THE ART OF DISPOSITIVE MOTIONS IN FRANCHISE DisPUTES

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THE ART OF DISPOSITIVE MOTIONS IN FRANCHISE DISPUTES

I. INTRODUCTION

Discovery and trials are time-consuming, expensive, and risky. In addition, the longer litigation goes on, the more the parties’ positions harden, and the more difficult it becomes to salvage the relationship. Cutting litigation short by way of dispositive motion is therefore a compelling possibility for any litigant, and perhaps particularly so for franchisors and franchisees, who may be locked in a long term relationship. Dispositive motions are the means to that end and this paper provides a summary of the what, when, and how of dispositive motion practice under the Federal Rules of Civil Procedure, along with strategy and practice tips for successfully prosecuting or defending against such motions, and relevant cases from the franchise context.

The 2002 Forum on Franchising included a comprehensive article and presentation that we do not attempt to duplicate here. The paper is divided into two Parts. Part I discusses Rule 12 motions to dismiss, or to strike, or for judgment on the pleadings, and Part II discusses motions for summary judgment under Rule 56.

II. MOTIONS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12

A. Overview, Pros and Cons

Motions under Federal Rule of Civil Procedure 12 ("Rule 12") are a device for disposing of an opposing party’s claims or defenses at the outset of the case on the basis of legal rather than factual deficiencies. Specifically, Rule 12(b) permits defendants (and counterdefendants) to defer filing a responsive pleading, and instead move for dismissal of one or more claims in a complaint, counterclaim, cross-claim or third-party claim on some or all of the following grounds: (1) lack of subject matter jurisdiction; (2) lack of personal jurisdiction; (3) improper venue; (4) insufficient process; (5) insufficient service of process; (6) failure to state a claim upon which relief can be granted; and (7) failure to join a required party. Rule 12(c) offers the possibility of obtaining a judgment on the merits after filing a responsive pleading but before enduring discovery. And Rule 12(f) provides a vehicle for picking off individual defenses and paragraphs of pleadings that are irrelevant and/or prejudicial.

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1 This paper addresses dispositive motions in federal court. State rules generally duplicate Rules 12 and 56 of the Federal Rules of Civil Procedure.


3 "A responsive pleading within the meaning of Rule 12(b) includes an answer to a claim for relief asserted in an original complaint, a cross-claim, or a third-party complaint; a reply to a counterclaim; and any other reply ordered by the district court under Rule 7(a)." 5B Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE § 1348 (3d ed. 2004) ("FED. PRAC. & PROC."). Rule 12 motions are not responsive pleadings within the meaning of the Federal Rules. However, if a Rule 12 motion is granted, courts may treat it as a responsive pleading for the limited purpose of terminating the non-movant's leave to amend as of right under Rule 15(a). See 5B FED. PRAC. & PROC. § 1348 n.5 and associated text.

4 Rule 12(e) motions for a more definite statement are not dispositive and are not discussed in this paper. The remaining provisions of Rule 12 set out the procedural requirements for motions under 12(b), (c), and (f).
The most obvious attraction of a Rule 12 motion is the possibility of having the opposing party’s entire case dismissed at a very early stage of the litigation, without the risk and expense of discovery and trial. But even short of complete disposition, a well-crafted Rule 12 motion can provide significant strategic advantages for the defense, including an early opportunity to: (1) reclaim the narrative and reframe the facts and the law; (2) narrow the issues and therefore limit the scope and cost of responsive pleading, discovery, and trial; (3) reduce the value of the case to the plaintiff and its attorneys — and therefore promote settlement — by nixing claims that permit attorneys’ fees or punitive damages; and (4) force the claimant to litigate in a different forum where it may lack a “hometown advantage” and where applicable state law may be less favorable on dispositive issues such as the limitations period. For parties to an on-going franchise relationship, resolving the dispute at an early stage and on the law rather than the facts may do less damage to the relationship.

Nonetheless, Rule 12 motions are not all upside. Preparing a strong motion can be time-consuming and expensive. Even if successful, many Rule 12 motions will result in dismissal with leave to amend or dismissal without prejudice to re-filing in a different forum. Upon re-pleading, the plaintiff may be able to use the arguments in the motion and the guidance provided by the court’s decision in order to strengthen its claims. There is also the possibility that the motion will be unsuccessful. A failed motion costs more than the money wasted on researching and drafting it; it may damage the movant’s credibility with the court, embolden the opposing party, and provide the non-movant with a roadmap of the movant’s legal theories and their weaknesses.

B. Rule 12(b) Motions: Timing, Tips, and Cases

1. Timing and Waiver

Under Rule 12, private litigants generally must assert every legal and factual defense to any claim, counterclaim, cross-claim or third-party claim in a responsive pleading that must be filed within 21 days of being served with the claim. However, seven specified defenses are carved out for special treatment. These are the defenses of: (1) lack of subject matter jurisdiction; (2) lack of personal jurisdiction; (3) improper venue; (4) insufficiency of process; (5) insufficiency of service of process; (6) failure to state a claim upon which relief can be granted; and (7) failure to join an indispensable party under Rule 19. As an alternative to immediately filing a responsive pleading, a litigant may assert these seven defenses in a single omnibus motion.

If the litigant chooses not to file a responsive pleading and to proceed instead by Rule 12(b) motion, Rules 12(g) and (h) require all available Rule 12(b)(2), (3), (4), and (5) defenses — i.e., all objections to personal jurisdiction, venue, process and service of process — be raised in the motion. If any of these defenses are omitted, they are waived, and may not be raised at a later stage of the litigation. By contrast, the defenses of lack of subject matter jurisdiction,

6 See Fed. R. Civ. P. 12(a)-(b). Rule 12(a) provides government entities and defendants who waive service under Rule 4(d) with a longer period of 60 days to file their responsive pleadings.

5 See Fed. R. Civ. P. 12(g)(2). No defense is waived by raising it with other defenses and the distinction between “general” and “special” appearances has been largely abolished in federal courts. See Fed. R. Civ. P. 12(b); 5B Fed. PRAC. & PROC. § 1344. (But for a discussion of limited appearances in the context of actions in rem and quasi in rem, see Volumes 4B § 1123 and 5C § 1396 of the Wright & Miller treatise on federal practice and procedure.)

failure to join an indispensable party, failure to state a claim upon which relief can be granted, and failure to state a legal defense to a claim are not waived if not asserted in the motion; they may be raised in a motion for judgment on the pleadings, or even at trial.\(^8\)

Once the motion is filed, the requirement to file a responsive pleading is suspended unless and until the court denies the motion, after which the litigant has 14 days to file its responsive pleading.\(^9\)

2. **Burdens of Proof and Matters Outside the Pleadings**

Practice under Rule 12 involves a few key points:

- On motions challenging subject matter jurisdiction, personal jurisdiction, venue, the content of the summons, or the service of process, the burden is on the non-moving party, and the court is permitted to consider matters outside the pleadings.\(^10\)

- On motions to dismiss for failure to state a claim, failure to join a required party, motions to strike, and motions for judgment on the pleadings, the burden is on the moving party, and the court is permitted to consider matters outside the pleadings.\(^11\) If the parties offer matters outside the pleadings on a motion under Rule 12(b)(6), (b)(7), or 12(c), the court has discretion to accept or reject them but, if it chooses to consider the extra-pleading material, it must convert the motion filed to a motion for summary judgment.\(^12\)

- The following categories of information are *not* considered to be "matters outside the pleadings" and may be considered on any Rule 12 motion without converting it into a motion for summary judgment: (1) matters of which a court may take judicial notice; (2) documents that are integral to the claim (such as a contract); (3) documents that are attached to the complaint; and (4) documents that are incorporated into the complaint by reference.\(^13\)

- As a general rule, to the extent that the pleadings are relevant to resolution of the motion under Rule 12, the court assumes the truth of all well-pled的事实s and draws all

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\(^8\) See Fed. R. Civ. P. 12(h)(2)-(3).


\(^10\) See generally 5C FED. PRAC. & PROC. § 1363; see also 5B FED. PRAC. & PROC. § 1350 nn. 63-65 and associated text (subject matter jurisdiction); id. § 1351 nn. 27-33 and associated text (personal jurisdiction); id. § 1352 nn. 6-9 & 13-17 and associated text (venue); id. § 1353 nn. 32-36 and associated text (process and service of process). Courts are split on proper allocation of the burden on a motion challenging venue but the majority rule appears to be that the plaintiff bears the burden. See 5B FED. PRAC. & PROC. § 1352 nn. 7-9 and associated text; but see 2 James Wm. Moore et al., MOORE'S FEDERAL PRACTICE – CIVIL § 12.32 (3d ed. 2007) ("[T]he better view is that the party challenging venue has the burden of proving its propriety .... [because] venue is an affirmative defense that should be raised and proved by the party challenging [it]").

\(^11\) See generally 5C FED. PRAC. & PROC. § 1363; see also 5B FED. PRAC. & PROC. § 1357 nn. 11-14 and associated text (failure to state a claim); 5C FED. PRAC. & PROC. § 1359 nn. 12, 13 and associated text (required party); 5C FED. PRAC. & PROC. § 1367 nn. 6, 7 and associated text & § 1368 (judgment on the pleadings).

\(^12\) 5B FED. PRAC. & PROC. § 1357 n.13 and associated text (failure to state a claim); 5C FED. PRAC. & PROC. § 1380 n. 28 and associated text (motion to strike); 5C FED. PRAC. & PROC. § 1369 nn. 17-18 and associated text (judgment on the pleadings).

\(^13\) See, e.g., 5C FED. PRAC. & PROC. § 1363 nn.39-42 and associated text; 5B FED. PRAC. & PROC. § 1357 n.1 and associated text; Stehr v. Hartford Fin. Servs. Group, Inc., 547 F.3d 406, 425-426 (2d Cir. 2008); Roth v. Jennings, 489 F.3d 499, 509 (2d Cir. 2007); Armengau v. Cline, 7 Fed. App'x 336, 344 (6th Cir. 2001).
reasonable inferences in favor of the non-moving party.\textsuperscript{14} However, courts are not obliged to credit conclusory allegations of law or fact, or allegations that are contradicted by matters of which the court is permitted to take judicial notice.\textsuperscript{15}

3. **Lack of Subject Matter Jurisdiction – Rule 12(b)(1)**

As every law student quickly learns, federal courts are courts of limited subject matter jurisdiction – they only have power to hear cases that satisfy Article III of the Constitution and the two federal statutes enacted to give it effect: (1) 28 U.S.C. §1331, which provides jurisdiction over “civil actions arising under the Constitution, laws, or treaties of the United States,” commonly known as “federal question jurisdiction”; and (2) 28 U.S.C. § 1332, which provides jurisdiction over cases between citizens of different states where the amount in controversy exceeds $75,000, commonly known as “diversity jurisdiction.”\textsuperscript{16}

The requirement of subject matter jurisdiction is so fundamental that defects cannot be waived and may be raised by the parties, or even sua sponte by the court, at any point in the proceedings – including for the first time in a motion for relief from the judgment under Rule 60(b) or even on appeal.\textsuperscript{17} Similarly, if a challenge to subject matter jurisdiction is joined with other defenses in an omnibus motion under Rule 12, the court must address subject matter jurisdiction before turning to any other defense, with the exception of lack of personal jurisdiction.\textsuperscript{18}

Common grounds for challenges to subject matter jurisdiction include: lack of diversity between the parties, failure to meet the amount in controversy requirement, failure to satisfy the requirements of the federal statute upon which the party is predicking federal question jurisdiction, and lack of standing to sue.\textsuperscript{19}

For parties to a franchise dispute in federal court, the following subject matter jurisdiction points should be kept in mind in order to: craft pleadings that will minimize the risk of a Rule

\textsuperscript{14} See 5B FED. PRAC. & PROC. § 1350 nn. 49-51 and associated text (subject matter jurisdiction); § 1351 n.31 and associated text (personal jurisdiction); id. § 1352 n. 13 nn. 13-17 and associated text (venue); id. § 1353 n.33 and associated text (process); 5B FED. PRAC. & PROC. § 1357 nn.11 and associated text (failure to state a claim); 5C FED. PRAC. & PROC. § 1359 nn. 12, 13 and associated text (failure to join a required party); 5C FED. PRAC. & PROC. § 1380 n. 23 and associated text (motion to strike).

\textsuperscript{15} See 5C FED. PRAC. & PROC. § 1363 n.39 and associated text; 5B FED. PRAC. & PROC. § 1360 n. 49 (subject matter jurisdiction); 5C FED. PRAC. & PROC. § 1380 nn. 23, 24 and associated text (motion to strike); 5B FED. PRAC. & PROC. § 1357 nn. 17-33 and associated text (failure to state a claim).


\textsuperscript{17} See Fed. R. Civ. P. 12(h)(3); 5B FED. PRAC. & PROC. § 1350 nn. 21-29 and associated text.


\textsuperscript{19} See 5B FED. PRAC. & PROC. § 1360 nn. 4-8 and associated text. For an example of problems with federal question jurisdiction, see Kennyrick, LLC v Standard Petroleum Co., 2009 U.S. Dist. LEXIS 46449 (D. Conn. June 1, 2009), where the court denied a franchisor’s motion to remove the action to federal court for lack of subject matter jurisdiction because the franchisee’s claims that the franchisor breached its contracts, unjustly enriched itself and violated Connecticut’s Franchise Act by charging the wrong gasoline tax rate did not raise questions about the interpretation or application of the federal gas tax statutes, 26 U.S.C §§ 4081 and 6428.
12(b)(1) motion; prepare a response to such a motion if filed; or to move for dismissal of the opposing party’s pleadings under the Rule:

- The Federal Arbitration Act does not create an independent basis for federal jurisdiction. Arbitration provisions are common in franchise agreements but under the Supreme Court’s decision in Moses H. Cone, a party wishing to enforce the arbitration provision cannot get into federal court to do so on the basis of the Federal Arbitration Act itself. Instead, the claim for enforcement of the arbitration clause itself must satisfy the requirements for diversity or present a substantial federal question, and this independent basis for jurisdiction must be adequately pleaded on the face of the petition. If these requirements are not satisfied, a motion to dismiss the petition to compel arbitration based on lack of subject matter jurisdiction should be filed.

- Even absent a petition to compel, failure to arbitrate may result in dismissal for lack of subject matter jurisdiction. Although the usual method for challenging a failure to arbitrate is a petition to compel arbitration in accordance with Section 4 of the Federal Arbitration Act, some courts have treated failure to arbitrate in the face of a mandatory arbitration clause as a jurisdictional defect and granted motions to dismiss claims that are subject to an arbitration clause under Rule 12(b)(1). Other courts disagree. In light of the unsettled authority on this point, a petition to compel arbitration is the safer course, although in a jurisdiction with favorable appellate precedent on point, a Rule 12(b)(1) motion will save the cost of filing a separate action to compel.

- Diversity jurisdiction requires complete diversity – that is, each plaintiff must have citizenship different from any defendant. In franchise disputes, this requirement can cause difficulty for franchisees who wish to sue not only the franchisor but also competing local franchisees or an area developer (for example on state law theories of tortious interference). Problems may also arise from the fact that the franchisor may be a citizen of multiple states,

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20 See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983) (“Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute; hence, there must be diversity of citizenship or some other independent basis for federal jurisdiction before the order can issue.”).

21 See, e.g., Greenberg v. Bear, Steams & Co., 220 F.3d 22, 26 (2d Cir. 2000) (“Simply raising federal-law claims in the underlying arbitration is insufficient ... In the context of a motion to compel arbitration under § 4 of the FAA, see 9 U.S.C. § 4, we have specifically held that there is no federal subject matter jurisdiction merely because the underlying claim raises a federal question.”) (quotation marks omitted); accord Prudential-Bache Sec., Inc. v. Fitcho, 966 F.2d 981, 987-89 (5th Cir. 1992) holding that jurisdiction for a petition to compel cannot be derived from the underlying dispute to be arbitrated but must “be determined from the face of the petition”).


24 See 5B FED. PRAC. & PROC. § 1350 nn. 15 (collecting cases approving use of Rule 12(b)(1) motions to raise the defense of failure to arbitrate).

25 See 5B FED. PRAC. & PROC. § 1350 nn. 14 (collecting cases disapproving the use of Rule 12(b)(1) motions to raise the defense of failure to arbitrate).

26 See Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806); see also 5B FED. PRAC. & PROC. § 1350 n. 65 and associated text.
because a corporation is a citizen not only of its state of incorporation but also its principal place of business.\textsuperscript{27}

- **To avoid dismissal, diversity must be apparent on the face of the pleadings.** This means including careful allegations regarding: the domicile (not residence) of all individuals, the place of incorporation and principal place of business of corporate entities, and a good faith assertion that the claimant could recover a judgment exceeding the amount specified in 28 U.S.C. § 1332 (currently $75,000).\textsuperscript{28}

- **Limited liability companies or "LLCs" are treated as citizens of every state in which a member of the LLC resides.**\textsuperscript{29} As a result, a federal court will only have diversity jurisdiction over a case to which an LLC is a party if all of the LLC's members reside in different states from all of the defendants. Since LLCs are a popular corporate vehicle for franchisees and area developers, the parties to a franchise dispute in federal court that is predicated on diversity jurisdiction must pay careful attention to the citizenship of all members of all LLCs and should be sure to include specific allegations regarding the citizenship of all LLC members on the face of their pleadings.\textsuperscript{30}

- **Franchisors can and do remove state court actions worth over $75,000 to federal court.** For a variety of reasons, franchisees often prefer to litigate in state court. To avoid undesired removal to federal court, franchisees should pay careful attention to the value of the claims they plead. Notably, attorneys' fees recoverable under a statute or by contract count towards the amount in controversy.\textsuperscript{31} While many franchise agreements mandate that each party bear its own costs, including attorneys' fees, plaintiffs asserting claims under fee-shifting statutes may find it difficult to resist the conclusion that those claims satisfy the jurisdictional amount. In sum, if the claim is truly worth more than $75,000, and all parties are diverse, removal may be inevitable but accurate pleadings that avoid overstating the value of claims will avoid unnecessary motion practice.\textsuperscript{32}

\textsuperscript{27} For example, in *Bellamy v. Excel Investments, Inc.*, No. 07-0532-CV-W-DW, 2008 U.S. Dist. LEXIS 32123 (W.D. Mo. Apr. 18, 2008), the court granted the franchisor's motion to dismiss for lack of jurisdiction on the grounds that, although its place of incorporation was Kansas, under the "total activities" test, its principal place of business was Missouri, where the plaintiff was domiciled.

\textsuperscript{28} See 5B FED. PRAC. & PROC. § 1350 nn. 65-66 and associated text. Notably, provided that a good faith assertion regarding the amount in controversy has been made in the pleadings, the party challenging jurisdiction bears the burden of proving "to a legal certainty" that the plaintiff could not recover the requisite amount. *Id.*

\textsuperscript{29} See, e.g., *Camico Mut. Ins. Co. v. Citizens Bank*, 474 F.3d 989, 992 (7th Cir. 2007); *General Tech. Applications, Inc. v. Exro Ltda.*, 388 F.3d 114, 120 (4th Cir. 2004); *GMAC Commercial Credit LLC v. Dillard Dep't Stores, Inc.*, 357 F.3d 827, 829 (8th Cir. 2004).

\textsuperscript{30} See, e.g., *Dunkin' Donuts Franchising LLC v. Komal International Inc.* No. 08-61483-CIV-ZLOCH, 2008 U.S. Dist. LEXIS 114424, * n.4 (SD Fla. Oct. 28, 2008) (["B]ecause Plaintiffs have failed to allege properly the citizenship of each of their members, they have failed to allege the diversity of citizenship for all of the named Parties and have not met the initial burden of establishing this Court's jurisdiction [over the state law claims])."

\textsuperscript{31} See, e.g., *Rae v. Perry*, 392 Fed. Appx. 753, 755 (11th Cir. Fla. 2010); see also 14B FED. PRAC. & PROC. § 3712 n.6 and associated text.

\textsuperscript{32} For cases discussing the amount in controversy requirement in the context of franchisor efforts to remove cases to federal court and franchisee efforts to obtain remand to state court, see, e.g., *Spinks v. The Krystal Co.*, No.: 6:07-2619-HMH, 2007 U.S. Dist. LEXIS 65549 (D.S.C. Sept. 4, 2007) (denying franchisees' motion to remand case to state court because "[t]he parties disagree whether the Defendant is entitled to recover future lost profits" and, therefore "the legal impossibility of recovery by the Defendant is not certain.") (quotation marks omitted); *Southern Ill.*
Supplemental jurisdiction requires a common nucleus of operative fact. 28 U.S.C. § 1367 permits federal courts to exercise "supplemental" jurisdiction over claims that do not independently satisfy the requirements of federal question or diversity jurisdiction, provided that such claims "are so related to claims in the action [over which the court has] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." To form part of the "same case or controversy", the supplemental claims must arise out of "the same nucleus of operative fact" as the claim upon which federal jurisdiction is predicated. If the state law claims do not arise out of the same nucleus of operative fact as the claim that provides jurisdiction, they are not "part of the same case or controversy" and do not satisfy the requirements of 28 U.S.C. § 1367. Accordingly, the court will lack supplemental jurisdiction and must dismiss the claims. For example, in Mason v. Kyle's Friendly Service, Inc., the franchisee pleaded a claim for wrongful non-renewal under the Petroleum Marketing Practices Act ("PMPA") along with state law alleging unfair pricing. The PMPA claim vested the court with federal question jurisdiction. The franchisor filed a Rule 12(b)(1) motion asserting that the court could not exercise supplemental jurisdiction over the unfair pricing claims because they did not arise from the same nucleus of operative fact as the jurisdiction-vesting PMPA claim. The court agreed and dismissed the unfair pricing claims.

Even if state claims are part of the same case or controversy, the exercise of supplemental jurisdiction is discretionary and may not survive dismissal of the claim providing original jurisdiction. Section 1367 vests courts with discretion to decline supplemental jurisdiction if the claim over which it has no original jurisdiction "(1) ... raises a novel or complex issue of State law, (2) ... substantially predominate over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction." A common source of supplemental jurisdiction problems is when jurisdiction is predicated on a federal question — in franchise disputes this might be the franchisor's rights against trademark infringement under 28 U.S.C. § 1338(a) or the Lanham Act, or a gas station franchisee's rights against wrongfoul termination or non-renewal under the PMPA. If the federal claim is dismissed, the court has discretion under Section 1367(3) to dismiss related state law claims or counterclaims at the same time. Another frequent cause of denial of supplemental

34 See City of Chi. v. Int'l College of Surgeons, 522 U.S. 156, 164-165 (1997) ("[t]he Court has long adhered to principles of pendent and ancillary jurisdiction by which the federal courts' original jurisdiction over federal questions carries with it jurisdiction over state law claims that derive from a common nucleus of operative fact,' such that 'the relationship between the federal claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'") (quoting United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966)).
40 See also 5A FED. PRAC. & PROC. § 1350 n. 9 and associated text.
jurisdiction is that the supplemental claims "substantially predominate[]" over the claims that provide federal jurisdiction. For example, in *Dunkin' Donuts Franchising LLC v. Komal International Inc.*, the court not only found problems with the pleading of diversity jurisdiction over the state law claims, but also held in the alternative that "supplemental jurisdiction should not be exercised over the state law claims asserted in Counts I & II of the Complaint ... because those claims present questions of state law which would otherwise ... dominate the federal claims and obscure their significance."

A dismissal for lack of subject matter jurisdiction under Rule 12(b)(1) is not a decision on the merits, merely a determination that the claim or claims cannot be heard in the federal court. Depending on the reasons for concluding that subject matter jurisdiction is lacking, the court may grant the non-movant an opportunity to cure the defect by filing an amended pleading. In any event, because the dismissal is not on the merits, it does not have *res judicata* effect, and the claimant remains free to re-file in a court that has jurisdiction. Importantly, claims over which the court declines to exercise supplemental jurisdiction will not be time-barred as a result of having been joined in the federal action. The statute avoids this harsh effect by providing that "[t]he period of limitations for any [such] claim ... shall be tolled while the claim is pending and for a period of 30 days after it is dismissed."

4. **Lack of Personal Jurisdiction – Rule 12(b)(2)**

While Article III limits the kinds of cases that federal courts may hear, the Due Process Clause of the Fourteenth Amendment limits judicial power over particular defendants. Specifically, for a court to obtain personal jurisdiction over a nonresident defendant, the defendant must have "certain minimum contacts with [the state in which the court sits] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." Federal courts have identified two types of personal jurisdiction corresponding to different kinds of contacts with the forum: (1) general jurisdiction, which exists when a defendant has systematic and continuous contacts with the forum state (such as when the state is a corporate defendant's principal place of business and place of incorporation); and (2) specific jurisdiction, which exists only when the claim arises from or relates to conduct that the defendant purposely directed at the forum state.

For parties to a franchise dispute in federal court, the following personal jurisdiction points should help to: craft pleadings that will minimize the risk of a Rule 12(b)(2) motion;

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42 See supra n. 30.
44 See SB FED. PRAC. & PROC. § 1350 nn. 61-62 and associated text.
45 See id. nn. 55-58 and associated text.
46 See id. nn. 61-62 and associated text.
prepare a response to such a motion if filed; or to move for dismissal of the opposing party's pleadings under the Rule:

- Unlike defects in subject matter jurisdiction, the defense of lack of personal jurisdiction is waivable.50 Failure to raise the defense of lack of personal jurisdiction in a timely responsive pleading or in a pre-pleading motion requesting dismissal on other Rule 12 grounds waives the defense.51 Filing a permissive counterclaim under Rule 13(b) also may waive the defense.52

- Forum selection clauses also waive the personal jurisdiction defense. Franchise agreements frequently contain clauses specifying not only the parties' choice of law but also their choice of a specific forum. These clauses are commonly raised through Rule 12(b)(3) motions attacking the plaintiff's choice of venue,53 but they can also be invoked to defend against claims that the specified forum lacks personal jurisdiction over the defendant.54 Although some states have decreed that forum selection clauses are unenforceable,55 state law on this point does not govern in federal court, even when the court is sitting in diversity. Rather, federal common law governs the enforcement of forum selection clauses in federal court,56 and that law treats the clauses as presumptively valid and generally enforceable absent special circumstances.57 The presence or absence of a forum selection clause will therefore be a significant factor in making or opposing a Rule 12(b)(2) motion for parties to a franchise dispute in federal court.

- Minimum contacts are not always enough; state statutory requirements must also be considered. In addition to the constitutional requirements, the exercise of personal jurisdiction over non-resident defendants must comport with the provisions of the forum state's long-arm statute, which may or may not extend the forum's power to the limits permitted by the Constitution, and also may impose additional procedural prerequisites to the exercise even of general jurisdiction, such as personal service of process within the state.58 Failure to comply with these statutory requirements can result in dismissal or transfer to a less favorable forum.59

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50 See 5B FED. PRACT. & PROC. § 1351 nn. 21-24 and associated text.
51 See id. nn. 21-22; Fed. R. Civ. P. 12(h).
52 See FED. PRACT. & PROC. § 1351 n.24.
53 See infra Part I.B.5.
58 For example, D.C. CODE ANN. § 13-334(a) conditions the exercise of general personal jurisdiction over a non-resident corporation on satisfaction of two independent conditions: (1) consistent with the Due Process Clause, the defendant "carries on a consistent pattern of regular business activity within the jurisdiction"; and (2) the plaintiff
The minimum contacts calculus can be complex. One of the seminal Supreme Court cases on minimum contacts was decided in the context of a franchise dispute. In Burger King v. Rudzewicz, the Supreme Court rejected a Michigan-based franchisee's attempts to avoid personal jurisdiction in Burger King's home state of Florida based principally on the following "minimum contacts": franchisee initiated negotiations for and purchased a franchise knowing that Burger King was a Florida corporation; franchisee submitted to "exacting regulation" of its business by Burger's King's corporate headquarters in Florida; franchisee purposefully availed itself of Florida's laws by agreeing to a Florida choice of law provision in the franchise agreement; and franchise failed to send royalty payments to the contractually stipulated address in Florida.59

Following Burger King, courts have generally required out-of-state franchisees to submit to jurisdiction in the franchisor's home state.61 Nonetheless, there are also decisions granting out-of-state franchisees' motions to dismiss for lack of personal jurisdiction.62 Figuring out how much contact – and of what kind – is enough can be difficult, leading to potentially expensive motion practice. (Although not decided in the franchise context, two very recent Supreme Court decisions on personal jurisdiction – one unanimous and one fractured 4-2-3, demonstrate the difficulty of the terrain.63 A forum selection clause, which acts as a waiver of personal jurisdiction objections,64 is a useful tool for circumventing messy and potentially expensive argument on the minimum contacts issue.

Personal jurisdiction must exist with respect to each and every claim asserted.65 The manner of establishing relevant minimum contacts varies for different categories of claims, such as tort and contract.66


62 See, e.g., Lee's Famous Recipes, Inc. v. Fam. Res, Inc., No. 3:07cv24, 2007 U.S. Dist. LEXIS 35311 (N.D. Fla. May 15, 2007) (dismissing Florida franchisor's suit against Indiana franchisee under Rule 12(b)(2) where franchise agreement had been executed before Florida company's acquisition of the franchisor, at a time when the franchisor was a Tennessee company and the franchise agreement included a Tennessee forum selection clause); GMAC Real Estate, LLC v. E.L. Cutler & Assoc., Inc., 472 F. Supp. 2d 960 (N.D. Ill. 2006) (similar facts); Fish Window Cleaning Services Inc. v Golden Deep South Enter., LLC, Bus. Franchise Guide ¶ 13,771 (E.D. Mo. Oct. 29, 2007) (dismissing Missouri franchisor's suit under Rule 12(b)(2) despite Missouri choice of law and choice of jurisdiction provisions in the franchise agreement because the claims related to post-termination conduct and a separate termination agreement did not contain a Missouri jurisdiction provision and because the franchisee's work occurred in Georgia and Florida). For a fuller exploration of this issue, see Bryan P. Couch, Are Franchisees Subject to Personal Jurisdiction in the Franchisor's Home State?, 28 Franchise L.J. 150 (2009).


64 See discussion earlier in this Part.

65 See, e.g., Helmer v. Doletskaya, 393 F.3d 201 (D.C. Cir. 2004) (separately analyzing asserted personal jurisdiction over fraud claims and contract claims, and separately analyzing asserted personal jurisdiction over contract claims predicated on distinct factual allegations).
Transfer is possible instead of dismissal. If the court determines that it lacks personal jurisdiction over the defendant it may grant the motion to dismiss and throw the case out of court, forcing the plaintiff to start from scratch in a new jurisdiction. However, under 28 U.S.C. § 1631, courts have discretion to take the gentler approach of transferring the case to a district in which personal jurisdiction is proper.  

Transfer for lack of personal jurisdiction changes the applicable law and tolls applicable statutes of limitation. 28 U.S.C. § 1631 mandates that a case transferred for want of jurisdiction in the transferor court "shall proceed as if it had been filed in ... the court to which it is transferred on the date upon which it was actually filed in ... the court from which it is transferred." This provision has two important consequences: (1) it requires application of the law of the transeree state, potentially including shorter limitations periods; and (2) it preserves the plaintiff’s initial filing date for purposes of calculating limitations periods, effectively tolling the time that the complaint was pending in the transferor court.

5. Improper Venue – Rule 12(b)(3)

A motion under Rule 12(b)(3) asserts that the particular federal court in which the claims have been brought is an improper venue for hearing the claims. In federal court, there are two principal bases for challenging venue: (1) failure to comply with the requirements of the federal venue statute, 28 U.S.C. § 1391, and (2) failure to comply with a contractual forum selection provision. 

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66 See, e.g., id.
67 28 U.S.C. § 1631 provides that:

Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

Courts sometimes transfer cases over which they lack personal jurisdiction under the authority of 28 U.S.C. § 1406(a) (2011) which provides that "[[The] district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." This use of the statute was authorized by the Supreme Court in Goldfarb, Inc. v. Heiman, 369 U.S. 463, 465 (1962), which held that, although the statute on its face applies only to defects in venue, "[n]othing in [its] language indicates that the operation of the section was intended to be limited to actions in which the transferring court has personal jurisdiction over the defendants." For a discussion of the history and interplay between the statutes permitting transfer for lack of venue and lack of personal jurisdiction, see Jeremy Jay Butler, Venue Transfer When a Court Lacks Personal Jurisdiction: Where are Courts Going with 28 U.S.C. § 1631, 40 Val. Univ. L. Rev. 789 (2006).
69 Id.; accord Ross v. Colorado Outward Bound School, Inc., 822 F.2d 1524, 1526 (10th Cir. 1987).
70 Section 1391 provides inter alia that diversity actions may only be brought in: "(1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred ... or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought." For federal question cases, a proper venue is: "(1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred... or (3) a judicial district in which any defendant may be found, if there is no district in
For parties to a franchise dispute in federal court, the following point about venue should be considered when seeking to file or avoid motions to dismiss under Rule 12(b)(3):

- **Unlike defects in subject matter jurisdiction, the defense of improper venue is waivable.** Waiver can result from failure to raise the defense in a timely responsive pleading or in a pre-pleading motion requesting dismissal on other Rule 12. It also commonly results from consent to a forum selection clause, which federal courts routinely enforce.

- **Unlike in state court, where forum selection clauses are often unenforceable, federal courts routinely sustain objections to venue based on forum selection clauses.** As noted in the discussion of personal jurisdiction above, forum selection clauses are common in franchise agreements and commonly enforced by federal courts, even in diversity cases where the forum state’s law would invalidate the clause.

- **The statutory requirement that a “substantial part” of the underlying events have occurred in the district is more stringent than the minimum contacts requirement of personal jurisdiction.**

- **Transfer is possible instead of dismissal.** By federal statute, if venue is improperly laid, the court must either dismiss the case or transfer it to a proper district. If the case is dismissed, the dismissal will be without prejudice to re-filing in a proper venue. Generally speaking, transfer will be preferable for the non-movant, because it preserves the plaintiff’s filing date for purposes of calculating the limitations period. However, it is important...

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71 See 5A FED. PRAC. & PROC. § 1352 nn. 3-4 and associated text. Challenges to venue based on a forum selection clause are sometimes brought under Rule 12(b)(6) instead of Rule 12(b)(3); there is a split in circuit authority regarding which vehicle is proper, but the majority rule appears to favor motions under Rule 12(b)(3). See id. n.5 and associated text.

72 See id. nn. 36-37 and associated text; Fed. R. Civ. P. 12(h).


74 See supra Part I.B.4 nn. 52-55 and associated text.

75 See Olberding v. Ill. Cent. R. Co., 346 U.S. 338, 340 (1953) ("The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction."); Gulf Ins. Co. v. Glasbrenner, 417 F.3d 353, 357 (2d Cir. 2005) ("caution[ing] district courts to take seriously the adjective 'substantial,'" because Olberding requires [constructing] the venue statute strictly. "It would be error ... to treat the venue statute's 'substantial part' test as mirroring the minimum contacts test employed in personal jurisdiction inquiries." (citation omitted)).

76 See 28 U.S.C. § 1406(a) (2008) ("The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."). Notably, the court need not have personal jurisdiction over the defendant in order to effect a transfer under Section 1406(a). See Goldlawr, Inc. v. Heiman, 369 U.S. 463, 465 (1962) ("Nothing in [the] language [of 1406(a)] indicates that the operation of the section was intended to be limited to actions in which the transferring court has personal jurisdiction over the defendants.").

77 Unlike in 28 U.S.C. § 1631 (discussed supra Part I.B.4 nn.65-67 and associated text), Congress did not express the rule preserving the filing date on the face of Section 1406(a). However, the Supreme Court has inferred the intention to protect plaintiffs from the limitations problem from the statute’s reference to transfer "in the interest of justice." See Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466 (U.S. 1962) ("The problem which gave rise to the enactment of the section was that of avoiding the injustice which had often resulted to plaintiffs from dismissal of their actions merely because they had made an erroneous guess with regard to the existence of some elusive fact of the
to note that if the case is transferred because the case was filed in an improper venue, the law of the transferee state will be applied in order to deter forum shopping and deny plaintiffs choice-of-law advantages to which they would not have been entitled in the proper forum.\(^7\)
 Under the law of the transferee state, the statute of limitations may be shorter, and may bar the claims even though they are deemed filed on the date the action was filed in the transferor court.\(^9\)


A motion under Rule 12(b)(4) challenges the content of the summons, that is, failure to comply with the mandates of Rule 4(a), for example on the theory that the summons does not properly name the parties or does not bear the court's seal.\(^6\) Rule 12(b)(5), by contrast, anticipates attacks on the method of service of process, such as when a defendant objects that the person to whom the summons was delivered is not its agent.\(^8\)

In common with the defenses of lack of personal jurisdiction and improper venue, objections to the contents and manner of service of process can be waived by failure to raise the defense in a timely responsive pleading or in a motion presenting other Rule 12 defenses.\(^9\) Moreover, even if not waived, objections to the contents or method of service will not result in dismissal but rather in quashing of the improper service, so long as there is a reasonable prospect that proper service can be accomplished.\(^3\)

7. **Failure to Join a Required Party – Rule 12(b)(7)**

Rule 12(b)(7) permits a party to move for dismissal of a complaint, counterclaim, cross-claim or third-party claim when there is a person who has not been joined to the action whose continued absence will either: (1) prevent the court from granting complete relief to the existing parties; or (2) hinder the absent person from protecting her own legal interest in the subject of the action; or (3) expose an existing party to prejudice in the form of multiple or inconsistent obligations.\(^4\)

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\(^7\) See, e.g., Levy v. Pyramid Co. of Ithaca, 871 F.2d 9, 10 (2d Cir. 1989); Ellis v. Great Southwestern Corp., 646 F.2d 1099, 1107-13 (5th Cir. 1981); Martin v. Stokes, 623 F.2d 469, 471-75 (6th Cir. 1980).

\(^9\) Notably, this is the reverse of the rule that applies when venue is properly laid, but a change of forum is requested for the convenience of the parties and witnesses under 28 U.S.C. § 1404(a). Under that provision, i.e., when transfer is requested from an otherwise proper venue, the law of the transferor court continues to apply even after the transfer, thereby preventing parties from seeking a change in venue simply in order to take advantage of more favorable laws in another forum. See Van Dusen v. Barrack, 375 U.S. 612, 633-640 (1964) (when defendant moves for transfer); Ferens v. John Deere Co., 494 U.S. 516, 527-528 (1990) (same rule when plaintiff moves for transfer).

\(^6\) See 5B Fed. Prac. & Proc. § 1353 nn. 4 and associated text.

\(^8\) See id. nn. 5, 8-10 and associated text.

\(^9\) See id. nn. 22-24 and associated text.

\(^3\) See id. § 1354 nn. 4-6 and associated text.

If the absent person meets the Rule 19(a)(1) criteria, and if there is no obstacle to joining the person as a party, the motion will simply result in a court order to join the party.\textsuperscript{65} However, joinder of a required party may cause difficulties with venue or subject matter jurisdiction. For example, the required party may object to venue or joining the party may destroy diversity. Under these circumstances, joinder is infeasible.\textsuperscript{66}

Infeasibility of joinder does not, however, automatically lead to dismissal. To the contrary, the court has discretion to maintain the action between the existing parties without joinder of the absent party, or to dismiss it.\textsuperscript{67} In choosing between these two paths, the court is required to balance the factors set out in Rule 19(b): (1) prejudice to the absent person or existing parties; (2) whether shaping the relief could lessen any prejudice; (3) whether adequate relief can be given without the absent party; and (4) whether the plaintiff can obtain an adequate remedy if the action is dismissed. In practice, courts give a great deal of weight to the fourth factor, and are particularly disinclined to dismiss if there is no alternative forum in which the absent party could be joined.\textsuperscript{68}

An example of a Rule 12(b)(7) practice in the franchise context is provided by Thompson v. Jiffy Lube Int'l, Inc.,\textsuperscript{69} a putative class action of customers against franchisor Jiffy Lube seeking damages for and injunctive relief from hidden shop fees, pressure to buy add-on services, and inadequate training of technicians. Jiffy Lube moved to dismiss on numerous grounds, including failure to join the franchisee at whose location the class representative claimed to have suffered injury. The court agreed that the franchisee was a required party under Rule 19, observing that a franchisee "has a rather obvious interest in a lawsuit that challenges the franchise's methods of operation and seeks to alter the way it does business."\textsuperscript{70} The court found that "[t]he injunctive relief requested by plaintiff would directly impact the franchisee," and that the interests of the franchisor and franchisee "may well be adverse to each other in some material respects," including because Jiffy Lube "contends the franchisee has a contractual obligation to indemnify [it] for damages arising out of the franchisee's actions, meaning ... that further litigation may be forthcoming if the franchisee is not joined."\textsuperscript{71} The court did not, however, grant the motion to dismiss, but rather ordered the plaintiffs to amend the complaint and join the franchisee.\textsuperscript{72}

Notably, failure to join a required party – like lack of subject matter jurisdiction and failure to state a claim – is not waived by failure to assert it in a Rule 12(b) motion or responsive pleading.\textsuperscript{73} However, as the facts of the case evolve, parties should identify and raise Rule

\textsuperscript{65} See generally 5C FED. PRAC. & PROC. § 1359.
\textsuperscript{66} See id.
\textsuperscript{67} See Fed. R. Civ. P. 19; 5C FED. PRAC. & PROC. § 1359.
\textsuperscript{68} See 5C FED. PRAC. & PROC. § 1359 n.8 and associated text.
\textsuperscript{70} Id. at * 58-59.
\textsuperscript{71} Id. at * 59.
\textsuperscript{72} Id. at * 60; see also Gillis v. McDonald's Corp, No. 91-7202, 1992 U.S. Dist. LEXIS 14239 (E.D. Pa., Sept. 10, 1992) (a slip and fall suit in which McDonald's obtained dismissal on the grounds that the franchisee who operated the unit where the plaintiff was injured was a required party).
\textsuperscript{73} See Fed. R. Civ. P. 12(h) (2).
12(b)(7) objections in a timely fashion because courts are charged by the Rule to evaluate dismissal versus continuation "in equity and good conscience," 94 and will not permit a party to lie in the weeds and then raise the defense after so much time has passed that no alternative forum exists for the claims.95

8. Failure to State a Claim – Rule 12(b)(6)

a. The Twombly/Iqbal Plausibility Standard

A Rule 12(b)(6) motion for failure to state a claim upon which relief can be granted challenges the legal sufficiency of the pleadings without challenging the truth of the factual allegations.96 In other words, the movant asserts that, even if all of the factual allegations were true, the claims would fail as a matter of law. Since the challenge is directed to the legal sufficiency of the pleadings, matters outside the pleadings may not be considered, and the court is obliged to assume the truth of all well-pledged allegations and to construe them in the light most favorable to the non-moving party.97 If either party introduces matters outside the pleadings, the court has discretion to consider the material but, if it does so, the motion to dismiss must be converted to a motion for summary judgment.98

Rule 8(a)(2) requires a pleading to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." For five decades following the Supreme Court's decision in Conley v. Gibson,99 courts interpreted this to mean that very little factual matter needed to be pleaded to support a claim and "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."100 Then, on May 21, 2007, the Supreme Court decided Bell-Atlantic v. Twombly,101 and announced that Conley's "no set of facts" formulation had "earned its retirement."102 Twombly explained that Conley's famous language had been misunderstood: it was "an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."103 Thus, according to Twombly, Conley "described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading."104

95 See, e.g., Parker Rust-Proof Co. v. Western Union Tel. Co., 105 F.2d 976, 979-80 (2d Cir. 1939).
96 See 5B FED. PRAC. & PROC. § 1355 & nn. 3-4 (explaining that the motion "is a lineal descendant of the common law general demurrer," and that "[i]f the party who demurred admitted all the well pleaded facts in his opponent's pleading and challenged the plaintiff's right to recover on the basis of those facts, thereby taking the position that even if all of the plaintiff's allegations were true, he still was not entitled to recover.").
97 See 5B FED. PRAC. & PROC. § 1357 n. 11 and associated text.
98 See Fed. R. Civ. P. 12(d) ("If ... matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment"); see also 5C FED. PRAC. & PROC. § 1366.
100 Id. at 45-46.
102 Id. at 562-63.
103 Id. at 563.
104 Id. at 563.
In terms of how pleaders can pass the initial hurdle of adequately stating a claim, Twombly explained that the pleading standard Rule 8 announces does not require "detailed factual allegations," but "[factual allegations must be enough to raise a right to relief above the speculative level,"\(^{106}\) and "state a claim ...that is plausible on its face."\(^{106}\)

Twombly involved a putative antitrust class action under Section 1 of the Sherman Act. At first it seemed possible that its ruling – that the complaint needed some factual context suggesting an agreement to restrain trade that was "plausible on its face" – might be limited to that context.\(^{107}\) However, two years later in Ashcroft v. Iqbal,\(^{108}\) the Supreme Court applied the Twombly plausibility standard to a Bivens civil rights action,\(^{109}\) and expressly stated that "[o]ur decision in Twombly expounded the pleading standard for all civil actions."\(^{110}\)

In light of Iqbal and Twombly, it is clearly important for plaintiffs to allege enough factual context to give plausibility to their claims.\(^{111}\) Less obviously, it may also be important for defendants to plead their affirmative defenses with sufficient factual detail to render them plausible. The question whether the plausibility standard applies to affirmative defenses was not expressly addressed in Iqbal or Twombly, and no federal appellate court has ruled on it to date. District courts have reached differing conclusions, but the emerging majority position seems to be that the Iqbal/Twombly standard applies with equal force to defensive pleadings.\(^{112}\)

\(^{105}\) Id. at 555.

\(^{106}\) Id. at 570.

\(^{107}\) Id. at 570.


\(^{109}\) A Bivens action is a federal cause of action for damages against federal officials for constitutional violations. It works in much the same way as an action against state officials under 42 U.S.C. § 1983, except that the Bivens remedy was not created by statute, but implied directly from the Constitution in the seminal case Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

\(^{110}\) Id. at 1953.


b. **Common 12(b)(6) Arguments in Franchise Cases**

i. **Statutory and Contractual Limitations Periods**

Failure to comply with an applicable statute of limitations is a common basis for a Rule 12(b)(6) motion.\(^{113}\) Moreover, many franchise agreements contain provisions mandating that claims be filed in an even shorter period than the one established by the otherwise applicable statute of limitations. Courts often enforce these contractual limitations periods, including when raised on a motion to dismiss.\(^{114}\)

ii. **Merger/Integration Clauses & Disclaimers of Reliance**

A common provision in franchise agreements is a "merger" or "integration" clause specifying that the written agreement constitutes the full and only agreement between the parties that supersedes any and all prior understandings or agreements between the parties. These provisions are often supplemented by "no reliance" clauses, in which a franchisee acknowledges that it has not relied on any previous representations made by the franchisor or its agents.

"No reliance" clauses are appropriately raised by 12(b)(6) motion to defeat claims of fraud and fraudulent inducement. For example, in *Prince Heaton Enterprises, Inc. v. Buffalo's Franchise Concepts, Inc.*\(^{115}\) a group of Buffalo's Café franchisees sued the franchisor for torts including fraud and negligent misrepresentation, alleging that the franchisor had misrepresented financial data on existing restaurants and falsely represented that it would use a national advertising fund to promote the brand.\(^{116}\) The franchisor moved to dismiss under Rule 12(b)(6) arguing that the plain language of the franchise agreement prevented the plaintiffs from proving reasonable reliance because it contained a provision asserting that "[f]ranchisee acknowledges that it has not received any warranty or guarantee, express or implied, as to the potential volume, profits or success of the business."\(^{117}\) The court granted the motion and dismissed the claims for fraud and misrepresentation.\(^{118}\)

9. **Motion for Judgment on the Pleadings – Rule 12(c)**

A motion for judgment on the pleadings is just a Rule 12(b)(6) motion deferred until after all of the pleadings have been filed. As one treatise puts it, "[a]ny distinction between them is merely semantic because the same standard applies to motions made under either subsection

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\(^{113}\) See 5B FED. PRACT. & PROC. \$ 1357 n.69 (collecting cases).

\(^{114}\) See, e.g., *Hays v. Mobil Oil Corp.*, 930 F.2d 96, 99-100 (1st Cir. 1991) (contractual statute of limitations provision requiring that any claim be brought within one year enforceable); *Krumholz v. AJA, LLC*, 691 F. Supp. 2d 252, 257-58 (D. Mass. 2010) (one year contractual limitations provision enforced).


\(^{116}\) Id. at 1361.

\(^{117}\) Id.

\(^{118}\) See also *Hall v. Burger King Corp.*, 912 F. Supp. 1509, 1529 (S.D. Fla. 1995) (dismissing fraud claims based on alleged pre-sale representations concerning future profitability because plaintiffs signed a franchise agreement containing a no-reliance clause after the alleged misrepresentations were made); see also *Westfield v. Quizno's Franchise Co.*, 527 F. Supp. 2d 840, 844-51 (E.D. Wis. 2007); *Lady of America Franchise Corp. v. Malone*, 562 No. 05-61304, 2006 U.S. Dist. LEXIS 96577 (S.D. Fla. Feb. 13, 2006).
... [a]nd Rule 12(h)(2) expressly allows the Rule 12(b)(6) motion to be made by motion for judgment on the pleadings."\textsuperscript{119} Thus, courts adjudicating motions under Rule 12(c) must not consider matters outside the pleadings without converting the motion to one for summary judgment, and are obliged to accept the non-movant's non-conclusory allegations as true, to construe the facts in the light most favorable to the nonmoving party, and to assess whether the challenged pleading contains sufficient factual matter, accepted as true, to state a claim to relief that is "plausible on its face."\textsuperscript{120}

While the standards are identical, the consequences of victory or defeat under 12(c) are much more dramatic than under 12(b)(6). As the name suggests, the prevailing party on a motion for judgment on the pleadings obtains a final judgment on the merits.\textsuperscript{121} Correspondingly, the losing party has an immediate right to appeal.\textsuperscript{122}

10. **Motion to Strike – Rule 12(f)**

The purpose of a motion to strike is to seek deletion of (1) material in a pleading that is "redundant, immaterial, impertinent, or scandalous", or (2) defenses that are legally insufficient.\textsuperscript{123} The motion provides plaintiffs with a vehicle for challenging legally insufficient defenses as a counterpart to Rule 12(b)(6) attacks on the sufficiency of a claim.\textsuperscript{124} It also promotes judicial efficiency by reducing the risk of mini-trials on collateral matters and reduces prejudice that the moving party might suffer from having to respond to the extraneous material.\textsuperscript{125} The Rule expressly provides that a court may strike such matters on its own motion.\textsuperscript{126} A party moving under the Rule must act before filing a responsive pleading and bears the burden of showing that the challenged matter "has no bearing on the subject matter of the litigation and that its inclusion will prejudice the defendants."\textsuperscript{127}

C. **Practice Pointer Recap**

In summary, franchisors and franchisees litigating franchise disputes in federal court should keep at least the following Rule 12 practice pointers in mind:

- Plead claims \textit{and} defenses carefully, including enough factual matter to make the claim or defense sufficiently plausible to withstand an \textit{Iqbal} challenge under Rule 12(b)(6) or 12(f).

\textsuperscript{119} 2 Moore's Fed. Prac. – Civil § 12.38.

\textsuperscript{120} Id.; accord Hayden v. Paterson, 594 F.3d 150, 160 (2d Cir. 2010).

\textsuperscript{121} See 5C FED. PRAC. & PROC. § 1372.

\textsuperscript{122} See 5C FED. PRAC. & PROC. § 1372.

\textsuperscript{123} Fed. R. Civ. P. 12(f).

\textsuperscript{124} See 5B FED. PRAC. & PROC. § 1356 ("The Rule 12(b)(6) motion is directed to the claim for relief and not to the defensive portion of any pleading. If a party wishes to attack a defense, he should move under Rule 12(f), which provides for the striking of 'any insufficient defense.'").

\textsuperscript{125} See 5C FED. PRAC. & PROC. § 1380.

\textsuperscript{126} See 5C FED. PRAC. & PROC. § 1380.

Think carefully about attaching exhibits to the pleadings. If they are deemed incorporated by reference, the court can consider them on a motion to dismiss without converting the motion to one for summary judgment. Plaintiffs must therefore consider carefully whether the pleadings and exhibits provide all the factual matter they need to make their claims plausible and survive a potential Iqbal challenge, without introducing material that strengthens a defendant’s arguments for dismissal.

Think carefully about introducing matters outside the pleadings when litigating a Rule 12 motion. If the court chooses to consider them, it will have to convert the motion to one for summary judgment. Among other reasons, conversion to summary judgment may be undesirable because it: (1) costs money to convert the Rule 12 papers to summary judgment papers, including the statements of material facts often required by local rules; 128 and (2) provides the non-movant with an opportunity to request at least some discovery, on the grounds that they cannot properly respond to the motion without it.129

Check for complete diversity, including the citizenship of all members of any LLC that is a party.

Review statutory requirements for personal jurisdiction – minimum contacts may not be enough. For example, some states may require service of process within the state as a prerequisite to exercising general jurisdiction.130

If you don’t want to be in federal court, think carefully about the claims pleaded (do they raise a federal question?) and the amount of any judgment that those claims might produce (is it greater than $75,000 excluding costs but including statutorily- or contractually-mandated attorneys’ fees?).

Examine relevant contracts for forum selection clauses. While these may not be enforceable in many state courts, they are routinely enforced in federal court. Where you have to litigate can have an enormous impact on your case – by pushing up costs for travel, hotel accommodation, local counsel, etc., and by altering the legal rules applicable to the case, including statutes of limitation.

Examine relevant contracts for merger/integration clauses and “no reliance” provisions and evaluate them carefully under the applicable law before pleading fraud-based claims and estoppel defenses.

Avoid waiver of defenses by asserting all applicable defenses in a timely responsive pleading or Rule 12 motion. If crafting an answer, don’t forget that some courts will

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128 See, e.g., District of Connecticut Local Rule of Civil Procedure 56(a). ("There shall be annexed to a motion for summary judgment a document entitled ‘Local Rule 56(a)1 Statement,’ which sets forth in separately numbered paragraphs meeting the requirements of Local Rule 56(a)3 a concise statement of each material fact as to which the moving party contends there is no genuine issue to be tried. ... The papers opposing a motion for summary judgment shall include a document entitled ‘Local Rule 56(a)2 Statement,’ which states in separately numbered paragraphs meeting the requirements of Local Rule 56(a)3 and corresponding to the paragraphs contained in the moving party’s Local Rule 56(a)1 Statement whether each of the facts asserted by the moving party is admitted or denied....")

129 See infra Part II.E discussing motions for discovery under Fed. R. Civ. P. 56(d).

130 See supra n. 58.
apply *Iqbal* to affirmative defenses, so plead the defense with some specificity and enough factual matter to make it plausible.

- If filing a Rule 12(b) motion, pay particular attention to including all applicable 12(b)(2), (3), (4), and (5) defenses (personal jurisdiction, venue, content of summons, and service of process).

## III. SUMMARY JUDGMENT

### A. Summary of the Rule.

At the time that the summary judgment procedure was adopted in 1937, it had been used in England for 50 years and had been adopted in a number of states.\(^{131}\) In the past few years, Rule 56 of the Federal Rules of Civil Procedure, which governs the summary judgment procedure, has been amended in a number of ways. The Advisory Committee Notes emphasize that the current version of the Rule incorporates longstanding practices in federal court, rather than making substantive changes. This discussion of the summary judgment procedure will summarize the Rule, analyze its application, discuss changes to the Rule that were made over the past few years, discuss franchise and distribution cases in which the summary judgment procedure was applied, and provide some practical tips for preparing a case for summary judgment.

### B. Federal Rule of Civil Procedure 56(a).

"The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial."\(^{132}\) "Summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact."\(^{133}\) It is a pre-trial proceeding which enables courts to determine whether a party's pleadings lack evidentiary support. Subdivision (a) of Rule 56 sets forth the standard for summary judgment that before 2010 had been stated in subdivision (c) with one exception in terminology related to the standard, which now provides that summary judgment is appropriate when there is no genuine "dispute" (rather than "issue") as to a material fact. This is not intended to change the substance of the standard, but rather, better reflects the long standing standard.\(^ {134}\) A motion for summary judgment is a judgment on the merits of the claims. An order granting summary judgment is a final appealable order, although an order denying summary judgment generally is not. Typically, a party that moves for summary judgment hopes to avoid the time and expense of a trial.

Rule 56 of the Federal Rules of Civil Procedure governs motions for summary judgment in federal court. Subdivision (a) provides:

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131 Id. The summary judgment procedure was first used in England in 1855. Georgene M. Vairo, *Through The Prism: Summary Judgment After The Trilogy*, American Law Institute-ABA Continuing Legal Education, July 11-13, 2007 (hereinafter, "Vairo"), at 4 (citing 10 FED. PRAC. & PROC. § 556). Originally, the procedure was used to enable plaintiffs to expedite the enforcement of certain debt instruments. Id. (citing Bauman, *The Evolution of the Summary Judgment Procedure*, 31 Ind. L.J. 329 (1956)). Today, however, the procedure is used to identify claims that lack evidence sufficient to reach a jury and which probably would have been decided on a directed verdict at trial. Id.


A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.\textsuperscript{135}

Rule 56(a) recently was amended to make clear that summary judgment "shall" be granted where there is no genuine dispute of material fact and a party is entitled to judgment as a matter of law. This mandate had been removed from Rule 56 in the 2007 amendments as a part of the Style Project,\textsuperscript{136} which had replaced the word "shall" with "should."\textsuperscript{137} However, the direction to grant summary judgment was restored in the 2010 amendments in response to comments on proposals published in 2008 and to avoid "an unacceptable risk of changing the summary-judgment standard."\textsuperscript{138} Interestingly, courts are often reluctant to grant summary judgment when there is the slightest doubt that a dispute of material fact might exist.\textsuperscript{139}

The 2010 amendments also added a provision to Rule 56(a) providing new direction requiring the court to provide the reasons for granting or denying summary judgment.\textsuperscript{140} According to the advisory committee notes, this has the advantage of facilitating an appeal or later trial court proceedings.\textsuperscript{141}

C. \textbf{Time to File.}

Originally, a party could not file a motion for summary judgment until after a responsive pleading had been filed.\textsuperscript{142} The Rule was amended in 1946 to permit the plaintiff to file a motion for summary judgment at any time after the expiration of 20 days from the filing of the lawsuit or after service of a motion for summary judgment by the adverse party (presumably as a responsive pleading). In 2009, it was determined that the timing provisions were outmoded and therefore the Rule was amended to permit a party to file a motion for summary judgment at any time, until 30 days after the close of all discovery.\textsuperscript{143} The presumptive timing rules are default

\textsuperscript{135} Fed. R. Civ. P. 56(a).

\textsuperscript{136} In 1991, the Judicial conference Standing Committee on the Rules of Practice and Procedure started the Style Project, which was intended to promote uniformity among the different sets of federal rules (i.e., Appellate Rules, Criminal Procedure and Civil Procedure). See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, \textit{Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure}, at vii (February 25, 2005).

\textsuperscript{137} Prior to the 2010 amendments, Rule 56(a) provided: "... The court should grant summary judgment ... ."

\textsuperscript{138} Fed. R. Civ. P. 56 advisory committee's note (2010 Amendments). See \textit{Celotex Corp. v. Catrett}, 477 U.S. 317, 322 (1986) ("In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.")


\textsuperscript{140} See Fed. R. Civ. P. 56(a) ("the court should state on the record the reasons for granting or denying the motion.").

\textsuperscript{141} Fed. R. Civ. P. 56 advisory committee's note (2010 Amendments).

\textsuperscript{142} Fed. R. Civ. P. 56 advisory committee's note (1946).

\textsuperscript{143} Fed. R. Civ. P. 56 advisory committee's note (2009).
provisions only, and they may be altered by a court order or by local rule. Typically, courts
enter scheduling orders that trump the rule's default provision. Courts often invite the parties' input when entering a scheduling order, which sets forth the time when the parties may file a motion for summary judgment and typically schedule it for some period of time after all of discovery has ended in the case so that it can be based on a complete record.

D. **Procedures for Filing a Motion for Summary Judgment.**

1. **Supporting Facts with Material in the Record.**

   The party seeking summary judgment bears the initial responsibility to inform the court of the basis for its motion. This requires the moving party to identify those portions of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," as well as expert reports, that it believes demonstrate the absence of a genuine dispute of material fact.

   The 2010 amendments to the Rule created a new subdivision (c) which establishes common procedures for summary judgment motions that had been applied previously as a matter of practice by the courts or local rules. Subdivision (c)(1) provides:

   (1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

   (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

   (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

   The advisory committee notes to the 2010 amendments explain that this subdivision sets forth the ways to support an assertion that a fact can or cannot be disputed, but not the form for doing so. The committee notes recognize that courts and judges have adopted different forms, including the commonly used statement of undisputed facts and an opposing statement of facts in dispute. But this format is no longer required by Federal Rule, presumably expressly to give courts the latitude to which they have been accustomed.

   If the movant has the burden of persuasion in the case (i.e., the plaintiff moving for summary judgment on its claims, or a defendant seeking a summary judgment on a defense),

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144 *Id.*


146 *Id.*; see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).


149 Fed. R. Civ. P. 56(c) advisory committee’s note (2010 Amendment).
the movant must point to evidence in the record that is material to the claims and shows that the movant is entitled to judgment as a matter of law. The court will only consider facts supported by material in the record, such as deposition testimony, documents, written discovery responses and admissions. Subdivision (c)(1)(B) of the Rule makes clear that a party may respond to a statement of fact by pointing out that the materials cited do not in fact establish an absence of a dispute. In addition, a party may demonstrate that a party with the burden of proof cannot produce admissible evidence in the record to carry that burden.

Although the moving party bears the initial burden of identifying the undisputed facts and demonstrating that the movant is entitled to judgment as a matter of law, the nonmoving party must then produce "specific facts showing that there is a genuine issue for trial." To satisfy this burden, the nonmoving party must offer more than a mere "scintilla of evidence" to show that a genuine issue of material fact exists. Where there is nothing more than a "metaphysical doubt" as to the material facts, summary judgment is proper. The nonmoving party must produce specific facts showing there is a genuine issue for trial on which a jury could reasonably find in its favor. In deciding a summary judgment motion, the district court must resolve all ambiguities and draw all reasonable inferences in the light most favorable to the nonmoving party.

2. Objections that a Fact Is Not Supported by Admissible Evidence.

The material relied upon to prove a fact or demonstrate that a fact is in dispute must be of the type that would be admissible evidence at trial. Subdivision (c)(2) of Rule 56 provides that "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." The objecting party may move to strike that material on grounds that would support an objection at trial (i.e., hearsay, lack of foundation, etc.). The court may strike such material and disregard the fact if it is not otherwise supported by admissible evidence.

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151 Fed. R. Civ. P. 56(c) advisory committee's note (2010 Amendment).
152 Id.
153 Celotex, 477 U.S. at 317.
154 Anderson, 477 U.S. at 252.
156 See Celotex, 477 U.S. at 322; Anderson, 477 U.S. at 252.
159 Id.
a. Use of Affidavits.

If material that supports a fact is not in the record, a party may add it to the record by submitting an affidavit or declaration based on personal knowledge that sets forth a basis for the fact(s). The affidavit or declaration must show that the affiant or declarant is competent to testify regarding the matters asserted. An affiant may testify only to facts about which he or she has personal knowledge, as distinguished from conclusory assertions, hearsay or opinion.

However, a party may not submit an affidavit in bad faith for the sole purpose of delaying the process. Rule 56(h) is the 2010 amended version of former Rule 56(g), which addresses instances where an affidavit or declaration is submitted in bad faith or for the sole purpose of causing delay. Prior to 2010, the Rule made sanctions in such circumstances mandatory. However, courts rarely awarded sanctions, so the 2010 amendment made sanctions discretionary to be more consistent with existing practice. Further, the Rule now requires notice and a reasonable period to respond to an assertion that an affidavit or declaration was submitted in bad faith.

b. Failing Properly to Support or Address a Fact.

Subdivision (e) of Rule 56 makes clear that a court may not grant summary judgment by default. If a movant fails to support an asserted fact, the court may provide an opportunity to address the fact. If a nonmovant fails to address an assertion of fact made by the movant (or the movant fails to reply to a nonmovant's assertion of fact), the court may deem the fact undisputed for purposes of the motion. Subdivision (e)(3) makes clear that a court may grant a motion for summary judgment only if the facts asserted are supported by evidence in the record and judgment is appropriate as a matter of law. If there is a proper response or reply as to some facts, the court cannot grant summary judgment without determining whether those

report of expert witness).

161 An affidavit is a sworn statement of fact before a taker of oaths, whereas a declaration is an unsworn statement made under penalties of perjury. See Black's Law Dictionary 58, 407 (6th ed. 1990).


163 Id. Some local rules limit the number of depositions that a party may take, and Federal Rule of Civil Procedure 33(a)(1) limits to 25 the number of interrogatories a party may propound, absent a court order to the contrary. Therefore, it is possible that an opposing party may not elicit evidence that supports or refutes a fact needed to prove a claim or defense. For example, a witness with knowledge of material facts may not give deposition testimony during fact discovery and the party sponsoring that witness may submit an affidavit to support a fact or to demonstrate that a fact is in dispute.


166 Fed. R. Civ. P. 56(h) and advisory committee's note to 2010 Amendments.


168 Id. 56(e)(2).

169 Id. 56(e)(3).
facts can be genuinely disputed." Only after the court has determined the facts which are supported by evidence in the record and those that are undisputed can the court determine the legal consequences. Subdivision (e)(4) authorizes the court to issue any other appropriate order in recognition of the fact that such may be the case.

E. Rule 56(d) Motion for Discovery (Formerly Rule 56(f)).

Sometimes a complaint may be disposed of with a limited number of facts, for example, the fact that the plaintiff previously released the claim. Under such circumstances, the defendant may file a motion for summary judgment early in the case, supported by an affidavit and copies of any critical documents. By filing the motion early in the proceedings, the defendant hopes to avoid the expense of discovery and trial. However, if additional facts not available to the plaintiff would demonstrate that there is a dispute as to the material facts supporting the motion, Rule 56(d) (which before the 2010 amendments was Rule 56(f)) authorizes the court to: (1) defer any consideration of the motion until after discovery has been completed, or deny the motion; (2) give the nonmovant time to take discovery or obtain affidavits to oppose the motion; or (3) issue any order that the court deems appropriate under the circumstances. However, a motion to request additional discovery cannot be based on speculation as to what such additional discovery might uncover. The motion must be supported by a sworn affidavit or declaration, provide specificity about what facts the movant believes will be discovered, and provide the reasons why facts are essential to defeat summary judgment. If a court permits the nonmovant to conduct more discovery, the movant may be able to convince the court to narrow the scope of discovery to the issues raised by the motion for summary judgment. In this way, a defendant may be able at least to minimize the scope of discovery, as well as the associated costs.

F. Judgment Independent of the Motion

The 2010 amendments to Rule 56 added a new subdivision (f), which codifies recognized practices of the federal courts and provides:

After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment to the nonmovant;

(2) grant summary judgment on grounds not raised by the party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

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170 Id., advisory committee's note to 2010 Amendments.
171 Id.
173 Fed. R. Civ. P. 56(d). Prior to the 2010 amendments, Rule 56(d) was designated as Rule 56(f).
175 Id. 56(f).
With respect to subdivision (f)(3), the advisory committee notes recommended that it may be useful for the court first to invite a motion for summary judgment by the parties, which will then require the parties to identify the facts as to which there is no genuine dispute, rather than requiring the court to identify those facts.\textsuperscript{176}

G. Failing to Grant All the Requested Relief

Rule 56(g) gives the court the latitude to narrow issues for trial when the court does not grant all of the relief requested in a motion for summary judgment. Subdivision (g) of Rule 56 provides that "[i]f the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case."\textsuperscript{177} This approach may be appropriate to minimize the cost of a trial. However in doing so, the court is cautioned not to interfere with a party's right to agree to treat a fact as undisputed only for purposes of the motion for summary judgment.\textsuperscript{178}

H. Partial Summary Judgment

A summary judgment may be granted as to a claim or a defense, or any part of a claim or defense. Thus a plaintiff may move for summary judgment as to one or more of its claims and/or may move for a summary judgment that the defendant cannot prove its defense as a matter of law. Similarly, a defendant may move for a summary judgment that the plaintiff cannot prove one or more of its claims, or that the defendant can prove one or more of its defenses as a matter of law. A party may move for summary judgment to establish a threshold issue — for example, the question of whether an agreement is a franchise under applicable state or federal law.\textsuperscript{179} Therefore, the summary judgment procedure may dispose of less than all of the case. It can be used to narrow the number of claims or defenses that will be presented at trial.

I. Application of the Rule: The Summary Judgment "Trilogy".

In 1986, the Supreme Court issued three decisions which clarified the standards for summary judgment: \textit{Celotex Corp. v. Catrett},\textsuperscript{180} \textit{Anderson v. Liberty Lobby, Inc.},\textsuperscript{181} and \textit{Matsushita Electric Industrial Co. v. Zenith Radio Corp.}\textsuperscript{182} None of the amendments made to Rule 56 since 1986 have changed the standards set by the Supreme Court in these cases. On the contrary, the amendments appear to reflect more clearly those standards. A review of these oft-cited cases is instructive to understanding more completely the standards that they established.

\textsuperscript{176} Fed. R. Civ. P. 56(f) advisory committee's notes (2010 Amendments).
\textsuperscript{177} Fed. R. Civ. P. 56(g).
\textsuperscript{178} Id. advisory committee's note (2010 Amendments).
\textsuperscript{180} 477 U.S. 317 (1986).
\textsuperscript{181} 477 U.S. 242 (1986).
\textsuperscript{182} 475 U.S. 574 (1986).
In *Celotex*, the Court addressed the burdens of the respective parties when a motion for summary judgment is filed. The Court held that summary judgment must be granted if a party fails to make a sufficient showing to establish an element essential to the party's case on which it bears the burden of proof. In *Celotex*, the estate of a deceased worker sued 15 asbestos manufacturers alleging that the decedent had died from exposure to the defendants' products. Two years after the lawsuit was filed, the defendants filed and prevailed on motions for summary judgment; the plaintiff appealed only that granting of Celotex's motion. Defendant Celotex had filed a motion for summary judgment on grounds that there was no evidence that the decedent was exposed to any product manufactured by Celotex. The district court granted summary judgment, but the Court of Appeals reversed. The appellate court held that Celotex's motion was "fatally defective" because Celotex failed to support its motion with any evidence. The Court of Appeals relied on *Adickes v. S.H. Kress & Co.*, where the Supreme Court established that "the party opposing the motion for summary judgment bears the burden of responding *only after* the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact."

The Supreme Court reversed, concluding that the appellate court's position was inconsistent with the standard in Rule 56. The Court held that "[i]n our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

The Court went on to note that "[i]n such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." The movant is entitled to judgment as a matter of law because the nonmovant has not come forward with proof on an essential element of her claim.

The Court noted that a movant has the initial burden of pointing out to the court the basis for its motion, and identifying evidence in the record, *if any*, that demonstrates an absence of a genuine issue of material fact. However, there is no *requirement* that a movant support its motion with evidence to *negate* the non-movant’s claim (i.e., like proving a negative). The Court referred to the version of Rule 56(c) in effect at the time as supporting that conclusion; that subdivision provided that summary judgment should be granted if "the affidavits, *if any*" (emphasis by the Court) show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. The current version of Rule 56(c)(B) expressly incorporates the Court’s interpretation of Rule 56, providing that a party may properly "show that

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162 477 U.S. at 324-25.
164 *Id.* at 320.
165 *Id.* at 321-322.
168 *Id.* at 322.
169 *Id.*
170 *Id.* at 322-323.
171 *Id.* at 323.
172 *Id.*
an adverse party cannot produce admissible evidence to support the fact."193 As the Celotex Court stated: "the burden on the moving party may be discharged by ‘showing’ — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party’s case."194 Once the movant carries its burden, the burden shifts to the nonmovant. Because the plaintiff in Celotex had the burden of proving that the decedent was exposed to Celotex’s asbestos product, she had to come forward with evidence sufficient to enable a jury to decide that issue in her favor.

Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.195

On the same day that the Court decided Celotex, it also decided Anderson v. Liberty Lobby, Inc.,196 which clarified the evidentiary standard of proof that a district court is to apply on a motion for summary judgment. The Court held that the substantive evidentiary standards that apply to the case at trial also apply in a motion for summary judgment.197 Indeed, the Court noted that the standard on summary judgment is the same as the "reasonable jury" standard applied to a motion for a directed verdict.198 "The primary difference between the two motions is procedural."199 A motion for summary judgment is decided on documentary evidence, whereas the directed verdict motion is decided on the evidence at trial.

Anderson involved a libel action brought by a public figure against a publisher and its chief executive officer. In libel cases concerning a public figure, the New York Times standard requires a plaintiff to prove, by clear and convincing evidence, that the defendant acted with actual malice.200 In support of its motion for summary judgment, the defendant submitted an affidavit of the author of the article in which the alleged libelous statements were published. The author stated that he obtained his information after a thorough investigation and research, as well as reliance on numerous other sources. Therefore, according to the movant, there was no genuine issue as to the material fact that plaintiff could not prove actual malice. The plaintiff opposed the motion by asserting that the sources on which the author had relied were not reliable, and that the publisher of the defendant had said that the articles were "terrible" and "ridiculous."201 The district court held that the author’s affidavit precluded a finding of actual malice; therefore, the plaintiff could not carry his burden of proving an essential element of his

194 Id. at 325.
195 Id. at 327.
197 Id. at 255.
198 "If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may: (a) resolve the issue against the party . . . ." Fed. R. Civ. P. 50(a).
199 Id. at 251 (quoting Bill Johnson’s Restaurants, Inc. v. NLRB, 461 U.S. 731, 745 n.11 (1983))
200 Id. at 244 (citing New York Times v. Sullivan, 376 U.S. 254 (1964)).
201 Id. at 246.
claim.\textsuperscript{202} However, the Court of Appeals reversed, holding that the respondent did not have to prove actual malice with "convincing clarity" at the summary judgment stage, and concluding that "a jury could reasonably conclude that the . . . allegations were defamatory, false, and made with actual malice."\textsuperscript{203}

The issue in the Supreme Court was "whether the Court of Appeals erred in holding that the heightened evidentiary requirements that apply to proof of actual malice in this New York Times case need not be considered for the purposes of a motion for summary judgment."\textsuperscript{204}

The Court noted that the standard applicable to Rule 56 "provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact."\textsuperscript{205} As to materiality, the Court noted that the substantive law dictates that determination: "[W]hile the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs."\textsuperscript{206} If the dispute about a material fact is "genuine" — i.e., "if a reasonable jury could return a verdict for the nonmoving party" — then summary judgment should not be granted.\textsuperscript{207} However, the respondent cannot rest on the pleadings alone to defeat summary judgment. Rather, the respondent must produce "significant probative evidence tending to support the complaint."\textsuperscript{208} "If the evidence is merely colorable," it is insufficient to defeat a summary judgment.\textsuperscript{209} "[T]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff."\textsuperscript{210}

In the context of the libel case against a public figure, a court must determine whether reasonable jurors could find by clear and convincing evidence that the plaintiff is entitled to a verdict. The Court noted that the issue of whether actual malice exists necessarily requires a consideration of the "actual quantum and quality of proof necessary to support liability under New York Times."\textsuperscript{211} In other words, the trial court must determine what facts are material to the claim by reference to the substantive law and whether there is a genuine dispute as to those facts. "For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence."\textsuperscript{212} In reversing and remanding the case to the Court of Appeals for a determination based on the standard applicable at a trial, the Court cautioned that

\textsuperscript{202} Id.
\textsuperscript{203} Id. at 247 (quoting Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563 (D.C.Cir. 1984)).
\textsuperscript{204} Id.
\textsuperscript{205} Id. at 247-48 (emphasis in original).
\textsuperscript{206} Id. at 248.
\textsuperscript{207} Id.
\textsuperscript{208} Id. at 249 (quoting First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 290 (1968)).
\textsuperscript{209} Id.
\textsuperscript{210} Id. at 252.
\textsuperscript{211} Id. at 254.
\textsuperscript{212} Id.
"[i]t by no means authorizes trial on affidavits." It is the role of a jury, not the judge, to make credibility determinations, weigh the evidence and draw inferences from the facts. In the context of a motion for summary judgment, the respondent's evidence is to be believed and all reasonable inferences made in his favor. Where the plaintiff is the nonmovant, he must still present affirmative evidence from which a reasonable juror could find in plaintiff's favor in order to defeat summary judgment.

The third case in the summary judgment "trilogy" is Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation. Matsushita addressed the question of what constitutes a genuine dispute of material fact in the context of an alleged conspiracy in violation of the antitrust laws. In short, the Court held that the district court should consider only those facts that are material to the claim; it is not relevant to the summary judgment motion if there is a dispute as to facts that are not material to the claim on which summary judgment is sought.

In Matsushita, American TV manufacturers sued Japanese TV manufacturers alleging that the defendants had conspired to depress prices in the United States market and drive the plaintiffs out of business. In short, the plaintiffs alleged that the defendants conspired to charge supracompetitive prices in Japan, and fix and maintain low prices in the U.S. market in violation of § 1 of the Sherman Act. In order to prove a violation of § 1, the plaintiff must prove the existence of a conspiracy among the defendants. The district court granted summary judgment in favor of the defendants, finding that the admissible evidence did not raise a genuine dispute of material fact regarding the existence of a conspiracy. The district court found that some of the evidence showed that the defendants conspired in ways that did not cause any injury to the defendants and therefore were not material to the claims that allegedly did cause injury, and the evidence that the defendants engaged in price-cutting was consistent with vigorous competition, not monopolization.

The Court of Appeals for the Third Circuit reversed, concluding that one could infer a conspiracy from the direct evidence and circumstantial evidence presented that the defendants conspired in some way. The Court identified that evidence as: (1) the Japanese market was characterized as oligopolistic, with few producers meeting regularly and exchanging pricing information which created an opportunity to fix prices in Japan; (2) defendants had higher fixed costs than the plaintiffs and thus needed to operate at close to full capacity to make a profit, and their plant capacity exceeded the needs of the Japanese markets; (3) they distributed their products in the U.S. according to a "five company rule"; (4) they were required to fix minimum

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213 Id. at 255.
214 Id.
216 Id. at 577-78.
218 The district court found that much of the defendants' evidence was inadmissible. That evidence included various government reports, business documents offered under hearsay exceptions, and expert testimony that did not rely on facts in the case. 475 U.S. at 578 and n.2.
219 Id. at 579.
220 According to the "five-company" rule, the defendants agreed to distribute their products in the U.S. only through five distributors. 475 U.S. at 581.
prices for exports to the U.S. pursuant to formal agreements arranged in cooperation with Japan’s Ministry of International Trade and Industry (referred to as the “check price agreements”); and (5) they undercut their own check prices by offering various rebate schemes. The Court of Appeals concluded that the evidence was sufficient for a fact finder to find the existence of a conspiracy to generate supracompetitive profits in Japan to fund low prices in the U.S. that would drive the American companies out of business.

The Supreme Court reversed the Third Circuit, holding that it had failed to apply the proper standards when evaluating the district court’s decision to grant summary judgment. The Court started by focusing on the respondents’ claims – more accurately, but pointing out what the claims were not. The purpose clearly was to identify the facts that were material to the claims with respect to which the respondents could actually assert a claim. The Court noted that any conspiracy to charge higher prices in the U.S. might violate the Sherman Act, but it could not cause any injury to the respondents because it would raise prices, which would benefit the respondents by increasing their own profits if they followed suit. Therefore, respondents could not state a cognizable claim based on an alleged conspiracy to raise prices in the U.S. Similarly, respondents would not suffer any injury from the “five-company rule,” supracompetitive prices in Japan, or the check prices that established minimum prices in the U.S., because all had the tendency to raise prices in the U.S., which would also benefit the respondents. In short, respondents had no cognizable claims based on the facts that tended to show the existence of a conspiracy by the petitioners to raise prices. The Court held that the Third Circuit erred when it found that evidence of conspiracies that were not cognizable by the respondents constituted direct evidence of the claim that was cognizable -- a conspiracy to charge predatory prices in order to drive out competition and monopolize the market in the U.S. -- a claim that, if proven, could have caused respondents to suffer an injury.

The Court stated that in order to defeat summary judgment, the respondents had to establish a genuine issue of material fact that the petitioners engaged in an illegal conspiracy that caused the respondents to suffer an injury. The only conduct that was cognizable under the Sherman Act was the allegation that petitioners conspired to charge predatory prices for the purpose of driving out the competition and monopolizing the U.S. market. Therefore, facts showing other "conspiracies" were not material to the respondents' claims. Further, respondents had to raise a "genuine" issue of fact. The Court noted that where the movant has carried its burden under Rule 56(c), the non-movant “must do more than simply show that there is some metaphysical doubt as to the material facts.” Rather, “the nonmoving party must come forward with ‘specific facts showing that there is a genuine issue for trial.’”

221 Id. at 581.
222 Id.
223 Id. at 582.
224 Id. at 583-84.
225 Id. at 585-86. Only facts concerning conduct that violates the Sherman Act was relevant to the respondents’ claims. For example, the Court noted that it is not a violation of the Sherman Act for petitioners to engage in unlawful conduct in Japan. Therefore, facts showing that petitioners charged supracompetitive prices in Japan were not relevant or material to respondents’ claims.
226 Id. at 588.
227 Id. at 586.
228 Id. at 587 (quoting Fed. R. Civ. P. 56(c)).
"[w]hen the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no `genuine issue for trial.'"\textsuperscript{229} While the inferences are to be drawn in favor of the non-movant, conduct that is equally consistent with a conspiracy as it is with no conspiracy does not, by itself, support an inference of antitrust conspiracy.\textsuperscript{230} The Court held that "[t]o survive a motion for summary judgment . . . a plaintiff seeking damages for a violation of §1 must present evidence `that tends to exclude the possibility' that the alleged conspirators acted independently."\textsuperscript{231} "Respondent . . . in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents."\textsuperscript{232} The Court found that the evidence presented by the respondents to establish a conspiracy was "economically irrational and practically infeasible."\textsuperscript{233} Therefore, it held that summary judgment should have been granted to petitioners.\textsuperscript{234}

\textbf{J. Some Recent Summary Judgment Decisions in Franchising and Distribution.}

The summary judgment procedure has been applied in numerous cases in the franchise and distribution areas. To demonstrate how the procedure has been used more recently, we reviewed cases from 2009 - 2010 to identify any patterns and/or insights. As the following demonstrates, the summary judgment procedure most often has been used to resolve cases alleging breach of contract and to determine whether a statute applies to the dispute. However, the procedure has resolved cases involving a wide variety of issues.

\textsuperscript{229} Id. at 587 (quoting First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289 (1968)).

\textsuperscript{230} Id. at 588.

\textsuperscript{231} Id. at 588 (quoting Monsanto Co. v. Spray-rite Service Corp., 465 U.S. 752, 764 (1984)).

\textsuperscript{232} Id. (citing Cities Services, 391 U.S. at 280).

\textsuperscript{233} Id. at 588. For example, the Court determined that it was not feasible for the petitioners to recoup any losses that they would sustain from predatory prices in the U.S., because they had been engaging in the continuing conduct for 20 years with no possibility in sight for them to expect to begin charging supracompetitive prices. The Court found that "[t]he success of any predatory scheme depends on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain." \textit{Id.} at 589. Therefore, the success of the alleged conspiracy was merely speculative; it depended on the willingness of the participants to endure losses for an indefinite period of time and complete compliance by numerous companies, each of which would have an incentive to "cheat." The Court found that the possibility that the petitioners might generate supracompetitive profits in Japan "simply cannot overcome the economic obstacles to the ultimate success of this alleged predatory conspiracy. \textit{Id.} at 593.

\textsuperscript{234} But see Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1993). In Kodak, another antitrust summary judgment case, the defendant (manufacturer of copiers) moved for summary judgment against the plaintiffs' (independent service providers) arguing economic implausibility. However, there, the Court held that summary judgment should have been denied and distinguished \textit{Matsushita}, finding that the plaintiff's theory was reasonable in light of the evidence. The motion for summary judgment in \textit{Matsushita} had been filed after years of discovery, and the conclusion that the plaintiff's economic theory was implausible was based on the facts in that case. In Kodak, however, Kodak filed its motion for summary judgment before the discovery of a fulsome factual record. The plaintiffs defeated summary judgment by offering evidence that Kodak's economic theory did not reflect economic reality, and Kodak failed to rebut that evidence. Further, Kodak's theory was inconsistent with the evidence of market behavior in the record. \textit{Id.} at 473.
1. **Contract Cases.**

Courts have resolved cases on summary judgment where there is a question of contract interpretation and the language in the contract is unambiguous.\(^{235}\) However, if the contract is ambiguous, there may be a dispute as to a material fact and summary judgment often is denied.\(^{236}\) Further, even where a contract is unambiguous, there may be a dispute regarding a party’s conduct in performing the contract that precludes summary judgment. In addition, even where there is no genuine dispute of material fact that the defendant breached the contract, the defendant may assert an affirmative defense that excuses the breach. If there is a dispute as to a material fact regarding the affirmative defense, the court may deny summary judgment for the plaintiff.

In *Bird Hotel Corp. v. Super 8 Motels, Inc.*\(^{237}\) Bird Hotel Corporation ("Bird Hotel") brought a class action lawsuit against Super 8 Motels, Inc. ("Super 8") for breach of the franchise agreement when it required the franchisees to pay a fee of 5% of gross room sales for their participation in a newly introduced customer loyalty program.\(^{238}\) A provision in the franchise agreement entitled "Consideration; Royalty and Advertising fees" unambiguously provided that the franchisees were required to pay 4% of gross room sales as a franchise fee and an advertising fee of 2% of gross room sales. The franchise agreement permitted Super 8, *inter alia*, to “revise, amend and to change from time to time its said System, or any part thereof.”\(^{239}\) Ten years after the franchise system was sold to Cendant Corporation, Cendant launched a TripRewards Program for customers. TripRewards was a points-based program that permitted customers to obtain points earned from hotel stays and redeem them for theme park tickets, gasoline cards and other reward items. Cendant required franchisees to begin paying a fee of 5% of gross room rate for their mandatory participation in the program. The franchisees filed a class action lawsuit against the franchisor asserting claims for breach of contract on grounds that there was no contractual basis for requiring franchisees to pay the 5% fee for participating in TripRewards.

In support of their claims, the franchisees pointed to the "Consideration; Royalty and Advertising fees" provision in the franchise agreement which provided only for the 4% franchise fee and the 2% advertising fee. The franchisor responded that the contract authorized it to charge the additional fee, in part relying on the provision that gave it the right to revise, amend and change the System from time to time. The franchisor also pointed out that other provisions of the franchise agreement authorized it to impose fees on the franchisees that were not

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\(^{236}\) See *Ingraham v. Planet Beach Franchising Corp.*, Bus. Franchise Guide (CCH) ¶ 14,159, at *4 (E.D. La. Apr. 1, 2009) (denying defendant’s motion for summary judgment on a breach of contract claim because the term in question was ambiguous).


\(^{238}\) Id. at *5.

\(^{239}\) Id. at *3.
contained in the section of the agreement entitled "Consideration; Royalty and Advertising fees," and therefore that provision was not the exclusive provision in which the court could find authorization for the additional 5% fee. For example, the agreement required franchisees to purchase certain approved equipment and supplies. On cross motions for summary judgment, the court found that the contract was not ambiguous. It held that when examining the agreement as a whole, the only "fees" that the franchisor was authorized to charge were those contained in the "Consideration; Royalty and Advertising fees" section. Therefore, as a matter of law there was no contractual basis for the franchisor to charge an additional 5% for the franchisees' participation in the TripRewards program. The court denied Super 8's motion for summary judgment, and granted Bird Hotel's motion.

In *Ramada Worldwide, Inc. v. Hotel of Grayling, Inc.*\(^{240}\) there was no dispute that a breach had occurred, but the nonmovant failed to produce admissible evidence in support of an affirmative defense in order to defeat summary judgment. Ramada Worldwide, Inc. ("RWI") and Hotel of Grayling, Inc., and its officers Ralph Ayar and Zuhair Ayar (collectively "Grayling") executed a licensing agreement to brand defendant's existing hotel (which previously had operated as a Holiday Inn) as a Ramada franchised hotel. The license agreement required, inter alia, that Grayling pay RWI monthly royalty and advertising fees to maintain the rights to its hotel franchise. Grayling stopped paying the required monthly fee and RWI brought a breach of contract claim.

In response to RWI's motion for summary judgment, Grayling did not dispute the meaning of the relevant contract provision and did not deny its failure to pay the required fees. Rather, it asserted the affirmative defense of fraudulent inducement, and further claimed that it was excused from its obligation to pay a license fee because RWI first breached the license agreement by failing to provide training, signage and other services required under the license agreement. In support of its affirmative defense, Grayling submitted evidence of pre-contract oral and written statements, as well as an affidavit of Ralph Ayar. The court first addressed the admissibility of Grayling's evidence, concluding that pre-contract oral and written statements were barred by the parol evidence rule because the license agreement contained an integration clause. The court also excluded the Ayar affidavit on grounds that it was a sham affidavit. The court noted that the affidavit directly contradicted Mr. Ayar's deposition testimony given only three months before the affidavit was executed. Grayling's affirmative defenses thus failed for lack of supporting admissible evidence. Because there was no genuine issue of material fact that Grayling stopped paying the license fee while continuing to operate the hotel using the Ramada trade marks, and because Grayling failed to support its affirmative defenses with admissible evidence, RWI was entitled to summary judgment as a matter of law.\(^{241}\)

Similarly in *Citgo Petroleum Corp. v. Ranger Enterprises, Inc.*,\(^{242}\) the defendant failed to support its affirmative defenses with admissible evidence. Ranger Enterprises arose in the aftermath of Hurricanes Katrina and Rita. Citgo Petroleum Corporation ("Citgo") sold petroleum products to Ranger Enterprises, Inc. ("Ranger") under a distributor franchise agreement for

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\(^{240}\) Bus. Franchise Guide (CCH) ¶ 14,409, at *6 (D. N.J. June 30, 2010).

\(^{241}\) Id. at *7-8. Grayling had asserted counterclaims for breach of contract based on its assertion that RWI breached the license agreement first, before Grayling stopped paying the license fee. However, the court denied Grayling's motion for summary judgment on those claims finding that some of Grayling's evidence of such breaches was not admissible evidence (i.e., the affidavit and pre-contract statements), and Grayling could not identify any provision in the license agreement that created the RWI obligations that were the subject of Grayling's claims. Id. at *9-11.

nearly fifteen years. The agreement required Ranger to purchase minimum quantities of refined gasoline and permitted Citgo to allocate gasoline to distributors in amounts less than those minimums in the event of a lack of adequate supplies. After the hurricanes, there was a lack of adequate supply of gasoline and, accordingly, Citgo allocated gasoline to distributors, including Ranger. The parties then amended their agreement to lower the required monthly minimum purchases of gasoline; however, Ranger failed to purchase the required minimum by 19 million gallons. Ranger then de-branded its gas stations, even though the agreement between the parties had not expired. Citgo sued for breach of contract alleging, inter alia, that Ranger breached the parties' agreement when it failed to purchase certain fuel allotments.\textsuperscript{243} Citgo moved for summary judgment.

The court first addressed the parties' motions seeking to strike certain evidence on grounds of admissibility. The court struck a supplemental report of Ranger's expert witness on the basis that it was untimely, that court leave was not granted to submit it, and that it impermissibly sought to rebut deposition testimony rather than add information not otherwise made known. Further, Ranger had submitted an untimely errata sheet, allegedly to correct the deposition testimony of one of its witnesses to change the year (from 2005 to 2003) in which certain fuel shortages occurred. The court struck the errata sheet concluding that it was an impermissible attempt to change testimony which could not plausibly be determined to be a transcription error (such as dropping the word "not" before a statement).\textsuperscript{244} Ranger had responded to the allegation that it breached the distributor agreement by failing to purchase the minimum required quantity of gasoline by arguing that Citgo failed to deliver the required amounts on a few occasions in the aftermath of Hurricane Katrina. The court concluded that a reasonable jury could not conclude that Citgo's failure to deliver the required minimum on only a few occasions over a 15-year period constituted a breach of the agreement under those circumstances. Because it was undisputed that Ranger fell short of its minimum purchase requirement by 19 million gallons of gasoline, it granted Citgo's motion for summary judgment on that claim.

In \textit{Kiddie Academy Domestic Franchising LLC v. Faith Enterprises DC, LLC},\textsuperscript{245} the court granted summary judgment for the plaintiff franchisor when the defendant franchisee failed to produce admissible evidence to support their affirmative defense and counterclaim for fraudulent inducement. Faith Enterprises DC, LLC and its owners (collective, the "defendants") negotiated to purchase two Kiddie Academy Child Care Learning Center franchises from an existing franchisee. The seller provided the defendants with monthly profit figures and pro forma financial statements for the franchises. The defendants forwarded the pro formas to Chris Commarota, an employee of the franchisor Kiddie Academy Domestic Franchising LLC ("Kiddie Academy"). Mr. Commarota commented that "they look okay to me."\textsuperscript{246} Two months later, defendants and Kiddie Academy entered into franchise agreements for the two franchise

\textsuperscript{243} \textit{Id.} The parties also had entered into 39 "branding" agreements which prevented Ranger from de-branding its gas stations for stated periods of time. Citgo sued for breach of those agreements as well. Notwithstanding Ranger's defenses to those claims, the court noted that the agreements prohibited debranding of Ranger's stations "for any reason," and it was undisputed that several of Ranger's franchises were debranded prior to termination of the agreement. According to the court, "[t]he contract language contains no apparent ambiguity: it states clearly that defendant is liable if it debrands prematurely." \textit{Id.} at *15. Thus, the court granted summary judgment for Citgo. \textit{Id.} at *14.

\textsuperscript{244} \textit{Id.} at *4.


\textsuperscript{246} \textit{Id.} at *2.
locations. The following month Mr. Commarota told defendants that the child centers generally had profits “in the mid to high teens.” Kiddie Academy brought a breach of contract claim after Faith failed to pay royalties from November 2006 to March 2007. Kiddie Academy later filed a motion for summary judgment.

It was undisputed that the defendants had failed to pay its royalty fees for a five month period. However, they asserted an affirmative defense and counterclaim for fraudulent inducement, asserting that the proforma financial statements were false and that the defendants reasonably relied on them in deciding to enter into the franchise agreements. To prove fraudulent inducement, the defendants had to prove, inter alia, that Kiddie Academy made a misrepresentation and that the defendants reasonably relied on the misrepresentations in entering into the franchise agreements.

The court first had to decide the admissibility of evidence before it could address the fraudulent inducement affirmative defense and counterclaim. Kiddie Academy asserted that the proformas were hearsay because they were not prepared by Kiddie Academy. However, the court admitted the proformas, finding that Kiddie Academy adopted them when Commarota reviewed them and said that “they look okay to me.” Significantly, Kiddie Academy did not dispute the accuracy of the proformas. Defendants also asserted that Cammarota’s statement that the child centers had profits in the “mid to high teens” was false. However, the court noted that defendants had failed to prove that that hearsay statement was false, so it could not preclude summary judgment.

Even though the court concluded that a reasonable jury could find that the proformas were false representations of the franchises’ financial condition, the court concluded that it was unreasonable for defendants to rely on those proformas. Defendants possessed documents that conflicted with the proformas and they failed to inquire further about the discrepancies. Therefore, the court concluded that defendants’ fraudulent inducement affirmative defense and counterclaim failed as a matter of law. It was undisputed that the defendants were required by the franchise agreement to pay royalties to Kiddie Academy based on the franchise’s gross weekly revenue and failed to do so, so the Court granted Kiddie Academy’s motion for summary judgment.

As the foregoing cases demonstrate, evidentiary rulings have the same affect on a motion for summary judgment as they do at trial. This is in keeping with the similar standards applicable both to motions for summary judgment and for a directed verdict. In the case of a motion for summary judgment, the parties file written motions to strike evidence cited by the opponent, where in a directed verdict, the parties’ objections at trial also may form the basis for a court to exclude the evidence.

In Qdoba Rest. Corp. v. Taylors, LLC, the defendant Taylors, LLC (“Taylors”) failed to defeat summary judgment because it could not support its affirmative defenses. There, Taylors entered into a development agreement with Qdoba Restaurant Corporation (“Qdoba”), granting Taylors the exclusive right to develop up to seven Qdoba restaurants. The Taylors opened four

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247 Id.
248 Id. at *6.
249 Prior to trial, parties also may file motions in limine to exclude evidence.
restaurants under the development agreement and also purchased seven restaurants from a third party franchisee. Eventually, Taylors closed seven restaurants because they were unprofitable. Qdoba brought a breach of contract claim, alleging that Taylors breached the respective franchise agreements for each restaurant by closing them.\textsuperscript{251} Taylors asserted counterclaims for violation of the Florida Franchise Act, and the Florida and Colorado "little FTC Acts," as well as fraudulent inducement and negligent misrepresentations. Qdoba moved for summary judgment on Taylors’ counterclaims.

Taylors based its counterclaim for fraudulent inducement on statements made on Qdoba’s website that: (1) its franchises offered excellent sales-to-investment ratios and the franchisor had seen 33 consecutive quarters of single store growth; (2) mapped sales projections; and (3) statements that the franchised restaurants were located in excellent locations and sales could be increased. However, Taylors failed to provide evidence to show that the website statements were untrue. Therefore, the court granted Qdoba’s motion for summary judgment on Taylors’ fraudulent inducement counterclaim.

The court also granted Qdoba’s motion for summary judgment on Taylors’ affirmative defense asserting that it was justified in closing its restaurants because they were not profitable. The court found that under both Florida and Colorado law, that defense was unavailing. The court noted that frustration of purpose required more than mere lack of profitability; rather, it required frustration that was so severe as to be outside the scope of risks under the contract — "i.e., a complete frustration of the essential purpose of the contract."\textsuperscript{252} Because a lack of profitability was foreseeable at the time the contract was executed, the defense was without merit. Because each franchise agreement prohibited Taylors, as franchisee, from ceasing operation of each respective franchise, the court granted Qdoba’s motion for summary judgment on Taylors’ affirmative defense.\textsuperscript{253}

In \textit{Best Western Int’l, Inc. v. Sharda, LLC},\textsuperscript{254} a defective motion for additional discovery under Rule 56(d) (then, Rule 56(f)) and the defendant’s failure to comply with the Federal Rules was fatal to the defendant’s ability to defeat summary judgment. Best Western International, Inc. ("Best Western") entered into a membership agreement with Sharda, LLC ("Sharda"), granting a license to operate a hotel using Best Western’s trademarks and trade name. Two years later, Best Western terminated the membership agreement because Sharda failed to meet quality standards required under the agreement and sued for breach of contract, seeking compensatory and liquidated damages. Best Western also alleged, \textit{inter alia}, that Sharda improperly failed to stop using Best Western’s trademarks after the termination of the membership agreement.\textsuperscript{255}

Best Western supported its motion for summary judgment with evidence in the record, as well as admissions that were deemed made by Sharda because it had failed to answer requests for admission before the deadline for responding. Shortly after Best Western filed a

\textsuperscript{251} Id. at *3.


\textsuperscript{253} Id. at *6.


\textsuperscript{255} Id. at *5.
motion for summary judgment, Sharda filed a motion pursuant to Rule 56(f) (now Rule 56(d)) seeking additional discovery to respond to Best Western's motion. The court denied the request because Sharda's Rule 56(f) motion utterly failed to comply with the requirements of such a motion; the motion was not supported by a sworn declaration or affidavit, it failed to provide specificity about the facts that it sought in discovery, and it failed to state the reasons why those facts were essential to resist summary judgment. Sharda also filed a motion to withdraw the admissions. However, the court denied that motion based on Sharda's apparent failure to comply with court rules repeatedly. Based on those deemed admissions, as well as evidence in the record, the court found that Best Western's termination of the license agreement was permitted by the membership agreement, and that Sharda had continued to use Best Western's trademarks after termination of its membership agreement in breach of that agreement. Therefore, the court granted Best Western's motion for summary judgment.

In *Dunkin' Donuts Franchised Restaurants, LLC v. Sandip, Inc.*[^257] the issue on summary judgment was whether Dunkin' Donuts Franchised Restaurants LLC ("Dunkin' Donuts") had "unreasonably" refused to approve the sale of a franchise owned by Sandip, Inc. ("Sandip"), an issue which could easily raise a dispute of material facts in many cases. Dunkin' Donuts had brought a breach of contract claim, alleging that Sandip breached the franchise agreement by failing to remodel its shops, participate in mandatory system-wide programs, attend required training, and prepare immigration forms for new employees. Dunkin' Donuts moved for summary judgment. The court determined that under the franchise agreement the franchiseor could terminate the agreement if the franchisee violated any of its terms.[^258] Because Sandip did not dispute all of Dunkin' Donuts' allegations, the court determined that Dunkin' Donuts could terminate the agreement. The court also determined that the agreement required Sandip to stop using Dunkin' Donuts' proprietary marks and system methods upon termination. Thus, the court granted summary judgment for Dunkin' Donuts.

Thereafter, Dunkin' Donuts and Sandip entered into a settlement agreement which permitted Sandip to sell its two donut shops. The settlement agreement provided that Dunkin' Donuts could not "unreasonably" refuse to approve the sale. Dunkin' Donuts rejected the two proposed sales that Sandip presented and Sandip sued for breach of the settlement agreement. The court granted summary judgment to Dunkin' Donuts based on evidence that Dunkin' Donuts had followed an established two-step procedure for approving such sales, which apparently provided an objective basis for evaluating the reasonableness of Dunkin' Donuts' decision. The first step was to determine whether the franchise likely would break even during the first year after the transfer. Only if the franchise would break even would Dunkin' Donuts move to the second step, which was to determine whether the potential buyer met certain financial condition requirements. Because Dunkin' Donuts concluded that the franchise would not break even during the first year, it did not evaluate the potential buyer's financial condition. Sandip attempted to create a genuine issue of material fact by challenging the data that Dunkin' Donuts used to determine whether the franchise would break even during the first year. However, because Sandip failed to offer evidence that Dunkin' Donuts' assumptions were inaccurate, it failed to create a genuine dispute regarding whether Dunkin' Donuts' use of the data was unreasonable. Sandip also asserted that Dunkin' Donuts had made an exception to its two-step procedure in 1995, and therefore its refusal to make an exception to its usual procedures in this

[^256]: *Id.* at *3.


[^258]: *Id.* at *5.
case demonstrated Dunkin' Donuts' unreasonableness. However, because Sandip failed to support that assertion with admissible evidence, it was disregarded. Accordingly, the court granted summary judgment in favor of Dunkin' Donuts.

In the foregoing cases, courts granted or denied summary judgment because the language in the contract was unambiguous and the nonmovant failed to raise a genuine issue of material fact, often with respect to an affirmative defense. However, where a contract is ambiguous, summary judgment is not appropriate. For example, in Ingraham v. Planet Beach Franchising Corp., the court denied summary judgment after finding that the franchise agreement was ambiguous regarding what constituted the franchisee's protected territory. Michael and Jeannine Ingraham ("Ingrahams") entered into a franchise agreement with Planet Beach Franchising Corp. ("Planet Beach") to open one of its tanning salon franchises. The Ingrahams sued Planet Beach after it awarded a franchise to a new franchisee in what the Ingrahams asserted was their protected territory. The franchise agreement defined the Ingrahams' territory as: "Philadelphia, PA 30,000 in Population." However, Planet Beach argued that the franchise agreement allowed for "overlapping" — i.e., where the area surrounding two franchisees' territories collide -- as long as the two franchises are not physically located in the same territory. Therefore, according to Planet Beach, it was permitted to grant a new franchise 5 miles away from the Ingrahams' spa. However, the court noted that the franchise agreement did not expressly permit overlapping and after reviewing the contract as a whole, there was ambiguity regarding whether overlapping was permitted. One provision of the agreement provided that Planet Beach would not unreasonably withhold permission to a franchisee to market outside its territory, but the default was for the agreement to prohibit such marketing. At the same time, another provision of the franchise agreement stated that the franchise was nonexclusive. The ambiguity grew based on deposition testimony of Planet Beach's Chief Operating Officer, who testified that "we draw the ring [around the spa location] and nothing goes inside that ring but your own location." Because the contract was ambiguous as to whether overlapping was permitted, the court denied the defendant's motion for summary judgment.

2. Cases Involving Statutory Claims

Courts decide issues on summary judgment where there is a question of statutory interpretation. When interpreting a statute, a court must look no further than the statute's plain language if it is unambiguous.

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260 Id. at *4.

261 Id.

262 See Merck & Co., Inc. v. Hi-Tech Pharmacal Co., Inc., 482 F.3d 1317, 1320 (Fed. Cir. 2007) (noting that summary judgment is proper for questions of statutory interpretation); Smith v. Califano, 597 F.2d 152 (9th Cir. 1979), cert. denied 444 U.S. 980 (1979) (noting that summary judgment is the proper procedural device where there is a question of interpretation of statutes and regulations); Romano v. Tordik, 939 F. Supp. 144, 146 (D. Conn. 1996) (noting that questions of statutory interpretation should be decided on summary judgment); Thompson v. Hanson, 219 F.3d 669 (Wash. 2009) (noting that "statutory interpretation is a question of law").

In *Ingraham v. Planet Beach Franchising Corp.*,\(^{264}\) discussed above, the Ingrahams also sued Planet Beach alleging it violated the Louisiana Trade Practices Act ("LUPTA")\(^ {265}\) and the Federal Trade Commission ("FCC ") Act\(^ {266}\) when it granted a third party a tanning salon franchise approximately five miles away from the Ingrahams' tanning salon. LUPTA provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are . . . unlawful."\(^ {267}\) The U.S. Court of Appeals for the Fifth Circuit has limited relief under LUPTA to consumers and business competitors.\(^ {268}\) Therefore, the court held that the Ingrahams lacked standing to bring a claim under LUPTA as a matter of law.\(^ {269}\) Similarly, The court held that the Ingrahams lacked standing to sue under the FTC Act, because private persons do not have standing to enforce it.\(^ {270}\) Thus, the court granted Planet Beach's motion for summary judgment.

In *Taylor v. 1-800-Got-Junk?, LLC,*\(^ {271}\) a dispute arose between Loren and Sage Taylor (the "Taylors"), Oregon franchisees, and 1-800-Got-Junk, LLC ("Got Junk"), the Canadian franchisor, over the operation of the Taylors' franchise located in Oregon. The Taylors entered into a settlement agreement and a release agreement under which they agreed to release Got Junk "from all claims, demands ... that Franchisee ever had, now has or may have, known or unknown..." in exchange for $20,000. The release agreement contained a governing law provision providing that Washington law would apply. The Taylors sought to invalidate the release under Washington's Franchise Investment Protection Act ("WFIPA")\(^ {272}\) because they were unrepresented during the negotiation and execution of the release. The U.S. Court of Appeals for the Ninth Circuit agreed with the district court that the WFIPA, by its terms, applies only to conduct occurring in Washington. Therefore, even though the contract provided that Washington law would apply to the contract, the Washington statute could not apply to the dispute as a matter of law, and Got Junk was entitled to summary judgment.\(^ {273}\)

In *Something Sweet, LLC v. Nick-N-Willy's Franchise Company, LLC,*\(^ {274}\) Something Sweet, LLC ("Something Sweet"), owners of a Nick-N-Willy's Franchise Company, LLC ("Nick-N-Willy's") franchise, alleged that Michael and Patti Moore (the "Moore's"), Nick-N-Willy's local area developers, failed to register their franchise offering and therefore they violated the WFIPA.\(^ {275}\) It was undisputed that the franchisor of Nick-N-Willy's had registered the franchise;

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265 LA REV. STAT. ANN. §51:1405(A).
270 Id. at *6 (citing 15 U.S.C. § 45).
271 Bus. Franchise Guide (CCH) ¶ 14,423, at *2 (9th Cir. July 14, 2010).
272 WASH. REV. CODE § 19.100-940.
273 Taylor, Bus. Franchise Guide (CCH) ¶ 14,423, at *6 (citing Gravquick A/S v. Trimble Navigation Int'l Ltd., 323 F.3d 1219 (9th Cir. 2003) ("When a law contains geographical limitations on its application ... courts will not apply it to parties falling outside those limitations, even if the parties stipulate that law should apply.").
274 Bus. Franchise Guide (CCH) ¶ 14,398 (Cl. of Apps. of Wash. June 1, 2010).
275 Id.
indeed, the Moores had provided a copy of the franchisor’s offering circular and franchise agreement to Something Sweet before executing the franchise agreement. The WFIPA provides that “[i]t is unlawful for any franchisor or subfranchisor to sell or offer to sell any franchise in this state unless the offer of the franchise has been registered under this chapter.” The court noted that the WFIPA merely required that the franchise be registered, it did not require that the subfranchisor be the one to register. Because it was undisputed that the franchise was registered, summary judgment in favor of the defendants was granted.

In Al’s Service Center v. BP Prods. North America, Inc., the Seventh Circuit affirmed the district court’s grant of BP Products North America, Inc.’s (“BP”) motion for summary judgment as to Al’s Service Center’s (“Al’s”) claim that it violated the Petroleum Marketing Practices Act (“PMPA”). The PMPA protects a franchised gas station from being terminated arbitrarily by the oil company franchisor. In 2002, Al’s received notification from the State of Illinois that a portion of the gas station’s property would be condemned in order to allow the state to widen the road. This left the gas station without one of its entrances and contributed to congestion on the street. In March 2003, BP notified Al’s that the franchise would be terminated 10 days before the condemnation took effect. This was permitted under the PMPA, which permits termination or nonrenewal in the event of “condemnation or other taking, in whole or in part, of the marketing premises pursuant to the power of eminent domain.” The condemnation did not occur until June 2005, at which time Al’s franchise agreements terminated by their terms. However, BP nevertheless continued to supply Al’s, and Al’s continued to pay BP, for gasoline as though the franchise agreement had not terminated. In the summer of 2006, the State removed Al’s sign as part of the road widening project. Al’s asked BP to replace the sign, but BP refused. Without the sign, Al’s asserted that it could not break even so it abandoned the business on May 1, 2008. Al’s then sued BP for terminating the franchise in violation of the PMPA. The district court granted BP’s motion for summary judgment and the U.S. Court of Appeals for the Seventh Circuit affirmed. The Court of Appeals held that BP did not in fact terminate the franchise, because notwithstanding its letter to the contrary, BP continued to supply Al’s with gasoline until Al’s abandoned the gas station. Further, there was no contractual requirement that BP supply Al’s with a sign, so Al’s claim that BP constructively terminated the franchise by refusing to replace the sign that the State removed, also failed as a matter of law. Therefore, BP was entitled to summary judgment.

As the foregoing demonstrates, cases involving statutory construction are often conducive to being decided on summary judgment. However, when the question under the statute is whether an agreement constitutes a franchise, there often will be genuine disputes regarding material facts concerning the definition of a franchise or a distributorship under the statute’s definition. For example, in Coyne’s & Comp., Inc. v. Enesco, LLC, the court held that there was a genuine issue of material fact regarding whether the putative franchisee paid an indirect franchise fee, and therefore was a franchise under the Minnesota Franchise Act. The

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276 Id. (emphasis added).
277 Bus. Franchise Guide (CCH) ¶ 14,347, at *6 (7th Cir. March 26, 2010).
279 Al’s Service Center, Bus. Franchise Guide (CCH) ¶ 14,347, at *2 (citing Draeger Oil Co. v. Uno-Ven Co., 314 F.3d 299, 299-300 (7th Cir. 2002) (additional citations omitted).
280 Id. (quoting 15 U.S.C. § 2802(c)(5) (emphasis added by court).
case involves numerous claims and facts, but in short, plaintiff Coyne’s & Company, Inc. ("Coyne’s") was located in Minnesota and sold giftware for more than 50 years, including a giftware line manufactured by defendant Country Artists, Ltd. ("CA") pursuant to a distributor agreement. The distributor agreement gave Coyne’s the exclusive right to sell CA products in the United States. Coyne’s was required to pay a 50% markup to CA on product and was required to sell a minimum of $5 million or 5% above the previous year’s sales. Coyne’s also was required to purchase excess inventory through a “Share Agreement.” Defendant Enesco, LLC (“Enesco”) was a competitor of Coyne’s in Illinois.

CA fell into receivership and subsequently sold its assets to Enesco. Thereafter, Enesco and Coyne’s attempted to work out an arrangement that would permit Coyne’s to continue selling CA products, but that did not come to fruition. Coyne’s then sued Enesco, CA and CA’s receivers. In one claim, Coyne alleged that the distributor agreement was a franchise under Minnesota law, and Enesco was the successor to the franchisor. Coyne alleged violations of the Minnesota Franchise Act against Enesco. The court noted that the definition of a franchise in Minnesota includes the requirement that the franchisee pay a franchise fee. Coyne’s asserted that the 50% markup that it paid constituted an indirect franchise fee. The court stated that while the markup alone was not enough to constitute a franchise fee, the minimum sales requirement and the requirement to purchase excess inventory might constitute indirect franchise fees because they often are based on reasonableness standards. The court concluded that “[b]oth parties present cogent arguments for whether the ... relationship included an indirect franchise fee, and thus, constituted a franchise relationship. At this summary judgment stage, it is not the Court’s place to decide which argument is stronger.”

Therefore, Enesco’s motion for summary judgment was denied.

The question of whether an agreement constitutes a franchise does not always raise genuine disputes of material fact, however. Such was the case in Englert, Inc. v. LeafGuard USA, Inc. There, Englert, Inc. ("Englert") alleged that LeafGuard USA, Inc. ("LeafGuard") violated the South Carolina Unfair Trade Practices Act (the “SCUTP”) when it failed to provide LeafGuard with a disclosure statement. In order for the SCUTP to apply, the parties’ agreement had to be a franchise agreement. Although the agreement was labeled a “license agreement,” the court noted that the label that the parties gave to it was not determinative of whether the SCUTP applies.

To constitute a franchise under the SCUTP, the relationship must (1) involve the distribution of goods or services in association with the franchisor’s trademarks or trade name; (2) the franchisor must exert a significant degree of authority over the franchisee's business methods and operations; and (3) the franchisee must pay a least $500 within six months of the start of the franchise relationship. The court found that only items (2) and (3) were at issue. The agreement provided that Englert would purchase a LeafGuard gutter-fabricating machine for $26,000, and would submit certain reports to LeafGuard, and meet certain minimum sales requirements. Englert asserted that the $26,000 payment was a franchise fee, and that LeafGuard’s minimum sales requirement and reporting requirements demonstrated its substantial control over Englert’s business. However, the court noted that the LeafGuard portion of Englert’s business was just one of many product lines that Englert represented, and therefore, LeafGuard could not be deemed to have significant control over Englert’s overall

282 Id. at *16.

business. Further, the court concluded that the $26,000 payment was made for the purchase of equipment and did not constitute a franchise fee. Therefore, the court held that the relationship was not a franchise as a matter of law and granted summary judgment to LeafGuard.

3. **Tort Claims.**

Tort claims sometimes are not decided on summary judgment because there are issues of fact regarding causation. For example, in *Thompson v. McDonald's Corp.*,\(^\text{284}\) issues of fact regarding causation precluded summary judgment for McDonald's. There, a franchisee's employee, Thompson, who worked the drive-through window at a McDonald's franchise located in an area where there was substantial crime, was shot when a pedestrian walked up to the drive-through window, pulled Thompson through it and shot her. Thompson sued McDonald's for negligence.

McDonald's owned and leased the land on which the franchise was located. Pursuant to the franchise agreement and the lease, McDonald's selected the type of drive-through window that would be installed. McDonald's offered three types, all of which opened, but when shut would lock automatically. Plaintiff asserted that the window at which she worked did not lock when it shut; rather, she was required to turn a knob to lock it. Thompson asserted that because the window failed to lock automatically, it enabled the pedestrian to open the window and grab her when she was not looking. Further, Thompson asserted that if a fixed window with a money drawer had been used, she would not have been shot. Even though the court excluded the testimony of Thompson's expert witness concerning causation (*i.e.*, on the issue of whether an unopenable window would have prevented the injury), McDonald's had failed to provide a prima facie showing that the openable window was not the cause of the incident. The court held that there was a genuine issue of material fact regarding causation, so McDonald's was not entitled to summary judgment.

In *Estate of Georgia Braucher v. Swagat Group, LLC*,\(^\text{285}\) franchisor Choice Hotels was entitled to summary judgment because it did not owe a duty to the plaintiff's decedent as a matter of law. There, Georgia Braucher died after being diagnosed with Legionnaires Disease shortly after staying at one of Choice Hotels' licensees. Ms. Braucher's estate sued, *inter alia*, Choice Hotels. The court concluded that the license agreement did not give Choice Hotels the degree of control over licensed hotels to create a duty of care to hotel guests. Further, the plaintiff failed to present evidence to show that Choice Hotels went beyond the contract terms and the level needed to protect its trademarks, such that it would have a duty of care to the plaintiff. Therefore, the court granted summary judgment to Choice Hotels on the plaintiff's negligence claim.

**K. Strategic Considerations.**

While it is important in every case to prepare fully for an eventual trial, one or more parties often prefer to avoid the expense of a trial. Further, in instances where one party may appear more sympathetic, notwithstanding the facts, the opponent may prefer to avoid presenting its case to a jury.

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1. **Starting with the Complaint.**

Preparing for summary judgment begins with the complaint. The complaint sets forth the claims and should provide sufficient facts from which to determine the issue or issues that are most important to the outcome of the case. Threshold issues in a case often are readily determined at the summary judgment stage. For example, if the claims are based on a statute, such as a franchise disclosure or relationship statute, a threshold issue may be whether the relationship between the parties falls within the definition of a franchise under the statute. If the parties are not in agreement on this issue, it may be one appropriate for summary judgment in order to narrow the scope of a trial. Further, a review of the complaint will guide the defendant in determining what affirmative defenses are appropriate and whether the case is a good candidate for summary judgment.

Similarly, the answer and/or counterclaims may set forth issues that are appropriate for summary judgment. As the above discussion of franchise cases demonstrates, the outcome of many breach of contract cases depends not on whether the conduct forming the breach occurred, but rather on whether the breaching party can prove an affirmative defense.

2. **Preparing for Discovery.**

Once an identification of issues in the complaint is completed, a party can better formulate a discovery plan to support that best positions the case for summary judgment, or to defeat it. To support a motion for summary judgment, one must point to admissible evidence in the record to support the material facts. As the discussion above demonstrates, a failure to submit admissible evidence will be fatal to a summary judgment motion. In *Best Western Int'l, Inc. v. Sharda, LLC*, the defendant's failure to request an extension of time to answer requests for admissions, or to seek immediate relief (during discovery) after it failed to answer timely, was fatal. The failure in *Dunkin' Donuts Franchised Restaurants, LLC v. Sandip, Inc.* of the defendant to obtain admissible evidence in discovery to demonstrate that Dunkin' Donuts had not followed its procedures for approving the sale of a franchise in the past was fatal to the defendant's defense. Also, how the evidence will be framed is important to support the desired inferences. Dunkin' Donuts had a two-step process that it followed to determine whether to approve a transfer of a franchise (*i.e.*, to determine its reasonableness). The defendant attempted to create an inference that the two-step process was merely pretextual or applied arbitrarily, by the way it framed the facts. The defendants attempted to show that the franchisor had not followed the procedure in the past, and challenged the data the franchisor used in the first step (*i.e.*, to determine whether the franchise would break even in the first year). However, the lack of evidence contributed to the failure to create the desired inference. Particularly where the reasonableness of a party's conduct is at issue, it is critical that sufficient admissible evidence be discovered to create the desired inferences.

Although answers to interrogatories and requests for admissions form a portion of a summary judgment record, because lawyers typically draft the answers, the answers may not provide the best sound bites. The most revealing evidence often comes from deposition testimony. Therefore, it is advisable to prepare a comprehensive outline of the facts that you expect to obtain from each witness. Further, it is important to include the documents that can

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286 Bus. Franchise Guide (CCH) ¶ 14,176 (discussed supra).

287 Bus. Franchise Guide (CCH) ¶ 14,383 (discussed supra).
be authenticated by each witness and obtain the necessary foundation for establishing the admissibility of the documents. Depositions often reveal the need to move to compel more complete answers to previously served interrogatories or document requests. And it is very important to have your witnesses timely review their deposition transcripts and prepare any errata sheets to ensure that they are accurate.

3. **Setting the Stage Through Other Pleadings.**

There is likely to be a long period of time between the filing of a complaint and the filing of motions for summary judgment. Therefore, the parties should be characterizing the case to the court and in other pleadings in the terms most beneficial to them at every opportunity.

A plaintiff has the advantage of characterizing the way the court views the case, because the plaintiff drafts the complaint. The complaint can be used as a tool through which the plaintiff can tell his or her story to the court in the way that is most sympathetic to him or her. Because courts understand that a complaint contains mere allegations which must be proven, the more detailed the complaint is concerning the facts, the more credible the allegations may appear. Attaching exhibits to the complaint containing the supporting contract provision or important letters containing admissions of the defendant can be useful in setting the stage.\(^{268}\)

Similarly, the defendant can use its answer and affirmative defenses to influence the characterization of the claims and the reasonable inferences that may work in its favor. Often defendants assert a laundry list of boiler plate affirmative defenses. However, if the defendant makes allegations of fact in its answer to bring the affirmative defenses alive, it will have an opportunity to influence the manner in which the court views the case. The manner in which a party presents facts can lead to inferences supportive of its position on summary judgment. A defendant also can frame the way the case is characterized in a motion to dismiss. The motion to dismiss also has the benefit of enabling the defendant to get the court’s views on what it will take for the plaintiff to prevail.

4. **Timing of a Motion for Summary Judgment.**

If the defendant believes it can prevail on a limited set of facts that are material to the claims, it may be wise to file an early motion for summary judgment. This may be the case even where the expected response is a motion for more discovery pursuant to Rule 56(d). Even if the court grants the motion, the defendant may be successful in convincing the court to limit discovery to the material issues raised by the summary judgment motion, thereby minimizing the cost of discovery. If the court refuses to narrow the scope of discovery, it may be easier to focus the discovery on obtaining evidence regarding the material facts raised by the motion for summary judgment first.

If you are opposing an early filed motion for summary judgment and you need additional discovery, it is critical that you promptly file a motion pursuant to Rule 56(d) requesting additional discovery. The motion must be supported by an affidavit which is sufficiently detailed to identify the facts that you believe are needed and state why those facts are critical to your party’s ability to respond to the summary judgment motion.

\(^{268}\) *But see* Part II.C. *supra* discussing the hazards of attaching exhibits.
In reality, however, the court may set a scheduling order that precludes the early filing of a motion for summary judgment. Courts sometimes are hesitant to grant a motion for summary judgment without giving the parties an opportunity fully to discover the facts relevant to the claims.

5. **Presenting the Motion for Summary Judgment.**

The format for supporting a motion for summary judgment may be established by local rules or court order. It is important to understand those orders and rules for very important reasons. First, many courts have page limits and require all issues on which a party seeks summary judgment to be presented in a single motion. In such circumstances, a party with many different bases for obtaining summary judgment must make important decisions on how to present an entire record most efficiently to fully support (or oppose) its motion with respect to each issue. For example, in an antitrust case, the defendant may move for summary judgment on grounds that (1) the relevant market is broader than plaintiff alleges; (2) the defendant lacks market power in the relevant market; (3) the plaintiff has not suffered an antitrust injury; and (4) the contracts at issue do not have an anticompetitive impact on the market. Each of these issues may consume all of the permitted pages. Similarly, if the plaintiff has asserted ten different claims (breach of contract, antitrust violations, tortious interference with contracts, tortious interference with prospective business relations), it may not be feasible to present a summary judgment motion on all of the claims. Decisions have to be made on what issues are most likely to be dispositive on the largest portion of the case, or the claims that the party most prefers not to present to a jury.

Second, it is often difficult to explain to a court how an appendix comprised of four bankers boxes of evidence does not contain disputed facts that are material to the claims. It becomes difficult for the court to sift through the quantity of evidence and determine whether a genuine issue for trial is lacking. If by court order or local rules, the parties are permitted to file multiple motions for summary judgment, it may be advisable to submit multiple, concise motions with separate appendices that reduce the pounds of paper that the court must cut through to decide the claim or issues. Where an issue can be presented in a succinct and cogent manner, it is easier to demonstrate to a court that there are no disputes as to material facts.

Even if there are mixed issues of fact and law that might demonstrate that a case is not a likely candidate for summary judgment, it may be desirable to file a motion for summary judgment nevertheless for the purpose of educating the judge in advance of trial. It gives the parties an opportunity to frame the issues for the court and it forces the opponent to disclose much of its strategy before the parties prepare for trial. Of course, if the court requires re-trial briefs, a summary judgment motion may be duplicative and unnecessary.

Finally, it is very important to file evidentiary motions in response to an opponent’s proffered evidence, where appropriate, on a timely basis in connection with a motion for summary judgment. As the above discussion of franchise cases demonstrates, courts may exclude evidence, including expert testimony that is fatal to a party’s case at the summary judgment stage. A failure to address evidentiary issues at this procedural stage may result in the granting of summary judgment against a party.

IV. **CONCLUSION**

In any litigation, the time to begin developing a strategy is at the start. For a plaintiff it is with the filing of the complaint. For a defendant it begins with a review of the complaint. The
decision to file a dispositive motion early in the litigation under Rule 12, and/or later under Rule 56, is one that typically is made at the start of the litigation and can have a significant effect on the cost and length of the litigation. Not all cases are conducive to a dispositive motion because the facts are hotly disputed. But where appropriate, a dispositive motion can save the parties time and money and conserve judicial resources.
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