Franchising (& Distribution) Currents

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ANTITRUST

***Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, No. 09-3013, Bus. Franchise Guide (CCH) ¶ 14,412 (3d Cir. July 7, 2010)**

Distributor Toledo Mack Sales & Service, Inc. (TMSS) appealed a judgment against it after a jury trial with manufacturer Mack Trucks, Inc. (Mack). TMSS had claimed at trial that, among other things, Mack had conspired "to restrain trade unreasonably in violation of § 1 of the Antitrust Act ('Sherman Act')." The jury disagreed. On appeal, TMSS argued that the trial court erred in instructing the jury on the type of evidence it could consider. The U.S. Court of Appeals for the Third Circuit affirmed the judgment.

Before trial, TMSS had moved to exclude evidence that (1) TMSS's reduced sales were "caused by the fact that it was embroiled in several lawsuits," (2) TMSS's top salesperson "had been convicted of receiving stolen auto parts," and (3) TMSS's dealership was terminated "for misappropriation of trade secrets." The trial court denied the motion. Because the "proffered evidence had a tendency to demonstrate that it was probable that [TMSS's] loss of sales was caused by poor management rather than Mack Trucks' alleged violation of § 1 of the Sherman Act," the trial court did not abuse its "broad discretion" in evidentiary rulings. However, because the trial court had not expressly addressed whether, under Federal Rule of Evidence 403, the evidence's probative value outweighed its prejudicial effect, the Third Circuit "elected to examine the record and perform the required balancing" itself and concluded that the "evidence had great probative value that was essential to [Mack's] defense and was not substantially outweighed by the danger of unfair prejudice."

The court similarly rejected a challenge to the trial court's exclusion of depositions taken in another lawsuit because they "were irrelevant and inadmissible under [Federal Rule of Evidence] 403." It also affirmed the trial court's decision to admit letters that other dealers sent to Mack because they were not hearsay as they were not offered for the truth of the matter asserted.

TMSS also challenged a jury instruction that TMSS claimed instructed "the jury to limit its consideration of the circumstantial evidence of [Mack's] conspiracy." The Third Circuit noted that "[u]nless a trial judge misstates the law, the judge's rulings on points for charge may be reversed only if the judge committed an abuse of discretion." The Third Circuit found no error in the trial court's instructions.

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ARBITRATION

***Binder v. Med. Shoppe Int'l*, No. 09-14046, 2010 U.S. Dist. LEXIS 72614, Bus. Franchise Guide (CCH) ¶ 14,432 (E.D. Mich. July 20, 2010)**

The U.S. District Court for the Eastern District of Michigan granted defendant franchisor Medicine Shoppe's motion to compel arbitration on the condition that the pending arbitration in Missouri be transferred to Michigan. Plaintiffs executed a license agreement to operate a Medicine Shoppe store in Michigan. The agreement contained an arbitration clause requiring arbitration in Missouri. Plaintiffs executed a guaranty agreement to be personally bound by the license agreement and operated their franchise for many years until defendant initiated arbitration proceedings in Missouri. Plaintiffs "filed an answering statement and asked to transfer [the] arbitration" to Michigan, but the request was denied. After the parties participated in a preliminary scheduling conference in the arbitration, plaintiffs sued Medicine Shoppe in Michigan state court on breach of contract and other related grounds, and Medicine Shoppe removed to federal court. Medicine Shoppe offered to relocate the pending arbitration to Michigan in exchange for plaintiffs' dismissal of the lawsuit, but plaintiffs refused. Medicine Shoppe then moved to compel arbitration of plaintiffs' claims in Missouri.

Before addressing the merits, the court decided two preliminary issues.

First, it found that plaintiffs did not waive their right to oppose arbitration even though they participated in arbitration proceedings before filing suit. Noting that cases provide "no bright line that delineates when waiver occurs," the court held that because the arbitration proceeding was still in its early stages, plaintiffs did not waive their right to object. Moreover, Medicine Shoppe did "not allege any significant

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prejudice from [p]laintiffs' attempt to terminate arbitration."

Second, the court found that plaintiffs were personally bound to arbitrate pursuant to the guaranty agreement even though they did not personally sign one of the agreements at issue. The court determined that a nonsignatory can be bound by an agreement to arbitrate under several theories, including incorporation by reference, assumption, and estoppel. Here, the full title of the guaranty (Owner's Guaranty and Assumption of Licensee's Obligations) and wording of the agreement ("personally . . . bound by, and personally liable for breach of, each and every provision [in the license agreement]") left no doubt as to the guaranty's purpose and effect of assuming obligations under the license agreement. In addition, because plaintiffs derived a direct benefit from the contract, "they [were] estopped from disclaiming the obligation to arbitrate."

On the merits, the court held that the license agreement was voidable, "but only to the extent that it require[d] arbitration to take place in . . . Missouri." Plaintiffs argued that they were fraudulently induced into believing that Medicine Shoppe would not try to arbitrate disputes. Medicine Shoppe gave plaintiffs a franchise disclosure document, "which state[d] that Michigan law prohibit[ed] franchise agreements from requiring out-of-state arbitration, and that any provision to that effect [was] void." "Plaintiffs [argued] that they relied on the [disclosure document] as . . . the parties' agreement to forego arbitration if the [l]icense [a]greement included a requirement to arbitrate in [Missouri]."

The court determined that the disclosure document "misrepresented [Medicine Shoppe]'s future conduct by implying that it would not resort to arbitration. At the very least, the inconsistency between the [disclosure document] and the license agreement created an ambiguity" to be construed against Medicine Shoppe as the agreement's drafter. The court further determined that plaintiffs relied on the disclosure document, "but only to the extent that they would not have to arbitrate outside of Michigan." The court found evidence of limited reliance in that, when Medicine Shoppe initiated arbitration, "plaintiffs did not object to the procedure itself, but simply asked to transfer venue to Michigan. When their request was denied, [p]laintiffs filed suit in state court, again without objecting to arbitration." Finding that the venue provision was void, the court severed the venue requirement and compelled arbitration consistent with the rest of the agreement because "[r]emoving the venue provision did not affect the rest of the license agreement, or alter the parties' rights and obligations."

***Med. Shoppe Int'l, Inc. v. Turner Invs.*, No. 09-2179, 2010 U.S. App. LEXIS 14960, Bus. Franchise Guide (CCH) ¶ 14,433 (8th Cir. July 21, 2010)**

The U.S. Court of Appeals for the Eighth Circuit affirmed the district court's confirmation of an arbitration award. In 1994, the appellant franchisees entered into a twenty-year license agreement with the Medicine Shoppe franchisor. In 2007, the franchisees closed their franchise, which Medicine Shoppe alleged breached the franchise agreement. Medicine Shoppe then filed an arbitration demand with the American Arbitration Association, seeking past due license fees and future continuing license fees for the remainder of the agreement's twenty-year term, as well as attorney fees and costs. The arbitrator granted Medicine Shoppe all of its requested damages, and the district court confirmed the award. The franchisees appealed, arguing that the district court erred because the arbitrator manifestly disregarded Missouri law, which requires that future fees be ascertained with reasonable certainty.

The Eighth Circuit affirmed confirmation of the award, following U.S. Supreme Court precedent in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), which held that an arbitration award may be vacated only for the reasons enumerated in the Federal Arbitration Act (FAA). The enumerated grounds for vacating an arbitrator's order include corruption, fraud, impartiality, or an abuse of power. The court found that the franchisees' claim was not among the specifically enumerated grounds for vacating an arbitration award under the FAA and that the district court therefore did not err in confirming the award.

***Next Step Med. Co., Inc. v. Johnson & Johnson Int'l*, No. 09-2077, Bus. Franchise Guide (CCH) ¶ 14,457 (1st Cir. Aug. 30, 2010)**

Next Step Medical Co., Inc. (Next Step) entered into a contract with Johnson & Johnson International (JJI) under which JJI made Next Step its exclusive distributor in Puerto Rico. After JJI sent Next Step a letter terminating its exclusive distributorship, Next Step and its president, Jorge Iván Dávila-Nieves, sued JJI seeking, among other things, a preliminary injunction. "Dávila also sought damages in tort for the pain and suffering."

The federal district court "referred the case to a magistrate to make a report and recommendation on the requested preliminary injunction and to resolve 'all non-dispositive motions.'" After a hearing, the magistrate "recommended that a preliminary injunction be denied." The magistrate also went on to grant a JJI motion to compel the parties to arbitrate all of Next Step's claims, including the preliminary injunction request and Dávila's tort claim. On that same day, citing the magistrate's order compelling arbitration, the district court dismissed all of Next Step's claims with prejudice. The federal district court denied Next Step's motion for reconsideration, and Next Step appealed, contesting (1) the district court's failure to consider the merits of the magistrate's recommended denial of preliminary injunctive relief; and (2) the dismissal of Dávila's tort claim with prejudice, arguing that it was not arbitrable.

The U.S. Court of Appeals for the First Circuit held that the district court did not err in failing to consider the merits of the magistrate's recommended denial of injunctive relief. The court found that the district court was correct in concluding that the magistrate's order of arbitration effectively superseded its previously recommended denial of injunctive relief. Because the arbitrator was empowered "'to take whatever interim measures [it] deem[ed] necessary,'" including

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injunctive relief, the First Circuit reasoned that the district court was correct in holding that it was up to the arbitrator to determine preliminary relief. The court further held that the district court did not err because (1) the parties' conduct did not suggest to the court that arbitration would be abandoned upon an order of preliminary relief, and (2) interim emergency preliminary injunctive relief was inappropriate because a year had passed since the initial complaint and Next Step had made no effort to seek injunctive relief from the arbitrator. The First Circuit also held that the federal district court did not err in dismissing the Dávila tort claim with prejudice in light of the magistrate's order compelling arbitration of all claims. It noted that a federal "district court can, in its discretion, choose to dismiss [a] lawsuit, if all claims asserted in the case are found arbitrable."

The First Circuit also held that the Dávila tort claim was arbitrable. Although the arbitration provision only referenced JJI and Next Step, the court observed that a separate provision entitled "Disputes and Arbitration" specified that Dávila was a party to the distributorship agreement. The court also noted that the arbitration clause covered "any dispute, controversy or claim . . . arising out of or relating in any way to the business relationship between JJI and Next Step." Thus, "Dávila's tort claim—a claim arising out of and relating to the breakdown in the business relationships between JJI and Next Step—was covered by" the broad language of the arbitration provision. Finally, the fact that Dávila signed the distributorship agreement not only as executive of Next Step but also in his personal capacity persuaded the court that Dávila should be bound personally.

***Paul Green Sch. of Rock Music Franchising, LLC v. Smith*, Case No. 09-2718, Bus. Franchise Guide (CCH) ¶ 14,424 (3d Cir. Aug. 2, 2010)**

This dispute arose out of a music franchise that defendant purchased from the School of Rock. The franchise agreement contained an arbitration clause providing that any disputes relating to the agreement would be settled by binding arbitration in Pennsylvania and that the agreement would be interpreted under Pennsylvania law. The franchisor submitted a demand for arbitration in Pennsylvania, claiming that the franchisee did not properly report royalties. The franchisee moved to compel arbitration in California, claiming that the forum selection and choice of law provisions in the agreement were unenforceable and unconscionable. The California court denied the franchisee's motion, holding that the provisions were enforceable contingent upon the franchisee's ability to pursue its California Franchise Investment Law rights and remedies in the Pennsylvania forum. Following the arbitration's conclusion in Pennsylvania in favor of the franchisor, the U.S. District Court for the Eastern District of Pennsylvania confirmed the arbitrator's award.

On appeal, the U.S. Court of Appeals for the Third Circuit found that the arbitrator did not manifestly disregard the law in dismissing the franchisee's counterclaims under the California Franchise Investment Law and enforcing the post-termination noncompete covenant contained in the parties' agreement. Rather, the court held that the arbitrator was aware of those claims and the arguments on both sides and found no evidence that the arbitrator consciously chose to ignore the merits of those claims. The Third Circuit held that the district court correctly determined that the arbitrator's holding was not a willful flouting of known governing law.

BANKRUPTCY

***Doctor's Assocs., Inc. v. Desai*, No. 10-575, 2010 U.S. Dist. LEXIS 86454, Bus. Franchise Guide (CCH) ¶ 14,451 (D.N.J. Aug. 23, 2010)**

The franchisor of Subway sandwich shops entered into arbitration proceedings with one of its franchisees for failure to pay royalties. The arbitrator found in favor of the franchisor, terminated the franchise agreements, and awarded the franchisor damages. The franchisor applied in the U.S. District Court for the District of New Jersey to confirm the arbitration award and sought relief for franchisee's continued use of the franchisor's trademarks. The franchisee filed for bankruptcy and, after the automatic stay was lifted, moved to refer the pending matters before the district court to the bankruptcy court. The district court granted the motion. The franchisor then moved the district court to withdraw the bankruptcy referral under 28 U.S.C. § 175(d). The court denied the franchisor's motion.

Under 28 U.S.C. § 175(d), both permissive and mandatory withdrawal of a case referred to bankruptcy court are allowed. The court noted that under the statute, mandatory withdrawal is appropriate only when a proceeding involves both Title 11 bankruptcy law and other federal law that impacts interstate commerce. Following the lead of other courts in the U.S. Court of Appeals for the Third Circuit, the court adopted a narrow reading of the statute and held that withdrawal is mandated only when "the matter involves the 'substantial and material' consideration of federal law outside the Bankruptcy Code rather than the routine application of such law." (quoting *Wile v. Household Bank, F.S.B.*, No. 04-32, 2004 U.S. Dist. LEXIS 9141, at *6–7 (E.D. Pa. 2004)). The court held that because the franchisor was simply asking the court to confirm an arbitration award and grant it relief under the Lanham Act based on the validity of that award, the bankruptcy court would only need to engage in a routine application of federal statutes, and withdrawal was thus not mandated.

The court next evaluated whether permissive withdrawal of the referral was appropriate. The court explained that this evaluation involved two steps. First, it must be determined "whether each claim is or is not core to the bankruptcy proceedings under 28 U.S.C. § 157(b)-(c)." If the claims are noncore, the court then considers "the goals of promoting uniformity in bankruptcy administration, reducing forum shopping and confusion, fostering the economical use of the debtors' and creditors' resources, and expediting the bankruptcy process." (quoting *In re Pruitt*, 910 F.2d 1160, 1168 (3rd Cir. 1990)). The court assumed, for the sake of judicial efficiency, that the claims were noncore to the bankruptcy and

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went on to determine that withdrawing the referral would not help meet the goals of uniformity, economy, or efficiency. The district court held that allowing the withdrawal would actually promote forum shopping and noted that "securing a more friendly forum . . . is not a valid reason for a district court to withdraw reference of a proceeding properly pending before the bankruptcy court." (quoting *Travelers Cas. & Sur. Co. v. Skinner Engine Co.*, 325 B.R. 372, 378–79 (W.D. Pa. 2005)). Having found that neither permissive nor mandatory withdrawal of the referral to bankruptcy court was warranted, the district court denied the franchisor's motion to withdraw.

***In re Rescuecom Corp. v. Mohamed E. Khafaga*, Case No. 06-43018-608, Bus. Franchise Guide (CCH) ¶ 14,422 (Bankr. E.D.N.Y. July 9, 2010)**
A nationwide computer services franchisor executed two franchise agreements with a franchisee for the purchase and operation of two Rescuecom franchises. These "[a]greements prohibited the [franchisee] from competing with [the franchisor] and from diverting business away . . . during [both] the term of the [a]greements and for a period of time after . . . termination of the [a]greements." The franchisor commenced an adversary proceeding seeking a declaration that the debt owed to it by the franchisee was nondischargeable. The franchisor later amended its claims alleging different operative facts and conduct not set forth in the original complaint. The franchisee sought to dismiss the amended complaint, contending that those new claims were time-barred.

The court found that the franchisor's amended complaint was time-barred because it was filed more than sixty days after the date set for the meeting of creditors. The franchisor argued "that the [c]ourt should equitably toll the statute of limitations." However, the court determined that the franchisor made no showing of fraudulent concealment on the franchisee's part that would justify equitable tolling. The court ruled that the amended complaint did not relate back to the date of the original claim because the franchisee did not receive notice from the original allegations that the claims asserted in the amended complaint might be made. Further, as a result of the factual discrepancies between the two pleadings, there was no sufficient factual nexus to permit relation back.

***In re Shreyas Hospitality, LLC, Debtor*, Case No. 09-70523, Bus. Franchise Guide (CCH) ¶ 14,427 (Bankr. C.D. Ill. July 15, 2010)**
At issue was a motion to allow an administrative expense claim filed by Super 8 Worldwide, Inc., the franchisor of Super 8 guest lodging facilities. The court permitted Super 8's administrative expense claim for a debtor franchisee's use of the Super 8 franchise system, service marks, trademarks, and national reservation system during the pendency of the franchisee's Chapter 11 bankruptcy case. In bankruptcy, "an administrative expense claim may be allowed for the actual and necessary costs and expenses of preserving an estate. . . . Generally, an allowed administrative expense must arise from a transaction with the debtor-in-possession [that] conferred some benefit on the estate."

Here, it was undisputed that during the pendency of the case and until Super 8 obtained stay relief, the debtor franchisee continued to operate the hotel as part of Super 8's franchise system and retained all benefits of the parties' franchise agreement. Super 8 asserted that its trademarks were used by the debtor franchisee in, inter alia, signage, phone books, and Internet advertising, as well as by its participation in Super 8's national reservation system.

As a result, the court ruled that "[t]he amounts due pursuant to the terms of the [f]ranchise [a]greement for the period of time" in which the debtor-franchisee continued to operate the hotel in the Super 8 franchise system under Chapter 11 was "the proper measure of the amount [to] be allowed as [Super 8]'s administrative expense claim." The court further ruled that Super 8 "need not prove that the [debtor franchisee] actually profited from use of the [f]ranchise [a]greement."

BREACH OF CONTRACT

***Stucchi USA, Inc. v. Hyquip, Inc.*, Case No. 09-cv-732, Bus. Franchise Guide (CCH) ¶ 14,437 (E.D. Wis. July 28, 2010)**
A hydraulic equipment distributor failed to allege adequately that an Italian manufacturer and its American subsidiary breached the parties' alleged contract when, from all indications, there was no binding contract between the parties. The distributor argued that the parties entered into an oral distributor agreement. The distributor brought suit for breach of contract against the Italian manufacturer and its American subsidiary after the subsidiary informed the distributor that it would not be using it as an intermediary and instead would be selling its product directly to one of the distributor's customers.

The only written document produced by the distributor was a Notice of Open Account that the subsidiary gave the distributor after formation of the alleged oral agreement. "The contracts[,] [it appeared][,] would have come in the form of purchase orders contemplated by the 'Notice of Open Account.'" On review of a motion to dismiss the breach of contract claim, the U.S. District Court for the Eastern District of Wisconsin found that even assuming the alleged distributor agreement was a binding and enforceable contract, the breach of contract claim would still fail because the agreement was not exclusive. Thus, even if the distributor's customer ordered products directly from the subsidiary, as alleged, the subsidiary was still free to fill that order, and doing so would not violate any contract with the distributor. The court added that there was no community of interest, and therefore the distributor was not entitled to the protections given to a dealer under the Wisconsin Fair Dealership Law.

CHOICE OF FORUM

***Big O Tires, LLC v. Felix Bros., Inc.*, Case No. 10-cv-00362, Bus. Franchise Guide (CCH) ¶ 14,420 (D. Colo. July 12, 2010)**
This matter was before the court on plaintiff's motion for preliminary injunction and defendants' motion to dismiss, to transfer venue, or, in the alternative, to stay the proceedings.

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Plaintiff, a Colorado retail tire franchisor, entered into three franchise agreements with a California franchisee in which the parties consented to venue in Denver. After the franchisee gave notice that it did not intend to renew one of its three franchises, the franchisor sued in the U.S. District Court for the District of Colorado to enforce the noncompete covenants contained in the franchisee's two remaining agreements. The franchisor sought to prohibit the franchisee from continuing to operate a competing tire store out of the location of the nonrenewed franchise. The franchisee argued that venue was improper because there was no allegation that any defendant resided or could be found in the district.

On review, the court held that the clause in question was "one of 'geographic' rather than 'sovereign' distinction." As such, the clause acted as a prospective contractual waiver of the franchisee's right to contest venue and thereby precluded it from arguing that venue in Colorado was improper. Accordingly, the court found that Colorado was "a permissible venue to which [the franchisee] consented."

The court further ruled that the franchisor would not be irreparably harmed if its request for a preliminary injunction enforcing the terms of a noncompete agreement was denied. The court found no evidence that the franchisee (1) violated the noncompete covenants in its two current franchise agreements by diverting customers to its third, competing store; and (2) was using its access to marketing strategy and promotional information to gain a competitive advantage. The court concluded that the franchisor failed to show any evidence of harm it was actually suffering but instead only proffered evidence of harm that it could theoretically suffer.

***Dunlap Enters. v. Roly Poly Franchise Sys., L.L.C.*, 2010 WL 2880179, Bus. Franchise Guide (CCH) ¶ 14,436 (Tex. Ct. App. July 23, 2010)**

Appellant franchisees appealed the trial court's decision dismissing their complaints without prejudice based on forum selection clauses in their franchise agreements with Roly Poly Franchise Systems, L.L.C. requiring suit in Georgia.

Under Texas law, forum selection clauses are enforceable unless the party opposing enforcement can show that "(1) enforcement would be unreasonable and unjust, (2) the clause is invalid for such reasons as fraud or overreaching, (3) enforcement would contravene a strong public policy of [the] state, or (4) the selected forum would be seriously inconvenient for trial." When the reason asserted is inconvenience and inconvenience was "foreseeable at the time of contracting, the challenger must show that trial in the contractual forum [would] be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court."

The franchisees argued that the clause was unreasonable and unjust because they could not secure personal jurisdiction over a co-defendant (a servicing company for Roly Poly) in Georgia. The franchisees' argument was based on the fact that Roly Poly sued the co-defendant in Georgia earlier, but the suit was dismissed for lack of personal jurisdiction over the co-defendant. The franchisees claimed that the prior decision was res judicata and would also prevent them from suing the co-defendant in Georgia. The court rejected the franchisees' claims as speculative and noted that res judicata is only binding when the exact same parties are subject to the previous judgment. Here, the franchisees were not parties to the case involving Roly Poly and the co-defendant. In addition, the subject of Roly Poly's dispute with the co-defendant was a Master Development Agreement that did not contain a Georgia forum selection clause. Finally, the court found that even if the franchisees were unable to secure personal jurisdiction over the codefendant in Georgia, they failed to establish that this would cause a hardship sufficient to find the forum selection clause to be unreasonable or unjust. Even though suing Roly Poly and the co-defendant in different courts could result in the "'empty-chair'" defense, where each defendant points to the other for liability, the hardship was not so grave as to amount to a denial of the franchisees' day in court.

***Pierce Mfg. Inc. v. First In Inc.*, Case No. 10-C-393, Bus. Franchise Guide (CCH) ¶ 14,429 (E.D. Wis. July 19, 2010)**

This dispute arose as a result of the desire of plaintiffs, manufacturers of emergency vehicles, to terminate a relationship with a dealer of its products. When the dealer learned of the manufacturers' effort to terminate its dealership, it sued in the U.S. District Court for the District of Arizona, seeking a temporary and preliminary injunction prohibiting termination. "In response, the manufacturers moved to dismiss . . . on the grounds that the . . . dealership agreements contained arbitration clauses mandating arbitration of disputes in . . . Wisconsin." The court "found that the dispute was not arbitrable because the arbitration clause was barred by the Motor Vehicle Franchise Contract Arbitration Fairness Act."

One week after the dealer's filing of suit in Arizona, one of the manufacturers filed suit in the U.S. District Court for the Eastern District of Wisconsin, seeking to enforce the arbitration clause and compel arbitration. The Wisconsin district court found that the manufacturer was not entitled to compel arbitration in Wisconsin because the Arizona court previously determined that the dispute was not arbitrable. The court determined that dismissal was required because co-equal federal courts in different states could not entertain parallel cases. Because the parallel action was filed in Arizona first, that court was therefore the proper court to determine the propriety of its jurisdiction and venue. The Wisconsin court noted that such a rule did not reward a "race to the courthouse" because the first-filed court could always decide to transfer the case or dismiss it. The rule merely afforded the first-filed court the ability to make a ruling as to which court should ultimately hear the case.

***RM Yogurt Haw. LLC v. Red Mango Franchising Co.*, Case No. 10-00157, Bus. Franchise Guide (CCH) ¶ 14,405 (D. Haw. June 29, 2010)**

The parties entered into an Area Development Agreement (ADA), Guaranty, and Release, which granted plaintiff the right to develop and operate defendant franchisor's Red Mango stores in Hawaii. In exchange, plaintiff paid defendant $125,000. Thereafter, plaintiff began to experience various difficulties with defendant and filed suit in Hawaii

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State Court for, inter alia, breach of contract and misrepresentation. Defendant removed the matter to federal court and subsequently moved to dismiss for improper venue. Defendant claimed the action was governed by a binding forum selection clause contained in the ADA, Guaranty, and Release. Plaintiff then requested that the court transfer venue to federal court in Texas.

Upon review, the U.S. District Court for the District of Hawaii held that the ADA contained a forum selection clause requiring any disputes to be brought in the state of Red Mango's principal place of business at the time of institution of suit. Plaintiff claimed that all three exceptions contained in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12, 15 (1972), were applicable to the instant matter in that (1) the forum selection clause was included as a result of fraud or overreaching, (2) the party seeking to avoid the clause would be deprived of its day in court, and (3) enforcement of the clause would contravene strong public policy in the forum in which the suit was brought. The court found that plaintiff failed to prove any of these elements and held the ADA's forum selection clause to be valid. The court further ruled that the forum selection clause contained mandatory language specifying that venue was to lie exclusively in the judicial district in which Red Mango had its principal place of business when suit was instituted, i.e., Texas. Moreover, removal did not foreclose the removing party from claiming that venue was improper if the parties were bound by a valid and mandatory forum selection clause. Accordingly, the court concluded that transfer, rather than dismissal, was appropriate and instructed that the action be transferred.

***S.K.I. Beer Corp. v. Baltika Brewery*, Case No. 06-3501, Bus. Franchise Guide (CCH) ¶ 14,430 (2d Cir. July 20, 2010)**

Russia-based brewer Baltika Brewery designated wholesaler S.K.I. Beer Corp. as its exclusive brand agent in New York State. The brewer and wholesaler subsequently entered into an agreement for the purchase and sale of Baltika products, which provided that all disputes would be subject to binding arbitration in Russia. Thereafter, SKI brought suit in the U.S. District of the Eastern District of New York claiming that Baltika had stopped performing under the agreement. Baltika moved to dismiss, arguing that the forum selection clause in the agreement mandated dismissal. In opposition, SKI claimed that the forum selection clause contravened New York public policy interest in protecting its licensed beer wholesalers. The district court granted the motion to dismiss based on the mandatory forum selection clause.

In affirming the district court's ruling, the U.S. Court of Appeals for the Second Circuit found that even if the New York beer laws applied to the agreement, it would not bar the mandatory forum selection clause. Further, the wholesaler offered only speculation that the New York beer law would not be applied if the mandatory Russian forum selection clause was enforced and that it would not have a substantive remedy in the Russian forum. The Second Circuit found that mere speculation as to what rights the wholesaler would or would not have in the Russian forum was "not sufficient to rebut the presumption of validity of the forum selection clause."

CLASS ACTIONS

***Castaneda v. Burger King Corp.*, 264 F.R.D. 557, Bus. Franchise Guide (CCH) ¶ 14,238 (N.D. Cal. July 12, 2010)**

In this case, a putative class attempted to certify a class of all "mobility impaired patrons" against the Burger King franchisor for alleged Americans with Disabilities Act (ADA) violations at ninety-two Burger King franchises in California. The putative class members sought to require Burger King

> to adopt policies that would ensure access for customers who use wheelchairs and scooters and to bring the leased restaurants into compliance with [the ADA], Section 51 of the California Civil Code (the Unruh Civil Rights Act), and Section 54 of the California Civil Code (the California Disabled Persons Act ["CDPA"]).

They also requested "the minimum statutory damages under the Unruh Act and the CDPA."

One of the problems with certifying one large class was that there was no common Burger King store blueprint, meaning that "the physical differences among the 92 locations would predominate over the common issues." Although Burger King required its franchisees to design and construct stores in compliance with federal and state accessibility requirements, it left the design and construction specifics to the franchisees. The court noted that "[w]hether or not any store was ever out of ADA compliance would have to be determined store by store, feature by feature, before turning to the easier question of whether defendants as the franchisor/lessor, would have a duty to force the franchisees to remediate." Therefore, there were no "questions of law or fact common to the class," a class action prerequisite under Federal Rule of Civil Procedure 23(a)(2).

Another problem was that the class members sought certification under Rule 23(b)(2), which requires that defendant "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole." Here, injunctive relief would be appropriate only for those stores that were in fact in violation of the ADA. Due to the lack of a common blueprint, it was "highly unlikely" that all ninety-two stores were in violation. Even then, the specific injunctive relief to be granted would vary store by store. In addition, class certification under Rule 23(b)(2) generally requires that "the primary relief sought be declaratory or injunctive." Here, any injunctive relief would likely be subordinate in value to the monetary damages sought under the state statutes.

As a result, the court certified ten separate classes under Rule 23(b)(3) against only those ten of the ninety-two franchises "where a named plaintiff encountered alleged access barriers." A class may be certified under Rule 23(b)(3) if "questions of law or fact common to class members predominate over any questions affecting only individual members." For plaintiffs who visited the same location, common questions as to whether and how that location was in violation would predominate; it would be irrelevant whether monetary damages would predominate over injunctive relief.

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***Ilene Siemer v. Quizno's Franchise Co. LLC*, No. 07-CV-2170, Bus. Franchise Guide (CCH) ¶ 14,440 (N.D. Ill. Aug. 13, 2010)**
On August 13, 2010, the U.S. District Court for the Northern District of Illinois approved a settlement agreement between two nationwide classes of franchisees and the Quizno's Franchise Company LLC and its related entities (Quizno's). The parties reached the settlement agreement on October 27, 2009, and it was preliminarily approved by the court on November 20, 2009. The court gave final approval to the settlement agreement on August 13.

The two classes of franchisees in the settlement agreement consisted of (1) a class of franchisees that had executed franchise agreements with Quizno's prior to July 2, 2009, for the operation of a Quizno's restaurant in the United States, the District of Columbia, or Puerto Rico but had not opened restaurants prior to that date (the sold but not opened, or SNO, Class); and (2) a class of franchisees that operated Quizno's restaurants in the United States, the District of Columbia, or Puerto Rico prior to November 20, 2009 (Franchise Operator Class). The two classes were further divided into subclasses based on several factors, including, among others, the time of closing of the franchisee's Quizno's restaurant, status as current or former franchise operators, prior releases executed, and previous refunds of franchise fees.

Notice was provided to potential class members, and class members were required to submit claim forms in order to receive compensation. Class members that elected not to be bound by the settlement agreement could opt out by submitting a timely opt-out form. After considering the notice given, the papers submitted in support of and in opposition to the settlement agreement, and the objection of the sole objector, and after conducting a final fairness hearing on June 30, 2010, the court issued its August 13, 2010, order granting final approval of the settlement agreement.

In approving the settlement, the court found that the settlement agreement satisfied the elements of Federal Rule of Civil Procedure 23 in that (a) the number of class members was so numerous that joinder was impracticable, (b) there were questions of law and fact common to each settlement class that predominated over any individual questions, (c) the claims of the SNO and Franchise Operator representative plaintiffs were typical of the claims of their respective settlement classes, (d) the SNO and Franchise Operator representative plaintiffs fairly and adequately represented and protected the interests of the SNO and Franchise Operator Settlement Classes, and (e) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

The court held that the settlement "is, in all respects, fair, reasonable and adequate" to all class members "in light of the complexity, expense, possible duration of the further litigation, the discovery and investigation conducted, and the risk and difficulty of establishing liability, causation and damages." The court further found that the settlement "is the result of good faith, arm's length negotiations between experienced counsel representing the interests of the" class members and defendants.

The court's order affirmed all aspects of the settlement agreement entered into between the parties, including the class notices procedures, claim procedures, opt-out procedures, and mutual releases of the parties from all present and future claims. The court dismissed the action with prejudice and on the merits and "retain[ed] jurisdiction to adjudicate any disputes over the interpretation and/or full and effective implementation of the [settlement] [a]greement."

*Ms. Cheng and her firm represented defendant in this matter.

***Ilene Siemer v. Quizno's Franchise Co. LLC*, No. 07-CV-2170, Bus. Franchise Guide (CCH) ¶ 14,446 (N.D. Ill. Aug. 13, 2010)**
In a decision issued the same day as the court's order approving the settlement agreement in *Siemer v. Quizno's Franchise Co., LLC*, discussed above, the court also issued an opinion overruling the objection of the sole objector to the settlement agreement.

Jill and Gary Gevaart and their Wisconsin business, Globe Food Services LLC, former Quizno's franchisees, raised an objection to the settlement agreement and filed a motion to intervene in the case and a request to conduct discovery. The court granted their motion to intervene, denied their request for discovery, and overruled their objection. The Gevaarts were classified as Franchise Operator Class III, a subgroup of the Franchise Operator Class, consisting of class members who purchased and operated Quizno's restaurants but had closed them as of November 20, 2009.

The Gevaarts' primary objection to the settlement was that because they had paid their financial obligations to Quizno's when they closed their store, they would not benefit from the settlement provision that releases the Quizno's claims against franchisees for past due royalties. The court rejected this argument, observing that the Gevaarts' position ignored the additional financial benefit that the Gevaarts would receive from the release provision whereby Quizno's released its claims for future royalties against class members that, like the Gevaarts, failed to operate their Quizno's restaurant for the full fifteen-year term of the franchise agreement. In fact, "[t]he Gevaarts terminated their franchise agreement less than three years after they signed the agreement." The court further recognized that in reviewing the terms of a class settlement, it was "not called upon to determine whether the parties have struck the best possible deal." The court also noted that the Gevaarts were free to opt out of the settlement agreement, but they chose not to do so.

The court also overruled the Gevaarts' objection to the incentive awards for representative plaintiffs. The court recognized that representative plaintiffs devoted substantive time and effort to the litigation, that the settlement generated benefits for the class, and that courts have approved incentive awards in similar and much larger amounts.

Finally, the court rejected the Gevaarts' request for discovery into "whether other Franchise Operator Class III members incurred additional, personal debt, like the Gevaarts, to stay current on [their obligations to Quizno's]." The court recognized that although the Gevaarts are likely not alone in having incurred personal debt to make

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payments to Quizno's under their franchise agreement, out of the 8,468 franchisees to whom notice was sent, only one (the Gevaarts) filed an objection to the proposed settlement. The court stated that it "has little inclination to permit discovery when as in this case, objectors represent only a small percentage of the class." Moreover, the court held, the fact that the Gevaarts or other Class III members incurred substantial personal debt to pay Quizno's

> does not satisfy the court that the settlement agreement accords disparate treatment to them. Whether a class member suffered loss as a result of Quizno's purportedly unfair practices does not turn on whether he or she had substantial personal wealth on the one hand, or was required to incur substantial personal debt on the other.

The court also noted that at the final fairness hearing, Quizno's called an expert witness who testified that the value of the Quizno's release of its future royalty claims against the Gevaarts was at least $174,000, and "[t]he Gevaarts offered nothing to rebut that testimony and did not even appear at the fairness hearing to cross-examine the witness."

*Ms. Cheng and her firm represented defendant in this matter.

CONTRACT ISSUES

***Ramada Worldwide, Inc. v. Hotel of Grayling, Inc.*, No. 08-3845, 2010 U.S. Dist. LEXIS 65186, Bus. Franchise Guide (CCH) ¶ 14,409 (D.N.J. June 30, 2010)**

In this case, the U.S. District Court for the District of New Jersey granted the Ramada franchisor's motion for summary judgment on its complaint and defendant franchisees' counterclaims. Ramada sued defendants, primarily for past due amounts owed. Defendants counterclaimed, alleging that they were not obligated to pay because of Ramada's breach of contract and fraud. Defendants argued that Ramada materially breached by failing to (1) provide signage, (2) install a computer and software management system, (3) place the hotel on third-party reservation system websites, and (4) provide training. Ramada moved for summary judgment, including on defendants' counterclaims.

The court excluded certain evidence of the parties' communications pursuant to the parol evidence rule. Although applicable New Jersey law recognizes "an exception to the parol evidence rule where oral communications would constitute proof of fraud," the exception did not apply because the alleged misrepresentations related to matters expressly addressed in a wholly integrated contract. The court noted that both parties were experienced hotel operators who negotiated explicit statements in the franchise agreement's integration clause. The court also applied the "sham affidavit rule" and did not consider defendants' affidavit in opposition to summary judgment because the affidavit, created after plaintiff moved for summary judgment, directly contradicted defendants' prior deposition testimony.

The court granted summary judgment on Ramada's claims and rejected defendants' defense to nonpayment (that Ramada breached the franchise agreement by denying services) because defendants continued to receive the franchise agreement's benefits without paying the required fees. The court also granted summary judgment on Ramada's claim of default under the parties' guaranty agreement.

The court further granted summary judgment for Ramada on defendants' counterclaims, finding that (1) Ramada was not required to provide signage under the agreement, and defendants were barred from relying on testimony that Ramada made representations regarding signage before they executed the agreement; (2) the agreement did not require plaintiff to install a computer and software management system, and defendants could not otherwise establish how plaintiff materially breached the agreement; (3) defendants could not dispute that their hotel was placed on third-party reservation websites as the agreement required; and (4) defendants failed to provide evidence, other than contradictory testimony in the sham affidavit, to establish that Ramada breached the agreement by failing to provide training. Finally, defendants failed to create a material issue of fact on their fraud counterclaim, and the court did not consider evidence of alleged oral misrepresentations because that evidence was barred by the parol evidence rule.

***Dry Dock, L.L.C. v. Godfrey Conveyor Co., Inc.*, Case No. 09-cv-396, Bus. Franchise Guide (CCH) ¶ 14,403 (W.D. Wis. June 7, 2010)**

A boat dealer/distributor brought suit against a manufacturer alleging that twenty-four of the twenty-seven boat-and-trailer combinations it purchased from the manufacturer were defective and unfit for sale. The distributor alleged that the manufacturer breached the implied warranty of merchantability under Wisconsin law by selling defective products and breached an express warranty by failing to reimburse the distributor for warranty repairs that it was required to perform. Each purchase was covered by an express written warranty, which insulated the manufacturer from responsibility for incidental or consequential damages. The U.S. District Court for the Western District of Wisconsin found such a warranty to be valid and not unconscionable under Wisconsin law. The manufacturer further argued that it did not breach the express warranties because the distributor failed to follow the warranty procedures it had implemented for defect repairs. The court found that the manufacturer's express warranties did not disclaim the implied warranty of merchantability contained in each purchase. Noting the valid limitation on damages contained in the express written warranty, the court ordered the matter to proceed to trial on the issue of the distributor's claim that the manufacturer breached the implied warranty of merchantability.

DAMAGES

***Cole v. Homier Distrib. Co.*, 599 F.3d 856, Bus. Franchise Guide (CCH) ¶ 14,414 (8th Cir. Mar. 29, 2010)**

Distributor Cole's Tractor & Equipment, Inc. and Gregory M. Cole (collectively, Cole's) sued supplier Homier Distributing

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Company (Homier) for breach of contract, violation of Missouri Revised Statutes § 407.405, tortious interference with contracts and business expectancies, and fraud stemming from Homier's termination of its distribution agreement with Cole's. The trial court granted Homier's motion to dismiss the tortious interference and fraud claims for failure to state a claim and also granted Homier's motion for summary judgment on the remaining counts because Cole's was unable to prove damages. The U.S. Court of Appeals for the Eighth Circuit affirmed the summary judgment decision in favor of Homier. Cole's alleged, inter alia, that Homier's breach caused Cole's to lose expected profits. The court stated that to establish lost profit damages, a plaintiff must "provide an adequate basis for estimating lost profits with reasonable certainty." Here, Cole's submitted expert testimony to establish lost profit damages. The court found that the expert report was factually flawed and speculative because the expert made the false assumption that Cole's would lose profits from no longer being a dealer for Homier. The termination letter that Homier sent to Cole's, however, explicitly stated that Homier hoped that Cole's would continue dealing its products. The expert used a twenty-five-year computation period based on the retirement age of the sole owner of Cole's and his qualification for government benefits. The court stated that the notion that this contract would have continued for twenty-five years was too speculative and that the trial court had not abused its discretion in awarding summary judgment for failure to establish damages.

***Med. Shoppe Int'l v. TLC Pharmacy, Inc.*, Bus. Franchise Guide (CCH) ¶ 14,416 (E.D. Mo. July 12, 2010)**

In this case, the U.S. District Court for the Eastern District of Missouri determined whether a franchisor may recover future license fees after franchise agreement termination. A pharmacy franchisor sued a franchisee that ceased operations and its personal guarantor. After obtaining summary judgment against the guarantor on the issue of liability, the franchisor sought summary judgment on the issue of damages, submitting affidavits showing past due license fees, future license fees, and attorney fees. The court concluded that the past due license fees were proper due to the franchise agreement's clause allowing for "all amounts due to [plaintiff] and any interest due thereon." Although Missouri courts had never considered whether franchisors were entitled to future fees, the court determined that they would likely decide that the franchisor was not entitled to such fees. Under Missouri law, lost profits are recoverable only if the parties contemplated recovery when the contract was formed. Here, the agreement did not demonstrate that either party contemplated recovery of future license fees. The agreement specified that obligations that "expressly or by their nature" survive termination would be recoverable after termination. However, the agreement did not expressly provide that the obligation to pay license fees survived termination. The court added that such an obligation does not "by its nature" survive termination. Accordingly, it concluded that recovery of future license fees was improper.

***Moran Indus. v. Mr. Transmission of Chattanooga, Inc.*, 2010 U.S. Dist. LEXIS 71753, Bus. Franchise Guide (CCH) ¶ 14,428 (E.D. Tenn. July 15, 2010)**

A franchisor (Moran) sued one of its franchisees (Mr. Transmission). The franchisee moved to dismiss the portion of the complaint that attempted to recover lost future royalties and marketing fund payments from the franchisee.

Pursuant to the parties' franchise agreement, Mr. Transmission was required to pay a weekly royalty fee along with a monthly marketing fund contribution. After twenty-seven years of operation, Mr. Transmission's owner retired and transferred all of his assets to his son. In response, Moran terminated the franchise agreement. The owner's son continued to operate the transmission service center under a different name, but using the same assets and equipment. Moran then sued, claiming over $250,000 in lost future royalty payments.

The franchisee's two main arguments in support of its motion to dismiss were that (1) the plain, unambiguous language of the franchise agreement provided that royalty payments would be made only for the agreement's first five years; and (2) as a matter of law, a franchisor that terminates a franchise agreement, even where the franchisee is in breach, is not entitled to future royalty payments because the franchisee's breach is not the proximate cause of the loss of future royalties.

The court first addressed whether the franchise agreement provided for royalties only for the first five years of the agreement. Although the franchise agreement only provided the royalty percentage that would be paid for the first five years, it also contained a parenthetical that the royalty payment could be increased for each subsequent five-year period. The parties had entered into an addendum seven years after the original agreement, which provided that certain work undertaken by the franchisee was afforded a lower royalty percentage payment. The court reasoned that the parenthetical and the addendum would make no sense if the agreement required royalty payments for only the first five years. The court found that the language in the franchise agreement was inherently ambiguous and, accordingly, parol evidence would be necessary to determine the parties' intent.

The court also addressed the franchisee's argument that franchisors are not entitled to future lost royalty payments as a matter of law where the franchisor terminated the franchise agreement due to the franchisee's breach. The court discussed various cases that the parties cited and noted that the variety of outcomes demonstrated the importance of the facts of each particular case and that courts disagree on how to analyze proximate cause and the significance of whether the franchisor terminated or simply sued the franchisee for breach. The court found that the franchisor's alleged facts "raised its claim to lost future royalties above the speculative level as required by *Twombly*." The court added that existing case law did not preclude future lost royalty damages where a franchisee has clearly abandoned the franchise.

Finally, the court held that a dismissal of the lost future royalty claim would be premature and that more factual evidence was needed to clarify the circumstances surrounding termination. Accordingly, the court denied the motion to dismiss.

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DEFINITION OF FRANCHISE

***Engines, Inc. v. MAN Engines & Components, Inc.*, Case No. 10-277, Bus. Franchise Guide (CCH) ¶ 14,431 (D.N.J. July 29, 2010)**

In this matter, an engine manufacturer and its authorized dealer entered into a nonexclusive dealer agreement for the manufacturer's products. Thereafter, the dealer moved for a preliminary injunction seeking to enjoin the manufacturer from terminating the agreement. The parties agreed that resolution of the dispute turned on whether their relationship constituted a "franchise" under the New Jersey Franchise Practices Act. In granting the dealer's motion for a preliminary injunction, the U.S. District Court for the District of New Jersey determined that the dealer would be successful in establishing that it was a franchise of the manufacturer based on the likelihood that the parties shared a community of interest. New Jersey case law provided that a community of interest exists "when the terms of the agreement between the parties or the nature of the franchise business requires the licensee, in the interest of the licensed business's success, to make a substantial investment in goods or skills that will be of minimal utility outside the franchise."

The court found that the relationship of the parties had the indicia of control that were the hallmark of a community of interest. The court also noted that the dealer stood to lose multiple tangible and intangible indicia of control if terminated, including signage, advertisements, development of a customer base, investments in employee training, parts inventory, special tools, and computer systems to service businesses related to the manufacturer; and the mastery of those tools and systems. Following precedent, the court concluded that the dealer and manufacturer shared a financial interest evidenced by interdependence of the parties, including the degree to which they cooperated, coordinated activities, and shared common goals. Accordingly, the court held that the dealer established that the parties likely shared a community of interest and that the dealer was a franchisee.

***Water Quality Store, LLC v. Dynasty Spas, Inc.*, Case No. 2009AP1731, Bus. Franchise Guide (CCH) ¶ 14,426 (Wis. Ct. App. Dist. IV July 15, 2010)**

In this action, plaintiff, a spa dealer, claimed that defendant, a spa manufacturer and distributor, violated the Wisconsin Fair Dealership Law (WFDL) when the manufacturer terminated an agreement under which the dealer sold and serviced the spas it manufactured. The parties' relationship began upon entry into a "letter of intent/dealer agreement." At trial, the court instructed the jury that in order to determine if a dealership existed, it had to find there was a contract between the manufacturer and the dealer, as well as a community of interest between the parties. The court explained that a community of interest meant that "the parties shared a continuing financial interest in which [they] cooperated and coordinated their activities in operating the dealership business or marketing the dealership's goods and shared in common goals in their business relationship."

The jury found that a dealership in fact existed that was covered by the WFDL and awarded the dealer damages for termination of that dealership. On appeal, the manufacturer contended that the dealer failed to establish a community of interest as required under the WFDL to support a showing of a dealership. The manufacturer's primary argument was that the dealer "was not dependent on [the manufacturer] for its economic livelihood because [it] was able to find other sources of spas to sell" following termination. The manufacturer relied on a U.S. Court of Appeals for the Seventh Circuit case in support of this proposition.

The Wisconsin appellate court affirmed the jury's verdict and rejected the manufacturer's contentions. In doing so, the appellate court noted that federal courts applying Wisconsin law were not precedential authority for Wisconsin courts. The court therefore rejected the Seventh Circuit analysis because it could not be reconciled with the Wisconsin Supreme Court's most recent application of the community of interest standard. Significant factors in supporting a determination that there was a community of interest were that between 60 percent and 70 percent of the dealer's business was in spa sales and that, with the exception of only five spas, the dealer sold only spas made by the manufacturer. Additionally, there was no doubt that the dealer derived substantial revenues from its sales of the manufacturer's spas as a percentage of its total business. As a result, it was clear that the dealer was highly dependent on its relationship with the manufacturer for its economic health, and a reasonable fact finder could find the dealer had an exclusive territory. For these reasons, the court found evidence to support the jury's determination that a dealership existed sufficient to show there was a community of interest under the WFDL.

FRAUD

***Fed. Trade Comm'n v. Network Servs. Depot, Inc.*, 617 F.3d 1127, Bus. Franchise Guide (CCH) ¶ 14,447 (9th Cir. 2010)**

This case involved an enforcement action by the Federal Trade Commission (FTC) against Network Services Depot, Inc. (NSD), its owner Charles Castro, and its senior executive Gregory High for engaging in deceptive business practices in violation of § 5(a) of the Federal Trade Commission Act (FTC Act) and the FTC's Franchise Rule. NSD was in the business of selling Internet kiosk business opportunities, in which an investor would buy the rights to operate an Internet kiosk in a public space, such as an airport or hotel lobby, and revenues generated from the kiosk would be paid to the investor. Customers paid NSD and its affiliates more than $18 million dollars to participate in the kiosk program. Unfortunately for the customers, almost all of the thousands of business opportunities sold by NSD were a sham and described by the FTC as "a classic Ponzi scheme." NSD engaged a third party, Bikini Vending Corp. (BVC), to install and operate Internet kiosks for customers on its behalf. However, BVC did not install a vast majority of the kiosks. Instead it used money received from NSD's new customers to pay existing customers their minimum monthly payments.

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Castro and High claimed that they did not investigate customer complaints or visit the kiosk sites to verify that machines had been installed. Instead Castro and High relied on BVC to install, maintain, and service the kiosks and to remit payments to customers. After the FTC began its investigation, Castro retained an attorney and paid him a lump sum of $375,000 for representation during the FTC litigation. One month later, the FTC filed suit against NSD, Castro, and High in the U.S. District Court for the District of Nevada. Prior to trial, the FTC and defendants filed cross-motions for summary judgment. The district court granted the FTC's motion and denied defendants' motion. The court found that "Castro and High were personally liable for equitable monetary relief" under § 5 of the FTC Act, "that the NSD kiosk venture satisfied the criteria for being a traditional services franchise[,] and that [defendants] violated the FTC's Franchise Rule by making misleading statements in the disclosure agreement circular provided to customers." The court further found that legal fees paid to Castro's attorney came from fraudulent kiosk sales; it imposed a constructive trust on $238,300 of the attorney fees and ordered the attorney to return that amount to the FTC. Defendants appealed the district court's finding on summary judgment that Castro and High were personally liable for equitable monetary relief.

The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's decision and found that Castro and High were individually liable to make equitable restitution under § 5 of the FTC Act. The court reasoned that the district court properly entered summary judgment on the claim for individual liability under the FTC Act because the undisputed facts established that Castro and High "acted with either (1) actual knowledge, (2) reckless indifference to truth or falsity, or (3) an awareness of a high probability of fraud and an intentional avoidance of the truth" when they made representations to customers regarding the Internet kiosk business opportunities. The court held that the FTC was not required to show that Castro and High had actually intended to defraud the customers.

The court also affirmed the district court's grant of summary judgment in favor of the FTC on the issue of whether Castro and High had personal knowledge. The court concluded that Castro and High's deliberate construction of a "Chinese wall" between NSD and BVC rose to "the level of reckless indifference," and they could not turn "a blind eye" to the problems that customers were complaining about and continue to sell the fraudulent business opportunities.

The court also concluded that the FTC presented substantial evidence that Castro's attorney received payment attributable to defendants' statutory violations, and, therefore, the district court did not err in fashioning equitable relief in the form of a constructive trust on $238,300 of the attorney fees. The court further held that the bona fide purchaser rule did not apply because Castro's attorney failed to make a good faith inquiry into the source of the fees. Finally, the court noted that the attorney was allowed to keep a reasonable fee of $136,700 based on hours of services performed before the FTC froze Castro's assets.

***Heyser v. Noble Roman's, Inc.*, 933 N.E.2d 16, Bus. Franchise Guide (CCH) ¶ 14,450 (Ind. Ct. App. 2010)**

Several franchisees sued the franchisor, Noble Roman's, Inc., and two banks after the franchisees' Noble Roman's Pizza Restaurants failed, claiming actual and constructive fraud. The banks each filed a motion to dismiss the fraud claims because they were based solely on allegedly fraudulent representations by Noble Roman's. The trial court granted the banks' motions and dismissed these claims from the case with prejudice. Noble Roman's then filed a motion for partial summary judgment, arguing that franchisees were not alleging constructive fraud and were instead alleging actual fraud only. The trial court found that in a hearing in March 2009 on the banks' motions to dismiss, franchisees' counsel stated to the court, "[W]e have not plead [*sic*] constructive fraud." The court found this statement binding and held that franchisees were estopped from now asserting constructive fraud. The franchisees appealed the trial court's grant of partial summary judgment.

The Indiana Court of Appeals opined that an attorney can make an admission to a trial court that binds his client. The court then turned to the present case and held that franchisees' counsel unequivocally stated in the March 2009 hearing that the franchisees were pleading only actual fraud and not constructive fraud. That admission bound the franchisees throughout the lawsuit; and, as a result, Noble Roman's was entitled to partial summary judgment on the constructive fraud claims.

***Zantum, LLC v. Wencel*, No. H034533, 2010 Cal. App. Unpub. LEXIS 4954, Bus. Franchise Guide (CCH) ¶ 14,410 (Cal. Ct. App. June 30, 2010)**

In this case, the California Court of Appeal affirmed the trial court's finding of negligent misrepresentation by an ink cartridge franchisor. Plaintiff purchased an area directorship from defendants, which gave it the exclusive right to sell Caboodle Cartridge franchises in a specified area. When defendants suddenly ceased operations, plaintiff sued, alleging, inter alia, negligent misrepresentation. The trial court found that defendants made negligent misrepresentations about franchise operations to induce the purchase of a valueless area directorship.

The only issue on appeal was the individual liability of Caboodle's president and founder (corporate defendants were defunct). The court affirmed the trial court's decision, rejecting the president's argument that there was no evidence of negligent misrepresentation because the representations were reasonable at the time that they were made. The court found that before plaintiff purchased the area directorship, the president made misrepresentations through a marketing scheme that included statements either written or approved by him. These representations included that (1) Caboodle cartridge products would be remanufactured in Caboodle's own manufacturing facility utilizing advanced and specialized equipment and that 100 percent of the remanufactured cartridges were tested, (2) that Caboodle's remanufactured ink cartridges met or exceeded original equipment manufacturer

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quality and specifications, (3) Caboodle invested in a state-of-the-art recharging facility that did not compromise quality but offered substantial savings, and (4) Caboodle supplied a sufficient quantity of Caboodle remanufactured ink cartridges to support a large number of franchised stores.

The court noted that there was evidence that the president did not have reasonable grounds to believe the truth of any of those representations before plaintiff purchased the area directorship. To the contrary, evidence showed that there were known problems with the quality of Caboodle's remanufactured cartridges and that it struggled to supply even a small number of existing franchises with enough products. In connection with quality and quantity issues, the president had fired Caboodle's director of manufacturing as well as several employees in the manufacturing facility. There were records of refunds made because of defects and quality problems. E-mails indicated concerns that existing franchises were losing customers because orders could not be filled. Caboodle employees also testified that Caboodle eventually purchased cartridges from outside vendors to fill orders and did not individually test them. The court therefore determined that substantial evidence supported the trial court's finding that a reasonable person with the information available to the president would not have represented Caboodle as a functional, valuable franchise that could be sold with an exclusive area directorship.

GOOD FAITH AND FAIR DEALING

***Miller Auto. Corp. v. Jaguar Land Rover N. Am.*, No. 3:09-CV-1291, 2010 U.S. Dist. LEXIS 81654, Bus. Franchise Guide (CCH) ¶ 14,444 (D. Conn. Aug. 11, 2010)**

A motor vehicle dealer brought six claims for relief against its franchisor, Jaguar Land Rover North America, as well as two claims against its predecessor franchisor, Ford Motor Company. The dealer's claims against Ford for breach of the implied covenant of good faith and fair dealing and promissory estoppel related to the dealer's allegations that it spent money to expand its facilities based on Ford's representation of substantial sales growth, but the additional sales never materialized. Ford moved to dismiss both claims.

Ford argued that the dealer's claim for breach of the implied covenant of good faith should be dismissed because the claim was time-barred by a three-year statute of limitations, not tied to any specific contract term between the parties, and failed sufficiently to allege that Ford had acted in bad faith. The U.S. District Court for the District of Connecticut found that the applicable statute of limitations for claims for breach of the implied covenant in Connecticut was six years. Because all of the acts complained of occurred within six years of commencement of the action, the claim was not time-barred. However, the court agreed with Ford's remaining arguments. The court held that the dealer failed to assert a claim closely tied to a "discretionary application or interpretation of a contract term" as required by Connecticut law. The court further held that the dealer failed to allege adequately any bad faith on Ford's part, as "altering business plans—especially when the right to do so is reserved by contract to the party who alters them—is not an action done in bad faith, even if it occurs to the detriment of another." The court therefore granted Ford's motion to dismiss the claim for breach of the implied covenant of good faith and fair dealing.

The court also granted Ford's motion to dismiss the dealer's promissory estoppel claim. Ford argued that the claim was precluded because there was a valid contract between the parties. The court agreed, noting that a contract is not void as a matter of law simply because the dealer "would have been at a competitive disadvantage vis-à-vis other Jaguar dealers" if the dealer had decided not to sign the contract. The dealer also failed to provide evidence, or even allege, that disproportionate bargaining power of the parties rendered the terms of the contract unconscionable. Although the court dismissed the promissory estoppel claim, it did so without prejudice and granted the dealer leave to file a second amended complaint.

***Miller Auto. Corp. v. Jaguar Land Rover N. Am.*, No. 3:09-CV-1291, 2010 U.S. Dist. LEXIS 87594, Bus. Franchise Guide (CCH) ¶ 14,452 (D. Conn. Aug. 24, 2010)**

A motor vehicle dealer brought six claims for relief against its franchisor, Jaguar Land Rover North America (JLRNA), as well as two claims against its former franchisor, Ford Motor Company. JLRNA moved to dismiss the dealer's claims for breach of the implied covenant of good faith and fair dealing and for violation of the Connecticut motor vehicle dealer law that prohibits a manufacturer from unreasonably denying a relocation request. Both claims arose out of JLRNA's denial of the dealer's multiple requests for relocation.

Similar to its earlier decision in favor of JLRNA's codefendant Ford, the U.S. District Court for the District of Connecticut found that the dealer failed to state a claim for breach of the implied covenant of good faith and fair dealing against JLRNA because the dealer had not adequately alleged the required element of bad faith. The dealer claimed that JLRNA imposed "excessive and onerous" facility requirements as a condition of approving relocation, but the court reasoned that even if true, this did not show that JLRNA acted with "dishonest purpose or moral obliquity." (quoting Buckman v. People Express, Inc., 205 Conn. 166, 171 (1987)). The dealer's allegations only established a legitimate business dispute over the relocation and did not show how JLRNA acted in bad faith.

The court also dismissed the dealer's claims for violation of a provision of the Connecticut motor vehicle dealer law that prohibited a manufacturer from unreasonably denying a dealer's relocation request as long as the dealer complied with certain notice requirements. The court found that this provision had only prospective applicability and should not be applied to a franchise agreement signed prior to the amendment that added this provision. The court found that the introductory language of the amendment was ambiguous with respect to retroactive applicability, and legislative history was silent on

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the issue of retroactivity as well. Therefore, the court followed the general rule under Connecticut law that applies legislation prospectively only unless the legislative history "clearly and unequivocably" expressed the intent to apply the legislation retroactively. Having dismissed two of the dealer's six claims against JLRNA, the court granted leave for the dealer to file a second amended complaint.

INJUNCTIVE RELIEF

***Dunkin' Donuts Franchising, LLC v. Panzar Boston Post*, No. 10-CV-4188, Bus. Franchise Guide (CCH) ¶ 14,445 (S.D.N.Y. Aug. 16, 2010)**

Franchisors of the Dunkin' Donuts and Baskin-Robbins franchises and their affiliates sued franchisees for breach of contract, trademark infringement, unfair competition, and trade dress infringement arising out of franchisees' alleged breach of their franchise agreements and for continuing to operate their Dunkin' Donuts franchises. Franchisors moved for a preliminary injunction. The U.S. District Court for the Southern District of New York was not persuaded that franchisors made a clear showing of irreparable harm as a result of franchisees' alleged misconduct. Specifically, the court held that there was no evidence of abuse of the trademark, violations of franchisors' industry standards, or customer confusion. Moreover, the court found that franchisees raised substantial issues concerning the franchisors' role in causing the franchisees' financial difficulties, which resulted in franchisees' default under the franchise agreements. Accordingly, the franchisors' motion for a preliminary injunction was denied.

JURISDICTION

***Bauer v. Douglas Aquatics, Inc.*, No. COA 10-47, Bus. Franchise Guide (CCH) ¶ 14,459 (N.C. Ct. App. Sept. 7, 2010)**

Defendant and appellant Douglas Aquatics, Inc. is a Virginia corporation that franchises pool management and construction companies in Virginia and North Carolina. Plaintiff is a North Carolina resident who entered into a swimming pool construction agreement with defendant Douglas Aquatics Charlotte, LLC (DA Charlotte), a franchisee of appellant located in North Carolina. Plaintiff sued both DA Charlotte and appellant for breach of warranties, breach of contract, negligence, fraud, unfair and deceptive trade practices, and agency in North Carolina state court arising from the alleged faulty construction of plaintiff's swimming pool. Appellant brought a motion to dismiss for lack of personal jurisdiction and failure to state a claim, which the trial court denied. Appellant appealed the trial court's denial of its motion to dismiss for lack of personal jurisdiction, and the appellate court affirmed.

The court determined that the sole issue for appeal was whether plaintiff's assertion of jurisdiction over appellant comported with due process of law. It recognized that to satisfy the due process component of the personal jurisdiction inquiry, there must be sufficient "minimum contacts" between the nonresident and the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" The court held that the record did not support a finding of general jurisdiction over appellant and limited its inquiry to whether specific jurisdiction existed.

The court recognized that "vicarious liability of a franchisor for the acts of its franchisee . . . depends upon the existence of an agency relationship." Here, it held that plaintiff failed to prove an actual agency relationship between appellant and DA Charlotte, but that vicarious liability may still exist where there is "apparent agency" or "agency by estoppel."

The court found that an apparent agency relationship existed between appellant and DA Charlotte and reasoned that the trial court's findings were sufficient to support the conclusion that appellant held DA Charlotte out as its apparent agent to the citizens of North Carolina through affirmative representations on appellant's website. Specifically, appellant described DA Charlotte as one of appellant's locations that provides pool construction needs in the Charlotte, North Carolina, area. The court rejected appellant's argument that no apparent authority existed due to the franchise agreement between itself and DA Charlotte, which "unequivocally defines the relationship between franchisee [DA Charlotte] and itself as independent" and specifically prohibits DA Charlotte from representing itself as appellant's agent or engaging in any activity that would purport to bind appellant. The court recognized that plaintiff was not privy to the franchise agreement defining the relationship between defendants. Therefore, the court concluded that

> [i]t was Appellant's statement on its website that "[DA Charlotte] is one of five [of] Douglas [Aquatics], Inc.'s locations throughout Virginia and North Carolina and that Douglas [Aquatics], Inc. opened its fifth location in Charlotte, North Carolina in 2005 trading as Douglas Aquatics Charlotte" that constituted words or conduct representing or permitting it to be represented that DA Charlotte is Appellant's agent.

Such statements, the court held, "can easily be construed as a manifestation by Appellant to citizens in the Charlotte area that DA Charlotte was its agent." In addition, the court noted that the contract between DA Charlotte and plaintiff provided that appellant would perform the pool construction work. Although the contractual provision itself would not have supported a reasonable belief that appellant and DA Charlotte were the same entity, the representations on appellant's website "justified Plaintiff's belief in the agency intimated by DA Charlotte, and his reliance thereon in entering the construction contract was consistent with ordinary care and prudence." The court concluded that "the elements of apparent agency are met, and Appellant can be considered legally responsible for the acts of its apparent agent, DA Charlotte, for purposes of personal jurisdiction."

***Smallbizpros, Inc. v. MacDonald*, 618 F.3d 458, Bus. Franchise Guide (CCH) ¶ 14,454 (5th Cir. 2010)**

Smallbizpros, Inc. (d/b/a Padgett Business Services), a

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franchisor, sued MacDonald, a franchisee, over termination of its franchise agreement. The parties agreed to settle the case and filed a stipulated settlement order with the U.S. District Court for the Western District of Texas. The order contained a stipulation of dismissal and attached the terms of the parties' settlement agreement. At the parties' request, the district court signed and entered the order. MacDonald later refused to comply with the settlement agreement, and the district court issued a contempt order against MacDonald for his noncompliance. MacDonald appealed, arguing that the district court did not have jurisdiction to enforce the terms of the settlement agreement. The U.S. Court of Appeals for the Fifth Circuit agreed.

The Fifth Circuit held that under Federal Rule of Civil Procedure 41(a)(1)(A)(ii) and Supreme Court precedent, the district court's jurisdiction over the matter ended when the stipulation of dismissal was filed by the parties. The Fifth Circuit recognized that there are instances when a district court has ancillary jurisdiction even after a stipulation of dismissal is filed, but it held that this was not one of those instances. The dismissal order filed by the parties did not incorporate the terms of the settlement agreement (it merely attached the terms to it), and it did not expressly give the court ancillary jurisdiction to enforce the settlement agreement. The parties could have, but did not, make the dismissal "expressly contingent upon the district court's entry of the order." For these reasons, the Fifth Circuit determined that the district court did not have jurisdiction. The Fifth Circuit noted that even though "the parties and the district court likely intended for the district court to retain ancillary jurisdiction to enforce the terms of the settlement agreement . . . jurisdiction is a strict master and inexact compliance is no compliance." The Fifth Circuit vacated the contempt order entered against MacDonald and remanded to the district court with instructions to dismiss for lack of jurisdiction.

STATE DISCLOSURE/REGISTRATION LAWS

***Coyne's & Co., Inc. v. Enesco, LLC*, No. 07-4095 (MJD/SRN), 2010 U.S. Dist. LEXIS 83630, Bus. Franchise Guide (CCH) ¶ 14,449 (D. Minn. Aug. 16, 2010)**

Plaintiff Coyne's & Company, Inc. (Coyne's), a Minnesota giftware company, entered into a distributor agreement with defendant Country Artists, Ltd. (CA), in which CA granted Coyne's "'the exclusive right to sell, distribute, market, and advertise certain lines of [CA] [gift] product[s] . . . for the territory consisting of the United States and Mexico.'" The distributor agreement provided that Coyne's pay a 50 percent markup on CA products and meet a sales requirement of $5 million or 5 percent above the previous year's sales, whichever was greater. The distributor agreement also provided that "either party could serve upon the other written notice to terminate the agreement if the other party became insolvent, filed [for] bankruptcy . . ., made a general assignment for the benefit of its creditors, or had a receiver or trustee appointed for its business." In August 2007, receivers were appointed for CA. The receivers and defendant Enesco, LLC, an Illinois giftware company that competes directly with Coyne's, entered into an asset sale agreement in which CA transferred its business and assets to Enesco. The receivers then sent a letter to Coyne's terminating the distribution agreement between Coyne's and CA. Coyne's, in turn, contacted Enesco to request release of CA products that Coyne's had ordered before August 2007. Coyne's and Enesco eventually entered into a Mutual Nondisclosure Agreement (NDA) in which the parties agreed that any confidential information that was exchanged would be used only to evaluate the parties' wish to "explore a business opportunity of mutual interest." By the end of 2007, however, Enesco returned all information Coyne's provided under the NDA and began to distribute CA products in the United States.

Several months after entering into the NDA, Coyne's filed a multiple-count complaint against Enesco, CA, and the receivers, who were later dismissed as defendants. Enesco and Coyne's filed cross-motions for summary judgment. The U.S. District Court for the District of Minnesota granted Enesco's summary judgment motion on the following claims: (1) tortious interference with contractual relations, (2) tortious interference with prospective business relations, (3) promissory estoppel, (4) unfair competition under the Lanham Act, (5) alleged violation of the Minnesota Deceptive Trade Practices Act, and (6) alleged violation of the Minnesota Trade Secrets Act.

The court denied Enesco's motion for summary judgment on the Coyne's claim that Enesco assumed CA's role as franchisor under the distribution agreement and wrongfully terminated the agreement in violation of the Minnesota Franchise Act. The court found that there was a genuine question of material fact on whether the 50 percent markup, minimum sales requirement, and/or excess inventory requirement constituted indirect franchise fees. The court observed that "minimum volume sales requirements can constitute an indirect franchise fee if the prices exceeded bona fide wholesale prices or if the distributors were required to purchase amounts or items that they would not purchase otherwise." The court also observed that parties cannot waive the protections of the Minnesota Franchise Act, so the fact that the distributor agreement stated that no franchise relationship existed was immaterial. Because a genuine question existed as to whether Coyne's was a franchisee, the court also denied Enesco's motion for summary judgment on Coyne's claim that Enesco violated § 80C.14 of the Minnesota Franchise Act, which makes it "unfair or inequitable practice" to "compete with the franchisee in an exclusive territory."

STATUTORY CLAIMS

***Anheuser-Busch, Inc. v. Schnorf*, No. 10-cv-1601, Bus. Franchise Guide (CCH) ¶ 14,438 (N.D. Ill. Sept. 3, 2010)**

This lawsuit was spurred by the proposed acquisition by Wholesaler Equity Development Corporation (WEDCO), a subsidiary of Anheuser-Busch, Inc. (AB), of an ownership interest in City Beverages from SD of Illinois, Inc. (SDI)

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and Double Eagle Distributing Company (Double Eagle). WEDCO owned a 30 percent interest in City Beverages, so the proposed transaction would result in WEDCO becoming the sole owner of City Beverages. The Illinois Liquor Control Commission (Commission) informed plaintiffs that the acquisition would violate the Illinois Liquor Control Act, which prohibits an out-of-state brewer, such as AB, from directly distributing beer to in-state retailers. However, "in-state brewers are permitted to perform the distribution function in Illinois." Because of its nonresident status, AB could not possess an ownership interest in a licensed Illinois distributor.

WEDCO, AB, SDI, and Double Eagle brought suit challenging the Commission's construction of the Illinois Liquor Control Act as violating the Commerce Clause of the U.S. Constitution. The Commission informed plaintiffs that the acquisition would violate Illinois law. Under the Commission's interpretation of the Illinois Liquor Control Act, an out-of-state brewer, such as AB, must go through an in-state distributor to distribute beer to in-state retailers. Therefore, because of its nonresident status, AB may not possess an ownership interest in a licensed Illinois distributor. However, in-state brewers are permitted to perform the distribution function in Illinois.

The court recognized that under Commerce Clause jurisprudence, laws are subject to per se invalidation where they discriminate against interstate commerce, whether the discrimination is explicit, "has a discriminatory purpose, or has substantial discriminatory effects." The court first recognized that under the Commission's interpretation of the law, "the basis for determining whether a brewer can distribute beer in Illinois turns on the brewer's residency; an in-state brewer is eligible, while an out-of-state brewer is not." Thus, the court held, "by its own terms, this law explicitly discriminates against out-of-state brewers."

The court next determined whether the law, which discriminates by its own terms, meets the "very narrow exception" to the rule of per se invalidity by "advancing a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." The court recognized that under this inquiry, "[t]he burden is on the State to demonstrate that the *discrimination* is . . . justified" and that "the State must come forward with concrete record evidence, rather than mere speculation." The court held that the state failed to demonstrate the law met the exception despite the state's arguments to the contrary. The court rejected the state's argument that the in-state brewers that currently distribute in Illinois are so small and produce such a small amount of beer that "permitting them to self-distribute does not jeopardize the Act's goal of promoting temperance and competition": the argument failed to address the fact that the Liquor Control Act permits all in-state brewers, not just small ones, to distribute beer within the state and prohibits all out-of-state brewers, not just large ones, from distributing beer within the state. Similarly, the court rejected the state's argument that it is more difficult to exert control over out-of-state licensees and that "there is an increased risk of tax evasion when a producer and distributor affiliate." The court found that the argument did not justify the discrimination against out-of-state producers because the tax evasion would apply to brewers that act as distributors regardless of where they are located. The court held that the state failed to demonstrate any legitimate purpose that justifies the discrimination.

Having found that the law violated the Commerce Clause, the court next turned to the appropriate remedy, choosing between (1) nullification of the discriminatory provision, which would allow out-of-state brewers to distribute directly to retailers, or (2) extension of the provision, which would prohibit in-state brewers from distributing directly to retailers. The court concluded that the more appropriate remedy from a judicial perspective was to withdraw the self-distribution privilege from in-state brewers rather than to extend the privilege to out-of-state brewers. The court added that it would stay enforcement of its order until March 31, 2011, to allow the Illinois state legislature to act on the matter if it so desires. The court directed the parties "to file a joint status report [on] March 15, 2011, advising the court of any legislative efforts to address the constitutional defect identified in [its] opinion, after which time the [c]ourt [would] determine whether to lift or extend the stay."

***Bonus of Am., Inc. v. Angel Falls Servs., L.L.C.*, 2010 U.S. Dist. LEXIS 67079, Bus. Franchise Guide (CCH) ¶ 14,415 (D. Minn. July 6, 2010)**

In this case, the U.S. District Court for the District of Minnesota granted a cleaning and maintenance service franchisor's preliminary injunction motion against its franchisee and "Patron," a competing business that the franchisor alleged was being managed by one of the franchisee owners in violation of contractual noncompete provisions. Before entering into any agreements, the franchisor shared other franchisees' revenue information with the franchisee to induce the franchisee to enter into the agreement. The parties entered into the initial franchise agreement on an expedited basis with an agreement to modify the agreement following negotiations. The parties later entered into Master Franchisor Agreements that superseded the expedited agreement. The Master Franchisor Agreements contained a covenant not to compete during the term of the agreement and for two years afterward within a fifty-mile radius.

Patron was a competing cleaning services business incorporated by a separate individual but that solicited the franchisee's customers and used the same employees and contractors as the franchisee. The franchisor alleged that the franchisee's owner played an active role in Patron's day-to-day management and presented as evidence Patron documents with the franchisee owner's signature, including invoices and business proposals. The court granted the injunction after finding that Patron's competing business using the franchisor's system was likely to cause irreparable harm to the franchisor's goodwill and that the balance of the harms weighed in the franchisor's favor. The court reasoned that the harm to the franchisor's reputation and goodwill outweighed the harm resulting in preventing the franchisee and Patron from competing, especially since the franchisee had entered into a covenant not to compete. As for likelihood of success on the merits, the court

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evaluated whether the Master Franchisor Agreements and the covenant not to compete were enforceable. The franchisee and Patron argued that the franchise agreement was not enforceable because it was entered into before the franchisor was registered to sell franchises in Minnesota, as required by the Minnesota Franchise Act (MFA). The franchisor conceded that the expedited agreement had been entered into before registration but that the parties entered into the later Master Franchisor Agreements after registration. The court found that the registration violation was merely technical and did not make the agreements unenforceable. The franchisee also argued that the franchisor violated the MFA by providing revenue information and projections before the franchise sale. Under the MFA, a franchisor must include a public offering statement that "includes a copy of estimated or projected franchisee earnings" and "may not make statements contrary to a disclosure in the public offering statement." The franchisor denied that it had provided information contrary to the public offering statement. The court found that because there were conflicting self-interested statements regarding this issue, the franchisee and Patron had not shown that the Master Franchisor Agreements were unenforceable.

The court then focused on the enforceability of the covenants not to compete. Under Texas law, covenants not to compete are enforceable if they are ancillary to an otherwise enforceable agreement and contain limitations as to time, geographic area, and scope of activity to be restrained. The court noted that "[a] covenant is ancillary if (1) the consideration given in the otherwise-enforceable agreement create[d] the franchisor's interest in restraining the actions of its franchisees, and (2) the covenant [was] designed to enforce the franchisee's promises." In this case, the agreements were found to be otherwise enforceable because the franchisor promised to allow the use of its system and to disclose confidential information in exchange for promises not to compete. The court also found that the restraints of competition for a two-year period after the agreement and a fifty-mile radius were reasonable. Based on the court's findings that the Master Franchisor Agreements and covenants not to compete were enforceable, coupled with the evidence presented that Patron and the franchisee were violating the covenant, the court found that the franchisor was likely to succeed on the merits. The court also ruled that "[t]he public interest [factor] [did] not strongly favor one party over the other." Accordingly, the court held that the preliminary injunction was warranted.

***Franklin Park Lincoln-Mercury, Inc. v. Ford Motor Co.*, 2010 U.S. Dist. LEXIS 66732, Bus. Franchise Guide (CCH) ¶ 14,407 (N.D. Ohio July 2, 2010)**

A Ford dealer owned a Lincoln-Mercury dealership in Ohio. Without his knowledge, a buyer who also owned a Ford dealership bought a Lincoln-Mercury dealership located close to the dealer. The buyer operated the purchased dealership at its existing location for one day before moving it less than a mile away to integrate it with his established Ford dealership. The dealer protested the actions with the Ohio Motor Vehicle Dealers Board (Board), arguing that it was entitled to notice of these actions and an opportunity to protest. The Board dismissed the protest, and the court of common pleas affirmed the dismissal based on two exceptions within the notice requirements of the Ohio Motor Vehicle Dealers Act (Act): (1) relocations of existing dealerships of less than one mile, and (2) sales or transfers of existing dealerships where "the transferee proposes to engage in business at the same location." After the dealer appealed to the appellate court and lost, it sued Ford in the U.S. District Court for the Northern District of Ohio, alleging breach of fiduciary duty and violations of the Act and the federal Automobile Dealers Day in Court Act (ADDCA). Ford moved to dismiss.

The dealer argued that Ford owed fiduciary duties arising out of three sources of law: (1) the common law, (2) the Act, and (3) the ADDCA. The court found that neither the Act nor the ADDCA created a fiduciary relationship because neither contained any language to that effect, and the court did not find any case law supporting this proposition.

However, the court found that the dealer had stated a plausible claim for breach of fiduciary duty under Ohio common law. The existence of a franchisee/franchisor relationship does not give rise to a fiduciary relationship unless a special trust and confidence has been placed by the franchisee in the franchisor. The court noted that a recent case, *Manhattan Motorcars, Inc. v. Automobili Lamborghini, S.P.A.*, 244 F.R.D. 204, Bus. Franchise Guide (CCH) ¶ 13,669 (S.D.N.Y. 2007), held that a franchise relationship involving "exceptional circumstances" creates a fiduciary relationship and that such exceptional circumstances suffice to meet the "special trust" requirement of Ohio law. In *Manhattan Motorcars*, a fiduciary relationship was created when a franchise agreement granted the franchisor "the authority to exercise near life and death economic power" over the franchisee and required the franchisee to disclose confidential information. Because the dealer's complaint had tracked the exceptional circumstances of the *Manhattan Motorcars* case by alleging that the franchise agreement placed Ford "in a position of disproportionate power and dominance over" it, required the franchisee to disclose confidential information, and made the franchisee "dependent upon Ford for economic survival," the complaint was sufficient to demonstrate a special trust in the franchisor. Accepting those allegations as true, the court found that the franchisee stated a plausible breach of fiduciary duty claim.

***Saccucci Auto Group, Inc. v. Am. Honda Motor Co., Inc.*, 617 F.3d 14, Bus. Franchise Guide (CCH) ¶ 14,439 (1st Cir. 2010)**

Plaintiff Saccucci, a car dealer located in Rhode Island, sued defendant American Honda Motor Co., Inc. (Honda) after Honda prohibited its dealers from selling Honda Vehicle Service Contracts (VSCs) over the Internet. Saccucci claimed that the prohibition violated three provisions of the Rhode Island Fair Dealership Act: (1) one provision prohibiting car manufacturers from "coerc[ing]" a dealer into entering an agreement, (2) a second provision prohibiting manufacturers from engaging in "arbitrary" action that causes damage to a dealer, and (3) a third provision prohibiting manufacturers from engaging in any "predatory practice" against a dealer.

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Saccucci also claimed that Honda violated Rhode Island's implied covenant of good faith and fair dealing.

A VSC is a vehicle protection package similar to an extended warranty. Honda does not sell its VSCs directly to customers; rather, Honda dealers pay Honda a fee for every Honda VSC they sell. Dealers are then free to charge their customers whatever price they wish, keeping the difference as profit. Honda also pays its dealers a "performance based allowance" for each VSC sold. Honda VSCs were initially sold at dealer locations only, but at some time in 1997 dealers began to sell VSCs over the Internet. In 2002, certain Honda dealers began to complain about the lower-priced VSCs sold online. Although Honda initially supported online VSC sales, in 2007 Honda's position began to change after it received more complaints from individual dealers and received a recommendation from a board comprised of dealers that Honda stop online sales of VSCs. Dealers pointed to dissatisfaction from customers who purchased VSCs in dealer stores and later discovered VSCs sold online at significantly lower prices. Honda's management considered this issue and announced a temporary prohibition on Internet sales of VSCs beginning in February 2008.

Saccucci sued Honda in Rhode Island state court shortly after Honda imposed the temporary prohibition on online VSC sales. Honda removed the case to federal district court and then moved for summary judgment. The U.S. District Court for the District of Rhode Island granted summary judgment for Honda. Saccucci appealed.

On appeal, Saccucci argued that the district court erred when it granted Honda summary judgment on Saccucci's dealer act claims and its claim that Honda breached the implied covenant of good faith and fair dealing. The U.S. Court of Appeals for the First Circuit affirmed the district court's decision. On the first dealer act claim for coercion, the First Circuit held that Honda's prohibition of online VSC sales did not constitute a wrongful demand. Although the court held that Honda read its rights under the relevant contracts too broadly, it rejected Saccucci's argument that the contracts were ambiguous with respect to Honda's ability to curb VSC sales on the Internet. According to the court, Honda made its decision based on its commercial judgment and concern that Internet VSC sales harmed brand image and loyalty and resulted in dealers promoting competing products. On the second dealer act claim for arbitrary action, the court held that Honda made its decision to prohibit online VSC sales only after thorough consideration and that, far from being without reason, Honda acted out of concern for its dealers. On the third dealer act claim for predatory practice, the court again held that rather than acting with the intent to harm dealers, Honda enacted the prohibition in order to protect brand image and loyalty, which were in the best interest of its dealers. Finally, the court, referencing its analysis under the coercion claim, concluded that the district court correctly granted Honda summary judgment on the implied covenant of good faith and fair dealing claim because Honda's actions did not interfere with any contractual objectives and lacked bad faith.

***Taylor v. 1-800-GOT-JUNK?, LLC*, No. 09-35661, 2010 U.S. App. LEXIS 14433, Bus. Franchise Guide (CCH) ¶ 14,423 (9th Cir. July 14, 2010)**

In this case, franchisee appealed the district court's grant of summary judgment in favor of the franchisor. After the parties entered into a settlement and release agreement, the franchisee sued the franchisor for allegedly violating the Washington Franchise Investment Protection Act (FIPA). Both parties moved for summary judgment. The franchisee argued that the settlement and release agreement did not bar its claims because it had not been represented by counsel and because the FIPA voids unrepresented parties' releases and waivers. The franchisor responded that the FIPA antiwaiver provision did not apply because the FIPA applied only to franchises sold in Washington, and the franchisee was in Oregon. Aside from the franchise agreement's Washington choice of law provision, the franchisee had no connection to Washington. The district court agreed. On appeal, the franchisee argued that the franchise agreement's choice of law provision permitted the action despite the FIPA's express territorial limitation; but it offered no supporting authority for its argument, and the argument contradicted an earlier U.S. Court of Appeals for the Ninth Circuit decision. The Ninth Circuit therefore affirmed.

***Warren Distrib. Co. v. Inbev USA, L.L.C.*, 2010 U.S. Dist. LEXIS 55542, Bus. Franchise Guide (CCH) ¶ 14,404 (D.N.J. June 7, 2010)**

Plaintiff beer distributors sued defendant beer brewers Inbev and AB for violations of the Malt Alcoholic Beverages Practices Act (Act). AB filed counterclaims for unjust enrichment, tortious interference with contract (two counts), and violations of the Act.

Distributors had individual distributing agreements with Inbev for several name-brand beers. AB ultimately purchased the brewing rights of several of those brands and chose to use its existing distributors. The Act requires a successor brewer to pay a distributor fair market value for the brand beers before terminating distributor rights. Accordingly, AB offered fair market value payments to each distributor based on what is known as the "market multiples" approach. The market multiples approach multiplies a distributor's gross profits from a prior year by "a multiple derived from purported comparable transactions." Here, AB offered a multiple of 3.3 for certain brands and 2.5 for others. AB also offered a premium payment for the distributors' cooperation during the termination process. The distributors refused to cooperate, believing that the calculations were unfair. Thus, AB terminated their rights and tendered payment to each distributor according to the market multiples calculations (minus the premium). Although the market multiples approach is not an uncommon approach in these circumstances, the distributors insisted that the "discounted cash flow" method be used. The distributors alleged that the market multiples approach undervalued their rights by $40 million.

The distributors also alleged that they were damaged because Inbev (1) actively negotiated with AB to transfer

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to it the import rights to certain brands and, in doing so, shared confidential, proprietary information with AB; and (2) induced the distributors to purchase large amounts of inventory when it knew that AB was taking over the brewing rights. AB's counterclaim asserted damages because the distributors allegedly sold terminated brands after termination and because one distributor actively engaged in a "duplicitous campaign" of representing itself as an authorized seller of certain brands while inducing retailers to stop selling those brands. The distributors as a group, AB, and Inbev each moved for summary judgment.

The distributors claimed that Inbev violated the Act by terminating the agreements without good cause and when AB was not acting in compliance with the Act. Inbev claimed that it did not violate the Act because AB was the successor brewer and thus responsible for acts taken thereafter. The court agreed that AB was a successor brewer but determined that Inbev was still responsible for whether AB paid the distributors fair market value before it could determine that the termination was with good cause. The court denied Inbev's summary judgment motion because there was a question of fact concerning whether AB paid fair market value to the distributors.

The court turned to AB's motion for summary judgment on claims of violations of the Act and tortious interference. AB argued that summary judgment was appropriate if it could show that a reasonable tender was paid. The court rejected this argument. The Act defines fair market value as "the price at which the asset would change hands between a willing seller and a willing buyer." The Act requires that a successor brewer pay a wholesaler "the fair market value." According to the court, the word *the* suggests that there is an objective fair market value that is not simply a reasonable tender and that must be determined by a jury.

One of AB's counterclaims concerned the distributors' alleged violations of the Act. The court stated that the Act does not provide for a cause of action by a brewer against a distributor. Thus, the court granted summary judgment in favor of the distributors on this claim.

TERMINATION AND NONRENEWAL

***Duncan Servs., Inc. v. ExxonMobil Oil Corp.*, 2010 U.S. Dist. LEXIS 69372, Bus. Franchise Guide (CCH) ¶ 14,421 (D. Md. July 12, 2010)**

In this case, the U.S. District Court for the District of Maryland reconsidered an earlier ruling on motions to dismiss and rejected ExxonMobil dealers' claims against ExxonMobil for constructive termination in violation of the Petroleum Marketing Practices Act and breach of contract. The court noted that the U.S. Supreme Court in the *Mac's Shell* case determined that a franchise is terminated only where one of the statutory elements of the franchise is terminated. Those elements include the use of the franchisor's trademark, the purchase of motor fuel, and the lease of the premises. None of the statutory elements had ended because the dealers could still use the trademark, purchase fuel, and lease the premises and still rented the property. The court also rejected the dealers' breach of contract claim because they had not alleged that ExxonMobil had actually violated any contract provisions.

***Krispy Kreme Doughnut Corp. v. Satellite Donuts, LLC*, Case No. 10-civ-4272, Bus. Franchise Guide (CCH) ¶ 14,434 (S.D.N.Y. July 21, 2010)**

Following multiple, uncured monetary defaults, a doughnut shop franchisor sent its franchisee a Notice to Cease and Desist, which effectively terminated the franchise agreement between the parties. Thereafter, the franchisor moved to enjoin the franchisee from operating the franchises and using the franchisor's trademarks and proprietary information. The U.S District Court for the Southern District of New York found that the franchisor had a clear and substantial likelihood of success on the merits of its claim that it properly terminated its franchisee and that the franchisee was infringing upon its trademarks in violation of the Lanham Act by continuing to operate its two doughnut shops.

The court further held that the franchisee's argument that the Notice to Cease and Desist was not called a Notice of Termination was of no merit. The notice mailed by the franchisor stated in substance that the agreements were terminated due to the franchisee's multiple failures to cure its defaults and that continued use of the franchisor's trademarks was unauthorized. The court found that the franchisee's receipt of the letter satisfied the franchise agreement's notice of termination requirements and that the franchisee's ongoing infringement of the trademarks constituted irreparable injury to the franchisor.

***Absolut Spirits Co. v. Monsieur Touton Selection, Ltd.*, Nos. A-3363-08T1, A-3680-08T1, 2010 N.J. Super. Unpub. LEXIS 1874, Bus. Franchise Guide (CCH) ¶ 14,443 (N.J. Super. Ct. App. Div. Aug. 3, 2010)**

Absolut, a manufacturer of vodka, sought to terminate Touton as a wholesaler by filing a petition with the Alcohol Beverage Commission (ABC). An administrative law judge (ALJ) recommended granting Absolut's petition to terminate Touton, and the ABC director accepted the ALJ's recommendation. Touton appealed the ABC director's order, and the New Jersey Superior Court remanded the matter to the ABC director to make findings of facts that supported his decision to allow Absolut to terminate Touton. The ABC director determined that the termination was supported by the fact that Touton disparaged Absolut's brand and committed unfair trade practices.

After hearing the evidence, the ABC director concluded that Absolut had met its burden of demonstrating that Touton had engaged in proscribed trade practices by (1) requesting reimbursement for participation in a sales program despite the fact that Touton was aware that it did not comply with the program requirements and was therefore not entitled to any reimbursement, (2) attempting to order brands of Absolut flavored vodka even though it knew that it was not authorized to sell such brands, and (3) selling Absolut

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products below cost even though the ABC director denied Touton's request to do so. The ABC director also concluded that Touton's conduct of undercutting the price and using Absolut products as a loss leader fell under the definition of *product disparagement*.

At the outset, the court noted its narrow scope of review in considering administrative decisions. The court then upheld the ABC director's findings as well-supported by the record and consistent with the governing law. The court, however, held that it need not determine whether Touton's conduct satisfied the definition of *product disparagement* because such conduct constituted unfair trade practices, which were more than sufficient to justify Absolut's termination of Touton as a wholesaler.

***Ultimate Ford Inc. v. Motor Vehicle Div. of the Tex. Dep't of Transp.*, No. 03-09-00548-CV, Bus. Franchise Guide (CCH) ¶ 14,174 (Tex. App. Aug. 27, 2010)**

In this case, Ford Motor Company, Inc. (Ford) sought to terminate two dealerships. In order to terminate such dealerships, Ford was required to comply with the Texas Occupations Code (TOC), which requires a franchisor to include, among other things, a statement required by the statute in its written notice of termination. However, Ford's written notices of termination to the dealerships did not precisely track the language specified in the TOC. Specifically, Ford misidentified the agency with which the dealerships could file protests and the governing statute. Despite the errors in Ford's notices of termination, the dealerships timely filed their protests with the Texas Department of Transportation (Division), the correct agency charged with enforcing the TOC.

After a hearing, a Division administrative law judge (ALJ) concluded that good cause had been established for terminating the dealerships and that the notices of termination failed to comply with the requirements of the TOC. Despite Ford's noncompliance with the TOC, the ALJ issued a proposed recommendation that the dealerships' franchise agreements be terminated, which the Division's director adopted. The dealerships sought judicial review of the Division's determination, asserting that (i) Ford's failure to comply with the TOC rendered the termination letters ineffective; and (ii) the Division's order violated the TOC, exceeded the Division's authority, resulted from "improper procedure," contained an error of law, was an abuse of the Division's discretion, and was not supported by substantial evidence. Specifically, the dealerships pointed to the language of the TOC providing that a termination notice "must" contain the specified statutory disclaimer. This *must* language, the dealerships asserted, made the specific disclaimer a condition precedent to termination of the dealerships' franchise agreements.

Although the court acknowledged that the *must* used in the TOC denoted a condition precedent, it noted that it did not follow that any noncompliance with the notice requirements by Ford must automatically invalidate the Division's good cause determination. Rather, to determine the consequences of a failure to satisfy a condition precedent, the court must look to the legislative intent of the statute. The court found that the legislative intent of the termination notice requirement of the TOC was to ensure that a dealer facing termination is notified of its statutory rights to protest the termination and to obtain a hearing and how to do so. The court found that the purpose of the notice requirement was satisfied. Even though the disclaimer included in Ford's termination notice did not precisely track the requirements of the TOC, the court reasoned that the termination letters did notify the dealerships of their rights to protest the terminations and how to do so. In fact, the court noted that the dealerships did file timely protests of the terminations with the correct agency and with citations to the correct governing statute, and the dealerships went on to participate in the ensuing contested-case hearing. Consequently, the court concluded that the Division's decision that any defect in Ford's notice of termination letter did not invalidate Ford's termination was reasonable and consistent with the statute.

TORTIOUS INTERFERENCE

***Minn. Deli Provisions, Inc. v. Boar's Head Provisions Co., Inc.*, Case No. 08-3607, Bus. Franchise Guide (CCH) ¶ 14,401 (8th Cir. May 27, 2010)**

Factual issues precluded a distributor's efforts to defeat, by summary judgment, claims that a manufacturer had breached an oral agreement and tortiously interfered with contractual and prospective relations. Boar's Head, a manufacturer of deli products, appointed Minnesota Deli Provisions, Inc. (Minnesota) as its distributor. Minnesota claimed that it was verbally assured that Boar's Head would not terminate the relationship or touch Minnesota's customer accounts as long as it performed adequately. After Boar's Head found multiple product deficiencies at Minnesota's retailers, Boar's Head stripped Minnesota of multiple customer accounts and reassigned those accounts without compensating Minnesota. Following Minnesota's institution of suit for breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel, and tortious interference, Boar's Head found additional product deficiencies at Minnesota's retailers and terminated the agreement.

The U.S. Court of Appeals for the Eighth Circuit affirmed the district court's grant of summary judgment in favor of Boar's Head, finding that, under Minnesota law, the verbal assurances made by Boar's Head contained nothing more than general statements too indefinite to create a legally enforceable offer for a durational term. The Eighth Circuit concluded that the contact between the parties was at will and thus that the relationship was terminable at will. Further, having found no evidence of a clear and definite promise or agreement between the parties, the Eighth Circuit could not conclude that Minnesota established a course of dealing between the parties regarding a contractual right to sell its customer accounts.

***Utility Trailer Sales of Kan. City, Inc. v. MAC Trailer Mfg., Inc.*, No. 09-2023-JPO, 2010 U.S. Dist. LEXIS 83142, Bus. Franchise Guide (CCH) ¶ 14,448 (D. Kan. Aug. 16, 2010)**

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In 2000, Utility Trailer Sales of Kansas City, Inc. (Utility) and MAC Trailer Manufacturing, Inc. (MAC) "entered into a dealer agreement [that] grant[ed] Utility a non-exclusive license . . . to sell trailers and other products manufactured by MAC." The agreement "set a geographic area consisting of . . . eastern Kansas and western Missouri . . . in which Utility . . . would be the sole" authorized dealer of MAC products. Both Utility and MAC had the right to terminate the dealer agreement upon thirty days' notice. In 2008, MAC sent a letter to Utility purporting to terminate the dealership "'effective immediately.'" After Utility protested and filed an administrative complaint with the Kansas Director of Vehicles, MAC sent a letter revoking the termination. In 2008 MAC authorized Summit Truck Equipment, LLC (Summit) as a licensed dealer of MAC products in the Kansas City metropolitan area. Later that year, Utility filed suit against MAC and Summit in state court. After MAC and Summit timely removed the suit to federal court, "MAC sent a second termination letter to Utility," giving thirty days' notice of termination as required by the dealer agreement.

In its suit, Utility brought claims against MAC for breach of contract, tortious interference with a prospective business relationship, and violation of the Kansas Vehicle Dealer and Manufacturer Licensing Act (KDMLA). Utility also brought claims against Summit for tortious interference with an existing contract and tortious interference with a prospective business relationship. A jury returned a verdict in favor of Utility on the claims of tortious interference with a prospective business relationship against MAC and Summit and awarded actual damages. The jury rejected Utility's remaining claims and its request for punitive damages.

This decision involves the renewed motion of MAC and Summit for judgment as a matter of law on Utility's claim of tortious interference with a prospective business relationship, and Utility's renewed motion for judgment as a matter of law on its KDMLA claim and motion for new trial on its claims for breach of contract and tortious interference with existing contract. The U.S. District Court for the District of Kansas granted MAC and Summit's renewed motion for judgment as a matter of law and denied Utility's motions.

MAC and Summit argued that the evidence could not support a finding that defendants acted with malice and that a "competitor privilege" existed. The court found that although there was sufficient evidence for the jury to find that MAC and Summit acted with malice, there was no legally sufficient basis on which the jury could have found the absence of the business competitor privilege. Under the business competitor privilege, an actor cannot be liable for tortious interference with a prospective business relationship if "(1) the relation concerns competition between the actor and the plaintiff, (2) the actor does not employ wrongful means, (3) its actions do not create or continue an unlawful restraint of trade, and (4) its purpose is at least in part to advance competition." The court concluded that the standard for establishing "wrongful means" under the second prong is higher than the standard for establishing malicious action and required Utility to show that the alleged wrongful actions of MAC and Summit rose to the level of independently actionable conduct. Utility's failure to do so required the court to determine that a jury could not conclude that there was an absence of competitive privilege.

On the remaining claims, the court denied MAC and Summit's motion for judgment as a matter of law based on their argument that the conduct underlying Utility's tortious interference with a prospective business relationship was the same as the conduct underlying Utility's breach of contract claim. The court also rejected MAC and Summit's argument that Utility could not recover damages for lost profits beyond the thirty-day notice period for termination.

The court denied Utility's motion for judgment as a matter of law on the KDMLA claim and dismissed that claim. The court held that it lacked jurisdiction to consider the KDMLA claim because Utility failed to exhaust its administrative remedies as required by the statute. Finally, the court denied Utility's request for a new trial on its breach of contract and tortious interference with existing contract claims based on a discovery violation.

TRADEMARK INFRINGEMENT

***Pinzone v. Papa's Wings, Inc.*, Case No. 2090472, Bus. Franchise Guide (CCH) ¶ 14,418 (Ala. Civ. App. July 9, 2010)**

A divorce settlement agreement between a pizza restaurant franchisor and his ex-wife transferred the franchisor's interest in his Fairhope, Alabama, "Papa's Pizza" restaurant to his ex-wife. That agreement, however, did not grant the ex-wife exclusive use of the Papa's Pizza name in Fairhope. The ex-wife subsequently sold her Papa's Pizza restaurant to Papa's Wings, an entity that continued the operation of the restaurant and use of the Papa's Pizza name. That entity owned other Papa's Pizza locations under franchise agreements with the franchisor. The franchisor subsequently opened its own Papa's Pizza location in Fairhope. After Papa's Wings sued, the trial court enjoined the franchisor from operating pizza restaurants using the Papa's Pizza name and logo within the town of Fairhope and declared that the current owner had exclusive rights to use that name and logo within those limits.

On appeal, the court reversed the trial court's ruling, finding that it had erred in declaring that the current owner of the Fairhope restaurant had the exclusive right to use the Papa's Pizza name in Fairhope and enjoining Papa's Pizza from using that name in connection with another restaurant in Fairhope. The divorce settlement agreement did not contain language granting the ex-wife exclusive use of the Papa's Pizza name in Fairhope. Further, the contract by which the current owner of the Fairhope restaurant purchased the restaurant from the ex-wife stated that the ex-wife sold the right to use the Papa's Pizza name in Fairhope "only"; it did not state that the current owner had the exclusive right to use the name in Fairhope. As a result, the appellate court ruled there was "no evidence from which the trial court could have concluded that [the current owner of the ex-wife's restaurant] ha[d] the exclusive right to use the Papa's Pizza name . . . in Fairhope."

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TRADE SECRETS

***Maaco Franchising, Inc. v. Augustin*, No. 09-4548, 2010 U.S. Dist. LEXIS 83895, Bus. Franchise Guide (CCH) ¶ 14,442 (E.D. Pa. Aug. 5, 2010)**

Franchisor Maaco Franchising, Inc. (Maaco) sued franchisees for breach of franchise agreement and improper disclosure of trade secrets. Maaco moved for a preliminary injunction to enforce the franchise agreement's covenant not to compete and enjoin the alleged misappropriation of purported trade secrets. After a two-day hearing on the preliminary injunction motion, Maaco requested that the entire transcript be withheld from the public or that almost all of the transcript be redacted. The U.S. District Court for the Eastern District of Pennsylvania held that Maaco "ha[d] not carried its burden to show a need for secrecy beyond 'broad allegations of harm.'" The court found that the evidence presented regarding the purported trade secrets constituted information that was available to the public at large. Accordingly, the court denied Maaco's request to withhold or redact the transcript from the preliminary injunction hearing.

*Ms. Appleby's firm represented Maaco in this case.

VICARIOUS LIABILITY

***Soto v. Superior Telecom, Inc.*, No. 10-CV-0135 (BLM), 2010 U.S. Dist. LEXIS 54327, Bus. Franchise Guide (CCH) ¶ 14,400 (S.D. Cal. June 2, 2010)**

In this case, the U.S. District Court for the Southern District of California refused to dismiss a vicarious liability claim against defendants 7-Eleven and its franchisee. Plaintiff alleged that "Bonita Señorita" phone cards purchased from a franchised location did not provide the full calling time they were supposed to due to undisclosed charges. Plaintiff sued in California state court with a request for class certification against the phone card maker, 7-Eleven, and its franchisee, alleging that he was unaware of the rates, charges, and fees associated with the phone cards because the information was not displayed on the cards or anywhere near the sales location in violation of California law. He also claimed that he would not have purchased the cards had he known about the undisclosed charges.

Defendants removed the case to federal court and moved to dismiss. Defendant 7-Eleven argued that it was not vicariously liable because the franchisee operated as an independent contractor, and plaintiff's conclusory allegations of joint venture and management of the sale of phone cards could not establish that 7-Eleven had actual control over the franchisee.

In denying the motion to dismiss, the court noted that under *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), it need not accept as true "conclusory," "bare assertions." However, plaintiff satisfied *Iqbal*'s pleading standard because plaintiff adequately alleged an agency relationship under California law by asserting that (1) under the Standard Franchise Agreement, 7-Eleven required franchisees "to offer and sell certain 'Categories of Inventory,'" including certain calling card brands; (2) 7-Eleven spent substantial resources to develop and market its "'Prepaid Card product category' by controlling which products the franchisees were required to sell, negotiating the purchase terms with the distributors of the cards . . . , and overseeing the installation and maintenance of electronic equipment used to activate and 'charge' the cards at the register"; and (3) 7-Eleven and the franchisee shared the profits and losses of the Bonita Señorita cards through their "joint management and control of the sale of the Bonita Señorita cards."

***Uninsured Employers' Fund v. Brown*, No. 2010-CA-000283-WC, 2010 Ky. App. Unpub. LEXIS 696, Bus. Franchise Guide (CCH) ¶ 14,453 (Ky. Ct. App. Sept. 3, 2010)**

"Tonda Michelle Brown sustained work-related injuries . . . while working at a Subway sandwich stop owned and operated by Watash, UBC." Because Watash did not carry workers' compensation insurance, Uninsured Employers' Fund (Fund) paid Brown's medical expenses and temporary disability benefits. The Fund, however, "reserved the right to seek indemnity from" Doctors' Associates, Inc. (DAI), the franchisor of the Subway sandwich shop operated by Watash, the franchisee, provided that DAI qualified as an up-the-ladder employer of Brown under Kentucky's Workers' Compensation Act (Act).

An administrative law judge (ALJ) held that the Act did not apply because franchise relationships fall outside its scope, and Watash should not be considered a "subcontractor" because Watash was paying DAI for the right to operate the Subway sandwich shop. The Kentucky Department of Workers' Claims affirmed the ALJ's opinion. The Fund appealed the decisions of the ALJ and Department of Workers' Claims.

The Kentucky Court of Appeals reversed and remanded for further findings. The court found no cases supporting the ALJ's conclusion that "a franchisor is always or even presumptively exempt from providing workers' compensation benefits for employees of its franchisees." The court further concluded that "[t]he question of whether a particular business opportunity or franchise relationship satisfies [the Act] must be answered on a case-by-case basis."

The court then held that the ALJ failed to make any findings of fact supporting its second conclusion that DAI and Watash did not have a contractor-subcontractor relationship simply because Watash made royalty payments to DAI and was not in turn "remunerated" by DAI. The court pointed to *R.O. Giles Enterprises, Inc. v. Mills*, 275 S.W.3d 211 (Ky. Ct. App. 2008), in which the court held that courts will look to the nature of parties' business arrangement in determining whether it constitutes a contractor-subcontractor relationship and will not defer to the label that parties' attach to the arrangement. Because the ALJ is the finder of fact in workers' compensation matters, the court reversed and remanded to allow the ALJ to make additional findings of fact regarding the nature of DAI's business that support a legal conclusion under the Act.

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