations sent an email to several of THG's executives detailing problems at plaintiff's restaurants with food handling, cleanliness, food safety, and the temperature of food storage devices. Also in 2018, plaintiff's restaurants failed two inspections by the Chicago Department of Public Health.

In March 2019, THG's new Director of Franchise Operations sent an email to plaintiff expressing concerns about the sanitary conditions and safety of plaintiff's restaurants. A detailed inspection report accompanied this email.

In May 2019, THG conducted an audit of plaintiff's restaurants, which identified a number of problems, including improper cooler and food warmer temperatures, inadequate and undated labels on food containers, expired food, and overall cleanliness issues. THG sent a letter and pictures to plaintiff regarding the conditions. The letter also cited the contract provisions that THG alleged plaintiff had violated and advised that the conditions must be remedied or the franchise agreements would be terminated.

In July 2019, THG again audited plaintiff's restaurants. The problems had not been remedied and in some instances had worsened. Photographs confirmed the conditions. On July 19, 2019, THG conducted a follow-up inspection, which revealed that the conditions identified in the prior audits had not been remedied. As a result, on July 19, THG sent a notice of termination to plaintiff based on repeated material defaults of the of the franchise agreement.

The day after the notice of termination was served, one of plaintiff's executives (Chong) and THG's former Director of Franchise Operation (Wilson) had a text conversation in which Wilson allegedly told Chong that THG's CEO and Chief Development Officer disliked plaintiff's principals, that the THG auditors should "go hard" on plaintiff's restaurants to push plaintiff out of the system, and that THG treated plaintiff worse than other franchisees.

Several days after the notice of termination was served, THG stopped shipment of food and supplies to plaintiff.

Plaintiff filed suit against THG alleging claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and violations of the Illinois Franchise Disclosure Act (the Act) by terminating the franchise agreement without good cause. Plaintiff asserted that the termination was "pretextual" because THG wanted to re-sell the rights to plaintiff's territory and was further motivated by personal "animus." THG argued the termination was based on repeated violations of the franchise agreement (principally food safety issues), as well plaintiff's operation of a Tea Ninja stand in one of the restaurants.

The court first reviewed the two-step analysis applicable in the Seventh Circuit to determine whether a temporary restraining order (or preliminary injunction) is warranted: the moving party musty first make a threshold showing that (1) it will suffer irreparable harm absent the requested injunctive relief; (2) there is no adequate remedy at law; and (3) there is a reasonable likelihood of success on the merits ("more than a negligible chance of succeeding on the merits"). If the moving party makes this showing, the court then considers (4) the irreparable harm the moving party will suffer if the injunction is "wrongfully denied," versus the harm to the nonmoving party if it is "wrongfully granted"; and (5) whether the grant or denial of the requested relief would have any effect on third parties. The court balances the potential harms on a sliding scale against the moving party's likelihood of success. Thus, the greater its likelihood of success, the less strong a showing the moving party must make that the balance of harms is in its favor.

The court started its analysis with the likelihood of success on the merits factor, addressing each of plaintiff's claims at length.

With respect to plaintiff's claim under the Act, the court concluded that it was unlikely plaintiff could prove the termination was without good cause because there were multiple detailed inspection reports and photographs confirming serious "violations of sanitation and food safety standards." The court found that this was "strong" evidence the termination was with good cause because it was likely the franchisee has repeatedly fail[ed] to comply with the lawful provisions of the franchise or other agreement." The court rejected plaintiff's argument discounting some of the food safety issues raised in the May 2019 letter because no evidence addressed the food safety issues raised in the July 2019 letter. The court was similarly unimpressed with plaintiff's claim that the termination was pretextual, noting that the texts were not made under oath and were made by a former employee. Finally, the court found that it was possible THG did not "like" plaintiff, but still had good cause to terminate the parties' agreement.

The court also found that it was unlikely plaintiff would prevail on its breach of the implied covenant of good faith and fair dealing claims. The court concluded that, although plaintiff may have a reasonable expectation, THG would not unilaterally terminate the franchise agreement; that would only be the case if plaintiffs were in compliance with the agreements. The court rejected plaintiff's theory that the termination was defective because the notice of termination was sent to an address different than the one set forth in the franchise agreement, noting that the notice was sent to the address plaintiff had requested for correspondence and a courtesy copy had been sent to plaintiff's counsel. The court similarly dismissed plaintiff's claim that the notice of termination would not be effective for five days and was an invitation to discuss the letter, which was "subverted" when THG cut off plaintiff's access to food and supplies before the five days had run, finding that the termination was immediate and the language relied on by plaintiff "did not walk back the entirety of the preceding six pages" of the termination notice.

The court next addressed whether plaintiff has an adequate remedy at law such that injunctive relief was not necessary. Although the court noted that the termination may "inflict serious or even terminal harm" to plaintiff's restaurant operations, the court found that this did not mean there was no adequate remedy at law. The court concluded that plaintiff's investment in the restaurants (claimed to be approximately $1.4 million), the value of the business and the profit from the business were "measurable with a reasonable degree of precision" and, therefore, this factor tilted in THG's favor.

The court then turned to the irreparable harm factor. Plaintiff's argument focused on its financial harm and the harm to the continued operation of its restaurants. THG focused on potential harm to its customers and its goodwill, citing alleged negative customer experiences. Plaintiff responded by citing to positive customers reviews from an online platform. Although the court considered the customer issues, it gave them little weight because they were unsworn statements from parties whose identity the court could not confirm. In balancing the harm, the court concluded that this factor leaned slightly in plaintiff's favor.

Finally, the court considered the effect on nonparties and the public interest factor. The court found that the public has an interest in parties "abiding by their contracts" and in franchisors and franchisees "treating each other fairly within the bounds of the agreement." However, the court concluded that it did not have enough evidence to "referee" the dispute whether THG terminated plaintiff out of spite as plaintiff claimed or because of health and safety concerns regarding plaintiff's restaurants as TDG claimed. Notwithstanding, the court found that the public interest balance tilted slightly in THG's favor to the approximate same degree the balance of harms tilted in plaintiff's favor.

Accordingly, the court denied plaintiff's motion for a temporary restraining order and directed, among other things, plaintiff to advise if it wanted to pursue a preliminary injunction and, if so, whether any expedited discovery was necessary.

***JTH Tax, Inc. v Sawhney*, Bus. Franchise Guide (CCH) ¶ 16,460, 2019 WL 3051760 (S.D.N.Y. July 11, 2019)**

In this case, the U.S. District Court for the Southern District of New York granted in part plaintiffs' motion for injunctive relief, holding that defendant Pawanmeet Sawhney's (Sawhney) continued use of plaintiffs' trademarks and service marks after the termination of their franchise agreement violated the agreement.

Plaintiffs Liberty Tax Service and Siempretax+ LLC (collectively, Liberty) are franchisors of an income tax preparation service with locations throughout the United States. Sawhney entered into a franchise agreement with Liberty to operate a tax preparation service in New York City. The agreement included a noncompetition clause pursuant to which Sawhney agreed that upon termination of the agreement, Sawhney would not compete with Liberty within twenty-five miles of Sawhney's former franchise location and would immediately stop using any marks, associated fixtures, and assets unique to Liberty. The agreement also included a Virginia choice of law provision.

After Sawhney's franchise agreement was terminated, Liberty alleged that Sawhney failed to comply with its post-termination obligations, namely that it would refrain from using Liberty's marks, not employ Liberty's former employees after the termination of the agreement, and stop operating as a Liberty branded franchise. As a result, Liberty filed suit and sought a temporary restraining order and preliminary injunction. At the time Liberty's motion was heard, Sawhney had not responded or otherwise appeared in the action.

The court started by conducting a choice of law analysis, ultimately determining that because Liberty's principal place of business was in Virginia and because New York courts will generally enforce a choice of law clause so long as the chosen law "bears a reasonable relationship" to the parties or to the transaction, Virginia law governed the breach of contract analysis.

In considering the merits of Liberty's motion, the counter analyzed each of the traditional preliminary injunction factors: (1) whether the moving party is likely to succeed on the merits; (2) whether the moving party is likely to suffer irreparable harm in the absence of preliminary relief; (3) whether the balance of equities tips in the moving party's favor; and (4) whether an injunction is in the public interest.

The court concluded that Liberty had made the requisite showing entitling it to injunctive relief. The court agreed that Sawhney's breach of his post-termination obligations, including the continued use of Liberty's marks, caused irreparable harm to Liberty's goodwill, reputation, and relationships with customers. However, the court found that Liberty had failed to demonstrate a likelihood of irreparable harm if Sawhney were to continue offering tax preparation services without using any of the marks or identifying features of Liberty's business, so long as Sawhney operated its business from a different location. Therefore, the court concluded there was no risk based upon the speculation that Sawhney may violate the franchisee agreement's noncompetition provisions by operating from another business location without using the Liberty's marks or branding. Accordingly, the court granted the injunctive relief, in part, and ordered Sawhney to, among other things, return all confidential information to Liberty and cease holding himself out to the public as a current or former franchisee of Liberty.

***Little Caesar Enterprises, Inc. v. Miramar Quick Service Restaurant Corp.*, Bus. Franchise Guide (CCH) ¶ 16,491, 2019 WL 3997161 (E.D. Mich. Aug. 23, 2019)**

The U.S. District Court for the Eastern District of Michigan denied a motion to stay enforcement of preliminary injunctions pending appeal to the Sixth Circuit. Plaintiffs Little Caesar Enterprises, Inc. and LC Trademarks, Inc. (collectively, Little Caesar) sought and obtained injunctions enjoining former Little Caesar franchisees from continuing to operate their Little Caesar restaurants, infringing on the Little Caesar trademarks, and violating various post-termination provisions of the parties' franchise agreement.

As an initial matter, the court reviewed the relevant legal standards. First, a preliminary injunction order is subject to an abuse-of-discretion standard and will only be overturned if "the court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." And, second, the factors to consider in addressing a motion to stay a preliminary injunction are essentially the same factors considered when deciding whether to grant the requested injunctive relief: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay."

The court first addressed the likelihood of success on appeal factor, holding that defendants failed to advance any new legal or factual arguments, but rather repeated the arguments they previously made in opposition to the Little Caesar's motion for injunctive relief, including that the termination of the franchise agreement was retaliatory and "motivated by national-origin discrimination." The court found that the evidence in support these allegations was "not strong," and defendants failed to rebut "compelling evidence" that they breached the franchise agreement, warranting the termination.

With respect to the irreparable harm factor, the court found that although defendants "may experience financial hardship" as a result of being prohibited from operating their Little Caesar restaurants pending a trial, the harm was not irreparable because it was "readily compensable by monetary damages."

The court next addressed the harm to other factors, noting that it previously found that Little Caesar would suffer irreparable harm if injunctive relief was not granted. The court held that, in the Sixth Circuit, the likelihood of confusion or potential reputational damages flowing from trademark infringement constitutes irreparable injury. The court also noted that, because defendants were no longer making payments to Little Caesar and were failing to comply with other unspecified post-termination requirements, staying the preliminary injunction would harm Little Caesar.

Finally, the court found that staying the preliminary injunction would not benefit the public interest because the public interest is served in protecting a trademark owner's "property interests in marks" and preventing the customer confusion that could occur where a former franchisee continues to hold itself out as an authorized franchisee.

***Tim Hortons USA, Inc. v. Tims Milner LLC*, Bus. Franchise Guide (CCH) ¶ 16,442, 2019 WL 2515006 (S.D. Fla. June 17, 2019)**

This case is discussed under the topic heading "Breach of Contract."

JURISDICTION

***Best Western International, Inc. v. Twin City Lodging, LLC*, Bus. Franchise Guide (CCH) ¶ 16,452, 2019 WL 2881270 (D. Ariz. July 3, 2019)**
In this case, the U.S. District Court for the District of Arizona denied defendants' motion to dismiss Best Western International Inc.'s (Best Western) complaint asserting multiple causes of action related to the termination of a Best Western membership agreement (Membership Agreement).

Best Western is a non-profit corporation that serves its members, who own and operate Best Western branded hotels. Defendants Twin City Lodging, LLC and Percy Pooniwala entered into a Membership Agreement to operate a Best Western Hotel in Minnesota. The following year, defendant Santha Kondatha signed an application agreeing to be bound by the Membership Agreement in exchange for becoming a voting member of the Best Western organization. Best Western terminated the Membership Agreement in 2018 due to defendants' alleged failure to comply with unspecified regulatory documents.

Best Western subsequently filed suit against defendants, alleging that defendants continued to use Best Western signage, Internet advertising, and other branded items after the termination. Defendants responded by filing a motion to dismiss on the grounds that Best Western's complaint failed to state plausible claims (Federal Rule of Civil Procedure 12(b)(6)) and the court lacked personal jurisdiction (Federal Rule of Civil Procedure 12(b)(2)).

Defendants argued that the complaint failed to state a viable claim against defendant Kondatha because there was no allegation that he received "any consideration for agreeing to the Membership Agreement" and, therefore, Best Western's breach of contract claim against Kondatha was not plausible. In response, Best Western argued the complaint alleged that Kondatha received consideration as a result of becoming a voting member after signing the Membership Agreement.

The court began its analysis by noting that, under Arizona law, "every contract in writing imports consideration" and that consideration need not be specifically pleaded when a claim is based upon an "instrument which as a matter of law imports a consideration." Because it was undisputed that the Membership Agreement and the Kondatha's application to be bound by the Membership Agreement were contracts made in writing, the court held that consideration was imported and therefore did not need to be specifically alleged. Accordingly defendants' motion on this ground was denied.

Defendants also argued that the complaint should be dismissed because Best Western had failed to comply with disclosure requirements set forth in the Minnesota Franchise Act (the Act) when "selling the franchise" and, therefore, the Membership Agreement was unenforceable. Best Western argued that it was not a franchisor and, therefore, was not subject to the Act's disclosure requirements. The court, in analyzing the relevant facts in the light most favorable to Best Western for purposes of the motion, found that

Best Western was not a franchisor as the complaint alleged that Best Western is a nonprofit corporation and does not identify itself as a franchisor or defendants as franchisees. Further, the Membership Agreement describes Best Western as a "membership organization." Accordingly, after holding that the Act only applies to franchisors and franchisees, the court rejected defendants' argument.

The court then turned to defendants' argument that the court lacked personal jurisdiction because Best Western could not establish the defendants (1) "maintained 'continuous corporate operations'" in Arizona, and (2) "had any business in Arizona or had any purposeful actvities" in the state. Best Western argued that the Membership Agreement included provisions requiring that any disputes arising under the Membership Agreement were to be resolved in Arizona under Arizona law. The court noted that an agreed-to forum selection clause may result in a waiver of any objections to personal jurisdiction and that defendants did not contend that the forum selection clause in the Membership Agreement was invalid. For these reasons, and because it was required to view the facts in the light most favorable to Best Western, the court found that defendants had submitted to personal jurisdiction in Arizona.

LABOR AND EMPLOYMENT

Deslandes v. McDonald's USA, LLC, Bus. Franchise Guide (CCH) ¶ 16,463, 2019 WL 7480646 (N.D. Ill. July 17, 2019)

The U.S. District Court for the Northern District of Illinois granted in part and denied in part McDonald's USA, LLC and McDonald's Corporation's (collectively, McDonald's) motion for a protective order with respect to employee data and denied McDonald's motion to compel plaintiffs to produce documents withheld on the basis of attorney-client privilege.

Leinani Deslandes (Deslandes), a then employee of a McDonald's franchise in Florida, sought a higher paying position at a corporate-owned McDonald's restaurant, but was unable to secure the position because her current employer refused to "release her" based on the non-solicitation provision in the franchise agreement.

The lawsuit challenged the non-solicitation provision in the McDonald's franchise agreement that prohibited the franchisee-owned restaurant and the corporate-owned restaurant Deslandes was seeking to work at from hiring each other's employees. Deslandes brought an action on behalf of herself and a purported nationwide class.

Deslandes sought discovery of (1) employee data from McDonald's Lawson database (Lawson Data), (2) documents from McDonald's custodians across the country and all divisions of the company (Custodian Data), and (3) employment data from five payroll companies that McDonald's franchisees used (Third Party Subpoena Data). McDonald's challenged the scope of these discovery requests.

With respect to the Lawson data, Deslandes sought to discover nationwide data regarding millions of employees. The court held that the discovery should be limited, and the extent of the Lawson Data to be released was to be determined after consultations with experts regarding a geographically diverse sampling. With respect to the Custodian Data, the court found that, although Deslandes was entitled to this data, the scope of what was to be produced must be narrowed, and the parties' experts were in a better position than the court to determine the appropriate sampling methodology. McDonald's motion to quash the Third Party Subpoena was denied. The court noted that parties generally do not have standing to quash a subpoena to a non-party and found that McDonald's had not sufficiently established a potential interference with business relationships with respect to this data sufficient to except itself from the general rule.

The court denied McDonald's motion to compel the production of two documents that Deslandes withheld on the basis of the attorney-client privilege. The documents in issue were questionnaire responses that Deslandes submitted online in response to an advertisement from a law firm. After submitting her responses to the questionnaires, Deslandes met with the law firm. The questionnaire responses were reviewed by attorneys and support staff at the law firm, as well as the marketing company that helped the law firm create the online questionnaires. McDonald's argued that because a third party (the marketing company) saw the questionnaire responses, the attorney-client privilege was not applicable. Although statements made to lawyers in the presence of third parties are generally not privileged, there is an exception where a third party is present to assist the attorney in rendering legal services. The court found that other courts in the district have generally found that the privilege was applicable if the person completing the questionnaire was seeking legal device. The court agreed and, therefore, denied McDonald's motion to compel.

***Franze v. Bimbo Foods Bakeries Distribution, LLC*, Bus. Franchise Guide (CCH) ¶ 16,451, 2019 WL 2866168 (S.D.N.Y. July 1, 2019)**

In this case, the U.S. District Court for the Southern District of New York granted Bimbo Goods Bakeries Distribution, LLC's (BGBD) motion for summary judgment after determining that plaintiffs, former delivery drivers for BGBD, were properly classified as independent contractors and not employees under the Fair Labor Standards Act (FLSA) and New York Labor Law.

Nicholas Franze and George Schrufer (Plaintiffs) worked for BGBD, delivering baked goods. Both Plaintiffs signed distribution agreements, which stated that they were independent contractors. During his nearly twenty-one years as a driver, Schrufer was deemed an "independent operator." In his capacity as an independent operator, Schrufer bought distribution rights from independent operators and sold distribution rights to others, which resulted in changes to the scope of his territory. Franze, also designated as an "independent operator," purchased his distribution rights from another independent operator. Neither Plaintiff received any benefits from BGBD or W2s or 1099s, and both paid for various items and expenses associated with their distributorships. Plaintiffs also had no fixed hours, except for a set time when they could access BGBD's depot to purchase and pick up products, had no control over product quantities or prices with institutional customers, and received no mandatory training or policies regarding how to meet their contractual obligations.

The court first analyzed whether Plaintiffs were properly characterized as "employees" or "independent contractors" under FLSA. In undertaking this analysis, the court considered various factors derived from case law, including (1) the degree of control BGBD exerted over Plaintiffs; (2) Plaintiffs' opportunity for profit or loss; (3) the degree of skill and independent initiative required to perform the work; (4) the performance or the duration of the working relationship with regards to which party controlled the term and permanency of the relationship; and (5) the extent to which the work was an integral part of BGBD's business. The court found in BGBD's favor with respect to each of these factors.

With respect to the first factor, the court found that BGBD did not control the Plaintiffs "closely and directly" enough to render the relationship an employee-employer relationship because Plaintiffs controlled the size and scope of their territories and the distribution agreements did not provide BGBD with control over the manner or means by which Plaintiffs were to achieve their distribution targets. As to the fifth factor, the court found that, although Plaintiffs' work as delivery drivers of baked goods was important, it was only a small piece of the BGBD's business, which was more about product manufacturing than the delivery of the product.

The court did not conduct a separate analysis under New York Labor Law to determine whether Plaintiffs were independent contractors or employees, holding that the relevant factors are similar to the factors under FLSA.

Accordingly, the court granted the BGBD's motion for summary judgment and dismissed Plaintiffs' claims.

***Patel v. 7-Eleven, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,477, 2019 WL 3554438 (Aug. 5, 2019)**

The U.S. District Court for the Northern District of Illinois found that a 7-Eleven franchisee in Illinois was unable to state a valid claim against 7-Eleven for violations of the Illinois Wage Payment and Collection Act (IWPCA) for allegedly taking improper deductions from his "wages."

Plaintiff Nira Patel owned and operated a franchised 7-Eleven store through a corporation, Shanti 11, of which he was the sole owner. Despite the franchise agreement between 7-Eleven and Shanti 11, Patel argued that he was nothing more than a glorified manager for 7-Eleven and should thus be afforded the protections of the IWCPA.

Patel argued that 7-Eleven controlled his working hours, store workers' uniforms, the types of payment that his store could accept from customers, the payroll system, the issuance of paychecks to store employees, and even the temperature of the store. In addition, Patel argued that he was required to deposit daily revenues into a bank account controlled by 7-Eleven, from which 7-Eleven would in turn deduct amounts owed to it for franchise fees, advertising fees, store maintenance, and payroll taxes for the store's employees, before allowing Patel to withdraw his share of the store's profits.

Patel alleged that the profits he received from the store account through his withdrawals constituted wages paid from 7-Eleven. According to Patel, the proof of this was the fact that 7-Eleven controlled the account.

In response, 7-Eleven asserted that Patel failed to adequately plead a claim under the IWCPA because he did not assert the existence of an agreement by 7-Eleven to pay wages to Patel. 7-Eleven made two arguments in this regard. First, there was no agreement to pay Patel if his store was not generating any revenue and, second, the franchise agreement was between 7-Eleven and Patel's corporation, Shanti 11, but the IWCPA only provides remedies to individuals.

The court recognized that to plead a claim under the IWCPA, a plaintiff must allege that compensation is due to an employee from an employer under an employment contract or agreement. The IWCPA does not create any new rights or obligations; it merely provides a means for enforcing an existing employment contract or agreement, the court explained.

In analyzing whether 7-Eleven had agreed to pay Patel wages, the court cited the Seventh Circuit's decision in *Enger v. Chicago Carriage Cab Corp.*, 812 F.3d 565 (7th Cir. 2016). In *Enger*, plaintiff taxi drivers argued that because the taxi company collected fares from passengers through its fare processing system, and then used those fares to in turn pay drivers, the drivers were in fact being paid wages as employees of the taxi company. The Seventh Circuit disagreed, concluding that the obligation to pay the drivers arose in the first instance from the passengers and not the taxi company. In other words, if no passengers hired the taxi drivers' services, there would be no payments to the taxi company and, consequently, no payments from the taxi company to the drivers.

In this case, the court determined that the same reasoning should apply. If no customers made purchases from Patel's 7-Eleven store, there would be nothing for Patel to withdraw from the store's account. In fact, Patel's franchise agreement with 7-Eleven contained a default weekly draw amount of $0.00, which the court found to be supportive of its reliance on *Enger*.

Patel further argued that 7–Eleven controlled his entire payroll system, that employees of the store entered hours on 7-Eleven's system, and that 7-Eleven calculated payroll and issued checks directly to the store's employees. But Patel failed to allege a connection between this system and his own compensation, so the court again cited *Enger* in concluding that these payments do not constitute an agreement by 7-Eleven to pay wages to Patel.

The court acknowledged that it was not aware of any law creating a hard-and-fast rule that prohibits a franchisee corporation's sole owner from qualifying as an employee of the franchisor under the IWPCA. It therefore invited Patel to amend his complaint to plead either that his corporation is a sham, and should thus be disregarded, or that he has an employment agreement with 7-Eleven that is distinct from Shanti 11's franchise agreement with 7-Eleven.

Co-author Matthew Gruenberg's law firm DLA Piper LLP represented 7-Eleven in this case.

STATE DISCLOSURE/REGISTRATION LAWS

***Best Western International Inc. v. Twin City Lodging, LLC*, Bus. Franchise Guide (CCH) ¶ 16,478, 2019 WL 3430174 (D. Ariz. July 30, 2019)**

The U.S. District Court for the District of Arizona granted in part and denied in part a motion to dismiss counterclaims by a franchisee alleging violations of the Minnesota Franchise Act (MFA), breach of the covenant of good faith and fair dealing, and breach of contract.

Defendant Twin City Lodging, LLC (Twin City) entered into a membership agreement with plaintiff Best Western Hotel International Inc. (Best Western) pursuant to which it acquired a license to operate a hotel in Minnesota under the Best Western brand. Best Western subsequently terminated the agreement and filed a complaint in the U.S. District Court for the District of Arizona against Twin City, asserting various claims, including breach of contract and trademark infringement. Twin City filed counterclaims against Best Western, alleging violations of the Minnesota Franchise Act (MFA), breach of the covenant of good faith and fair dealing, and breach of contract. In response, Best Western filed a motion to dismiss Twin City's counterclaims.

The court granted in part and denied in part Best Western's motion. Twin City alleged that Best Western violated the MFA by (1) failing to register the franchise under the MFA; (2) terminating the membership agreement without providing Twin City with their reasons for termination ninety days in advance and without good cause, and (3) for discriminating against Twin City's franchise. Based on the facts before it, the court denied the motion as to the failure to register and termination claims, noting that the complaint alleged facts plausibly establishing each of the elements of a franchise under the MFA and, further, that Best Western had failed to register and had indisputably terminated the relationship with less than the statutorily required advance written notice. The court granted the motion to dismiss for violating the MFA as to the discrimination claim, noting that the complaint was devoid of any allegations that the franchisor arbitrarily treated the franchisee differently from other franchisees. Instead, the complaint only noted, in conclusory fashion, that plaintiff was treated differently from other franchisees. With respect to Twin City's claims for breach of the covenant of good faith and fair dealing and breach of contract, the court denied Best Western's motion, finding Twin City had alleged facts sufficient to state a claim under these causes of action.

***Khorchid v 7-Eleven, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,484, 2019 WL 3812472 (D.N.J. Aug. 14, 2019)**
This case is discussed under the topic heading "Breach of Contract."

***Rex Distribution Co. v. Anheuser-Busch, LLC*, Bus. Franchise Guide (CCH) ¶ 16,435, 271 So. 3d 445 (Miss. 2019)**
This case is discussed under the topic heading "Transfer."

TERMINATION AND NONRENEWAL

***H Guys LLC v. Halal Guys Franchise, Inc.* Bus. Franchise Guide (CCH) ¶ 16,470, 2019 WL 3337116 (N.D. Ill. July 25, 2019)**
This case is discussed under the topic heading "Remedies, Damages, and Injunctive Relief."

***Howard Johnson International, Inc. v. Manomay, LLC*, Bus. Franchise Guide (CCH) ¶ 16,467, 2019 WL 3214165 (D.N.J. July 17, 2019)**
The U.S. District Court for the District of New Jersey granted plaintiff Howard Johnson International, Inc's (HJII) motion for summary judgment on its claims against the defendant franchisee and the franchisee's principals.

HJII entered into a franchise agreement with defendant Manomay, LLC (Manomay), granting Manomay the right to operate a Howard Johnson facility in Florida. At the same time, the individual defendants (collectively, the Patels) executed a guaranty of Manomay's obligations under the franchise agreement. Pursuant to the parties' agreement, Manomay was required to make various recurring payments (Recurring Fees), and HJII had the right to terminate the agreement in the event Manomay failed to perform its contractual obligations, as well as seek liquidated damages, attorneys' fees, and costs in such event. Section 18.4 of the agreement also provided that either party had the right terminate, so long as the party seeking to terminate the agreement was current on its financial obligations as of the date of the notice of termination and the effective date of the termination.

In late 2014, Manomay sent a letter of termination to HJII pursuant to Section 18.4 of the agreement. However, at the time of this letter, Manomay was in arrears on its Recurring Fees. HJII advised Manomay of this undisputed fact, that the failure to pay Recurring Fees was a breach of the parties' agreement, and that the agreement could be terminated in the event Manomay did not pay the amounts owed.

Over the next eighteen months, Manomay repeatedly failed to pay the amounts owed, and HJII sent numerous letters regarding the defaults, warning that the franchise agreement could be terminated in the event that the outstanding Recurring Fees were not paid. HJII ultimately terminated the agreement and demanded that Manomay perform its post-termination obligations, cease using the HJII trademarks, and pay the Recurring Fees owed through the date of termination and liquidated damages.

Manomay failed to make the demanded payments and continued to use exterior signage bearing HJII's registered trademarks. As a result, HJII filed suit asserting claims for breach of the franchise agreement and guaranty, as well as for violations of the Lanham Act. HJII sought to recover the unpaid Recurring Fees, liquidated damages, interest, attorneys' fees, and costs.

The court first addressed defendants' argument that Manomay had terminated the franchise agreement pursuant to the letter it sent in late 2014 purporting to exercise it termination rights under Section 18.4 of the agreement. The court found that Section 18.4 was unambiguous and that Manomay's attempted termination of the agreement failed because it was not current on its Recurring Fees as of the date that Manomay sent the letter of termination. Accordingly, the court held that the franchise agreement remained in effect until it was terminated by HJII.

The court also found that Manomay's financial obligations under the franchise agreement were clear. And, because it was undisputed that Manomay had failed to make the payments required by the franchise agreement, the court held there was not triable issues as to Manomay's breach of the agreement and, therefore, granted summary judgment on various of HJII's claims.

The court then turned to the question of whether HJII was entitled to summary judgment on its claims for Recurring Fees, liquidated damages, attorneys' fees, and costs, plus interest as applicable. HJII's claim sought to recover almost $90,000 in liquidated damages and approximately $41,000 in interest. The court found that the formula for calculating liquidated damages set forth in the franchise agreement reasonably forecast the harm HJII would suffer as a result of the early termination of the agreement and, therefore, awarded HJII the amount requested. The court also awarded the requested prejudgment interest, which was calculated at the contractually agreed-upon rate of 1.5% per month. The court further awarded HJII almost $400,000 in Recurring Fees after deducting a small amount of "de-identification" charges and other amounts that were incurred after the franchise agreement was terminated and, therefore, were not recoverable. Finally, the court also awarded HJII attorneys' fees and costs in the amount of $10,681.

The court next addressed HJII's claim for breach of the guaranty, finding that the guaranty was unambiguous and that it was undisputed that the Patels had not paid the amounts owed by its terms. Accordingly, the court also granted summary judgment on this claim.

TORTIOUS INTERFERENCE

***Security Data Supply, LLC v. Nortek Security & Control LLC*, Bus. Franchise Guide (CCH) ¶ 16,465 2019 WL 3305628 (N.D. Tex. July 22, 2019)**

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

TRANSFERS

***Rex Distribution Co. v. Anheuser-Busch, LLC*, Bus. Franchise Guide (CCH) ¶ 16,435, 271 So. 3d 445 (Miss. 2019)**

On interlocutory appeal, the Supreme Court of Mississippi found that a manufacturer violated the Mississippi Beer Industry Fair Dealing Act (BIFDA) by "interfering" with a transfer of a wholesaler's business when it exercised its contractual right to redirect the sale and that the Act rendered the underlying contractual provision void.

Rex Distributing Company (Rex) was the exclusive, long-standing wholesale distributor for Anheuser-Busch, LLC (Anheuser-Busch) along a stretch of the Mississippi Gulf Coast. Rex and Anheuser-Busch were parties to a distribution agreement that granted Anheuser-Busch (1) a right of first refusal "at the price and on the terms and conditions applicable" if Rex were to sell or transfer its business, and (2) the right to assign that right to a third party (Match and Redirect).

Rex attempted to sell its business to a another distributor. Under that sales contract, the "price would be determined by each individual distribution contract Rex successfully transferred." Two days before this sale was set to close, Anheuser-Busch stepped in and elected to exercise its right to Match and Redirect. Anheuser-Busch then assigned its right to Mitchell Distributing Company, Inc. (Mitchell), which Rex contended was a "reward" for Mitchell and meant to "punish" Rex because, if any manufacturers with which Rex had a distribution agreement refused to allow a transfer of Rex's distribution rights, Rex would receive a lower sale price.

Anheuser-Busch had recently tried to convince its distributors to refuse to sell beer for its competitor (Yuengling). Mitchell was the only distributor that agreed to not distribute products for Yuengling. Rex, on the other hand, had a distribution contract with Yuengling. Therefore, upon learning that Mitchell was purchasing Rex's business, Yuengling refused to transfer its distribution rights to Mitchell, which cost Rex $3.1 million.

The lower court dismissed Rex's claims against Anheuser-Busch and Mitchell for common-law tortious interference and civil conspiracy. It also dismissed Rex's claim against Anheuser-Busch for violating the BIFDA and for breach of contract. The Mississippi Supreme Court granted Rex's petition for interlocutory appeal from the lower court's dismissal of these claims.

On appeal, the court first addressed Rex's BIFDA claims. BIFDA states that a supplier "shall not interfere with, prevent or unreasonably delay the transfer of the wholesaler's business." BIFDA also states that "[a] wholesaler may not waive any of the rights granted in any provision of this chapter and the provisions of any agreement which would have such an effect shall be null and void."

Based on these provisions, Rex alleged that the Match and Redirect right was void and that Anheuser-Busch "prevented" or "interfered with" the sale of Rex's business. Anheuser-Busch argued that there was no violation of

BIFDA because, despite that fact that the sale was completed with a different party, the transfer did in fact occur. Siding with Rex, the court found that by exercising its Match and Redirect right, Anheuser-Busch "'interfered' with the proposed transfer." Given that the purpose of BIFDA is to "maintain stability and healthy competition in the . . . beer industry," the court concluded that "[a]llowing a manufacturer to choose the owners of its wholesalers in perpetuity would undermine the statutory separation of the beer industry into three tiers": manufacturers, distributors, and retailers. Therefore, the court reversed the lower court's dismissal of Rex's BIFDA claim.

Next, the court addressed Rex's breach of contract claim. Rex contended that, under the terms of his distribution agreement, Anheuser-Busch was required to ensure Rex received the same amount Rex would have received from the sale with the disapproved purchaser. Noting that it was unclear whether BIFDA voids Anheuser-Busch's obligation to pay for the transfer of rights, the court affirmed the lower court's dismissal of Rex's breach of contract claim. However, the court indicated that the same price provision only applies to *disapproved* transfers and pointed out that a separate price formula relates to the Match and Redirect provision.

The court next considered Rex's claims against Mitchell. In a line of unsuccessful arguments, Mitchell contended that it could not be liable to Rex for tortious interference because Rex did not allege that any act by Mitchell constituted interference. The court disagreed because the complaint alleged that both Mitchell and Anheuser-Busch interfered, and, while the specific acts may be attributed to Anheuser-Busch, Rex argued Mitchell was a joint tortfeasor and, therefore, liable for Anheuser-Busch's actions. After rejecting the remainder of Mitchell's arguments, the court concluded that the lower court erred in dismissing Rex's tortious interference claim against Mitchell. Last, rejecting Mitchell's arguments that there was no underlying tort, and that civil conspiracy required an overt act, the court reversed the dismissal of Rex's civil conspiracy claim against Mitchell.

***Tavarua Restaurants, Inc. v. McDonald's USA, LLC*, Bus. Franchise Guide (CCH) ¶ 16,487, 2019 WL 3858826 (S.D. Cal. Aug. 16, 2019)**

This case arises out of a dispute between Tavarua Restaurants, Inc., Scarab, Inc., and Carole Casale (collectively, Plaintiffs) and McDonald's USA, LLC (McDonald's) regarding a proposed sale of eight McDonald's franchises in San Diego. The U.S. District Court for the Southern District of California granted McDonald's motion for judgment on the pleadings as to its claim for a declaratory judgment that it validly invoked and exercised its right to purchase the restaurants for the price set forth in the purchase and sale agreement (PSA).

The proposed transaction was structured as a purchase and sale of stock in two privately held corporations that owned the McDonald's restaurants. The corporations were owned by a trust established by Robin Sedar (Sedar). Sedar selected a friend, John Cook (Cook), to be the next owner of the restaurants. Upon Sedar's death, the trustee, Carole Casale (Casale), negotiated the PSA with Cook to purchase the stock, assume ownership of the restaurants, and purchase an office and storage facility that was unrelated to the restaurants.

The franchise agreements required that Casale obtain McDonald's written consent prior to completing the purchase and sale. The agreements also provided McDonald's with a right of first refusal, which McDonald's chose to exercise. However, because McDonald's refused to purchase any assets of the corporations unrelated to the restaurant franchises (including the office and storage facility), Casale rejected McDonald's attempt to acquire the restaurants.

Plaintiffs filed suit seeking a declaratory judgment that McDonald's failed to validly exercise its right of first refusal under the franchise agreements. McDonald's counterclaimed, seeking a declaratory judgment that it validly invoked and exercised its right to purchase the restaurants for the purchase price set forth in the PSA. McDonald's argued that the language of the provision that governs its right of first refusal did not encompass and was not contingent upon the purchase, sale, or transfer of any assets unrelated to the restaurant franchises. The court agreed, holding that McDonald's validly exercised its option to purchase the restaurant franchises at the purchase price set forth in the PSA and was not required to purchase assets unrelated to the restaurants.