Franchising (& Distribution) Currents

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Antitrust

***New York v. Tempur-Pedic Int'l, Inc.*, Case No. 400837/10, Bus. Franchise Guide (CCH) ¶ 14,710 (N.Y. Sup. Ct. Jan. 14, 2011)**

This case arose out of an action brought by the attorney general of New York (OAG) against Tempur-Pedic International, Inc. alleging that Tempur-Pedic engaged in fraudulent and illegal conduct with respect to its retail pricing policies. OAG claimed that such policies violated New York General Business Law § 369-a.

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Tempur-Pedic had a long-established written policy that it would cease doing business with any retailer that did not "substantially adhere" to its suggested retail pricing. Tempur-Pedic advised the retailers that this was Tempur-Pedic's unilateral decision and was not negotiable and that Tempur-Pedic did not seek or accept the retailer's agreement with respect to the policy. However, it advised the retailers that they could set prices at whatever level they believed were in their best interests. Additionally, Tempur-Pedic established its Retail Partner Obligations and Advertising Policies (RPOAP), which set forth a number of mandatory advertising policies, including a prohibition on retailers advertising free gifts, gift cards, and the like with the purchase of a Tempur-Pedic product.

Tempur-Pedic filed a motion to dismiss OAG's petition. Tempur-Pedic argued that (i) § 369-a did not declare contracts with respect to retail pricing illegal but rather declared any such contracts to be unenforceable and (2) to construe § 369-a to render all such retail price agreements illegal would conflict with the Donnelly and Sherman Acts pursuant to which such agreements generally were legal. The court agreed, concluding that OAG had failed to allege an illegal act. Tempur-Pedic also argued that its policies were clear and that there were no attempts to deceive or mislead the retailers. The court agreed that OAG had failed sufficiently to allege that Tempur-Pedic's acts or practices were fraudulent. The court found that OAG had submitted no evidence establishing that the retailers had been "misled or deceived" into believing "that they had entered into contracts to restrain discounting." In fact, some of the evidence submitted by OAG confirmed that the retailers did not agree with Tempur-Pedic with respect to the retail pricing.

The court also rejected OAG's efforts to enjoin Tempur-Pedic's retail pricing policies on the ground that OAG had failed to establish that there was any agreement between Tempur-Pedic and retailers with respect to pricing. Finally, the court rejected OAG's claim that the RPOAP violated § 369-a because it allegedly "contain[ed] contractual provisions that prohibit and restrain discounting." The court noted that, by its terms, the RPOAP was not a contract to restrain discounting and only prohibited the advertising of discounting.

Arbitration

***Interstate Power Sys., Inc. v. Gen. Elec. Co.*, Case No. 11-2564, Bus. Franchise Guide (CCH), ¶ 14,720 (D. Minn. Oct. 21, 2011)**

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

Choice of Forum

***Travelodge Hotels, Inc. v. Perry Developers, Inc.*, Case No. 11-1464 (DMC) (JAD), Bus. Franchise Guide (CCH) ¶ 14,740 (D.N.J. Nov. 22, 2011)**

Travelodge Hotels, Inc. learned the pitfalls of a permissive, as opposed to a mandatory, forum selection clause when the New Jersey district court transferred its breach of contract action against a Missouri franchisee and its principals. Defendants moved to transfer the action to the Eastern District of Missouri, where both they and the franchised hotel were located. The court rejected Travelodge's argument that the forum selection clause in the license agreement, which stated that the franchisee "consent[s] to the nonexclusive personal jurisdiction of and venue in the New Jersey state courts situated in Morris County, New Jersey and the United States District Court for the District of New Jersey for all cases and controversies under this agreement . . ." prohibited transfer. The court recognized that this agreement provision was merely a permissive forum selection clause and did not require all litigation to be brought in New Jersey.

The court then analyzed the traditional factors for evaluating a transfer motion under 28 U.S.C. §1404(a) and concluded that the balance of those factors favored transfer. The court first held that the franchisor's choice of forum was not enti-

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tled to any "special deference" because the central facts giving rise to the lawsuit occurred in Missouri. The court also refused to give much weight to the forum selection clause because it was permissive and not mandatory. The convenience of the parties and witnesses favored transfer as defendants identified a key witness who would be beyond the process of the New Jersey district court, but Travelodge did not identify any key witnesses who would be beyond the process of the Missouri court. Finally, the court weighed the relative financial condition of the parties and found that this factor also supported transfer. Defendants submitted declarations that the corporate franchisee was defunct and did not have any assets or income and that the individual defendants did not have "sufficient personal resources to litigate the case in New Jersey." The court noted that Travelodge, in contrast, was "part of a large franchise system" and did not claim to have inadequate resources to litigate the case in Missouri.

***High Plains Constr., Inc. v. Paul Gay, Rob Rollins, & Aerostar, Inc.*, Case No. 4:11-cv-00245-JGE, Bus. Franchise Guide (CCH) ¶ 14,746 (S.D. Iowa Dec. 21, 2011)**

Unlike the franchise agreement in *Travelodge* discussed above, the dealership agreement in this case between a Massachusetts manufacturer and an Iowa dealer contained an exclusive forum selection clause for the courts of Massachusetts. The federal district court in Iowa therefore granted the manufacturer's motion to transfer the dealer's lawsuit to Massachusetts pursuant to that forum selection clause.

High Plains Construction, Inc. sued Aerostar, Inc. and certain affiliated individuals in Iowa for tortious interference and breach of contract, based on Aerostar's solicitation of High Plains' customers. Defendants removed the case to the federal court and moved to transfer. In considering the manufacturer's § 1404(a) transfer motion, the court gave primary weight to the forum selection clause, which stated that any dispute arising under or in connection with the agreement "shall be subject to the exclusive jurisdiction of the state and/or federal courts located in Massachusetts." The court determined that this forum selection clause clearly encompassed the subject matter of the dealer's claims. The court distinguished between permissive forum clauses and mandatory forum clauses such as the one here and held that a valid mandatory forum selection clause is a "significant factor that figures centrally in the district court's calculus." The court found no evidence of fraud or overreaching with respect to the forum selection clause. In light of the mandatory forum clause, the court spent little time discussing the other § 1404(a) factors. Although the court noted the dealer's argument that it would be "heavily inconvenienced if venue [were] transferred to Massachusetts," the court held that this inconvenience did "not deprive [the dealer] of its day in court" and did not outweigh the presence of the mandatory forum selection clause.

***WW, LLC v. Coffee Beanery, Ltd.*, Case No. 05-3360, Bus. Franchise Guide (CCH) ¶ 14,721 (D. Md. Oct. 26, 2011)**

This decision is the latest installment of a six-year litigation roller coaster encompassing proceedings before the Maryland Securities Commissioner, a lengthy arbitration in Michigan, and opinions from federal courts in Maryland and Michigan as well as the Fourth and Sixth Circuits. Here, the District of Maryland considered whether that court or the Eastern District of Michigan was the proper venue in which the dispute ultimately should be resolved and whether plaintiffs could amend their complaint to add a Racketeer Influenced and Corrupt Organizations (RICO) Act claim.

The dispute stemmed from a failed Coffee Beanery Cafe franchise location in Maryland. The franchisees attributed the store's failure to the store layout, the cash register system, the advertising program, and the nature of required equipment, as well as to material misrepresentations and omissions by the Coffee Beanery during the negotiation process, including false earnings claims and nondisclosure of the fact that the Coffee Beanery's vice president had a felony grand larceny conviction. Plaintiffs filed suit in Maryland alleging violations of the Maryland Franchise Law, detrimental reliance, intentional misrepresentation, and negligent misrepresentation.

Following a stay of the litigation and plaintiffs' rejection of an offer of rescission submitted by the Coffee Beanery pursuant to a consent order entered by the Maryland Securities Commissioner, the Coffee Beanery compelled arbitration in Michigan pursuant to the franchise agreement. Upon confirmation of the arbitrator's award in favor of the Coffee Beanery by the Eastern District of Michigan, the Maryland court closed its case. The Sixth Circuit subsequently reversed the confirmation judgment, vacated the arbitration award, and held the arbitration provision in the franchise agreement to be unenforceable because of fraud in the inducement. After the Maryland court refused to reopen the case, the Fourth Circuit ordered that it be reopened pursuant to Federal Rule of Civil Procedure 60(b)(5), which allows relief from a final judgment if "it is based on an earlier judgment that has been reversed or vacated."

The Coffee Beanery then filed a motion to dismiss or transfer. The Maryland court found that venue was proper in that court because (1) the Coffee Beanery sent to plaintiffs in Maryland a copy of its Uniform Franchise Offering Circular and a form franchise agreement, (2) the Coffee Beanery's vice president met with plaintiffs in Maryland to discuss the possibility of entering into a franchise agreement, (3) the franchise was ultimately located in Maryland, (4) plaintiffs' losses occurred in Maryland, and (5) the Coffee Beanery had expressly consented to suit in Maryland as it was required to do under Maryland's Franchise Registration and Disclosure Law. The court further found that it would serve neither the convenience of the parties nor the interests of justice to compel plaintiffs to split this action and to proceed in Michigan on their claims other than for violation of the Maryland franchise statute, and that there were pertinent witnesses in both Maryland and Michigan. The court likewise was not persuaded by the Coffee Beanery's reliance on the Michigan forum selection clause in the franchise agreement, noting that the Fourth and Sixth Circuits had recognized that the arbitration clause was invalid based on fraud in the inducement and relying on the strong public policy considerations favoring litigation in Maryland

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as reflected in Maryland's Franchise Registration and Disclosure Law.

The court denied plaintiffs' motion to amend the complaint with respect to the proposed RICO claim, finding that the claim would be futile. In particular, the court found that plaintiffs had not properly alleged an "enterprise" under RICO because the Coffee Beanery cannot be part of an enterprise when it is already the "person" whose behavior the RICO Act is designed to punish.

***Roberts v. C.R. Eng., Inc.*, Case No. C 11-2586, Bus. Franchise Guide (CCH) ¶ 14,737 (N.D. Cal. Nov. 22, 2011)**
This case is discussed under the topic heading "Definition of Franchise."

CHOICE OF LAW

***Samica Enters. LLC v. Mail Boxes Etc., Inc.*, Case No. 10-55433, Bus. Franchise Guide (CCH) ¶ 14,731 (9th Cir. Dec. 1, 2011) (unpublished)**
This case is discussed under the topic heading "Fraud."

***Kraft Power Corp. v. Gen. Elec. Co.*, Case No. 11-6073 (JLL), Bus. Franchise Guide (CCH) ¶ 14,730 (D.N.J. Dec. 1, 2011)**
This case is discussed under the topic heading "Injunctive Relief."

CONSTITUTIONAL ISSUES

***Izzy Poco, LLC v. Town of Springdale,* Case 2:10-cv-00559 CW, Bus. Franchise Guide (CCH) ¶ 14,715 (D. Utah Oct. 28, 2011)**
This case involves the interesting issue of the constitutionality of a town ordinance banning formula restaurants. A federal district court in Utah concluded that although such an ordinance might not be constitutional, the law governing this area was not so clearly established as to defeat the qualified immunity defense asserted by town employee defendants.

The town of Springdale, Utah, near Zion National Park, passed an ordinance banning "formula restaurants," which the ordinance defined as any business "which is required by contractual or other arrangement to provide any of the following: substantially identical named menu items, packaging, food preparation methods, employee uniforms, interior décor, signage, exterior design, or name as any other restaurant or delicatessen in any other location." The town justified the ordinance by explaining that formula restaurants were incompatible with the town's general plan because of the limited amount of private land available, the large size or scale of such restaurants, excessive noise, odor or light emissions, and other excessive use of resources. Plaintiff, a Subway franchisee, obtained a business license to operate a sandwich shop; but when town officials realized that the sandwich shop would be a Subway restaurant, they refused to perform services or renew the business license to allow that restaurant to open. The franchisee sued, challenging the constitutionality of the ordinance and seeking monetary damages under 42 U.S.C. § 1983 as well as declaratory and injunctive relief. All individual defendants moved for summary judgment on the grounds of qualified immunity, claiming that the franchisee could not prove that a reasonable official would have known that their specific conduct under the ordinance violated the franchisee's rights under clearly established law. The court agreed and granted summary judgment to individual defendants.

The court agreed with the franchisee that state governments may not significantly burden interstate commerce through discriminatory, protectionist legislation. The court explained, however, that the franchisee did not establish that "facially neutral laws prohibiting franchise restaurants have been clearly established as violating this constitutional principle." Although the court noted that one case from the Eleventh Circuit had "held that a local regulation banning franchise restaurants should be subject to a heightened level of scrutiny" under the commerce clause, there were no U.S. Supreme Court or Tenth Circuit cases on point. The court's characterization of the ordinance as facially neutral is interesting because it was clearly targeted toward a particular type of restaurant rather than applying to all restaurants of a certain size or possessing other characteristics that the ordinance deemed undesirable. Finally, although individual defendants were dismissed, the franchisee was not left without any remedy because its challenge to the ordinance remained. However, the dismissal of individual defendants precluded the recovery of any damages.

CONTRACT ISSUES

***Cont'l Cars, Inc. v. Mazda Motor of Am., Inc.*, Case No. C11-5266BHS, Bus. Franchise Guide (CCH) ¶ 14,688 (W.D. Wash. Sept. 9, 2011)**
This case presents the unusual situation of a dealer contract providing greater rights than the state's applicable dealer protection law. Plaintiff Continental Cars, Inc., a Mazda dealer, challenged defendant Mazda Motor of America, Inc.'s termination of its dealership based upon the felony conviction of one of its principals. The dealer challenged the termination through the administrative hearing process established by the Washington Motor Vehicle Dealer Law, but the administrative judge found the protest to be untimely. The dealer then sued, alleging breach of contract and violation of the Washington Consumer Protection Act, and sought a preliminary injunction enjoining the termination. The dealer argued that its dealership contract contained a condition precedent that prevented Mazda from terminating immediately based on the felony conviction because the relevant termination provision required the felony conviction to have a "significant adverse effect either on Dealer's Business or on the reputation of Dealer, Mazda or Mazda Dealers generally." Mazda moved for judgment on the pleadings on the ground that the Washington dealer statute provided an exclusive remedy for the dealer to challenge a termination, and the statute allowed termination for a felony conviction with no other condition.

The court rejected Mazda's exclusivity argument. The court first held that the statutory language in question contained no statement of exclusivity on this issue. The court then examined the legislative intent of the statute and concluded that "the legislature did not intend to abrogate a deal-

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er's contractual rights or preempt other statutory remedies." The court relied on the fact that many sections of the dealer law began with the phrase *notwithstanding the terms of the franchise [agreement]*. The court noted that the regulatory scheme simply provided "the baseline from which new automotive manufacturers and dealers cannot bargain below," but "nothing in the scheme suggest[ed] [that parties] cannot agree to greater protections for the dealer" in the contract.

***JMF v. Med. Shoppe Int'l, Inc.*, Case No. 3:09-cv-73, Bus. Franchise Guide (CCH) ¶ 14,692 (D.N.D. Sept. 19, 2011)**
The court granted partial summary judgment to the franchisor on many of plaintiffs' breach of contract claims but found that "[g]enuine issues of material fact preclud[e]d summary judgment on Plaintiffs' claims for breach . . . [of] the 'most favored nations' clause and for the alleged violation of" the North Dakota Franchise Investment Law (NDFIL). Plaintiffs JMF, Inc. and WW, Inc. operated pharmacies pursuant to franchise agreements with defendant Medicine Shoppe International, Inc. (MSI). In 2003, MSI's parent corporation acquired Medicap, which at that time operated approximately 250 to 300 Medicap stores, and Medicap became a wholly owned subsidiary of MSI.

In 2009, MSI announced a major change to its franchise program. Where previous franchise agreements typically called for a twenty-year term, an initial flat franchise fee, and monthly royalty fees in the range of 4.1 percent to 5.5 percent in exchange for a package of franchisor-provided services, the new format contemplated a fixed monthly fee ($499) to MSI and a "pay as you go" model for franchisee services. The existing franchisees were offered three options: (1) pay "to convert to the modified version of the new format with [a] conversion price that was a 'steeply' discounted amount of the franchisee's . . . future [royalty] fees under the former system"; (2) leave the franchise system by making a "buyout" payment equal to the projected future royalty fees under the former system; or (3) "remain under the existing contract with the same level of services."

Some franchisees, including plaintiffs, had a "most favored nations" clause in their agreements, which "provided that if MSI later offered new or updated terms to new franchisees in the same state, the renewing [franchisee] could . . . adopt the latest agreement" at no cost. In order to avoid losing conversion income from the "most favored nations" franchisees that could otherwise opt in for no cost, MSI only offered option number one (a discounted conversion cost) to those franchisees.

In 2009, MSI filed a franchise disclosure document (FDD) with the North Dakota Securities Commissioner that described the new format terms. The FDD projected "0-1" openings in North Dakota. However, when plaintiffs sought to "convert their renewal agreement[s] to the new terms contained in the FDD" under the "most favored nations" clause, MSI refused. And in states where "most favored nations" franchisees operated, including North Dakota, MSI decided to not offer the new format of franchise agreement under the *Medicine Shoppe* name but instead only offered Medicap franchises.

Plaintiffs sued MSI, asserting claims for breach of contract and violations of the NDFIL and "seek[ing] an order rescinding the[ir] contract[s], or, alternatively, . . . requiring MSI to allow them to convert their present franchise agreement[s] to the terms contained in the 2009 FDD." Plaintiffs also sought reimbursement for past excess royalty fees, costs, and attorney fees. MSI moved for summary judgment on all claims, arguing that there had been no "offering" to trigger the "most favored nations" clause, no breach of any provision in the contract, and no private cause of action under the NDFIL.

The court held that genuine issues of material fact existed regarding whether MSI had offered new franchises in North Dakota sufficient to trigger the "most favored nations" clause and denied summary judgment on that issue. The court noted that not only did the FDD itself raise fact issues, but MSI had admittedly offered Medicap franchises in North Dakota for the purpose of circumventing the clause. The court held that a reasonable fact finder could, given the relationship between MSI and Medicap, determine that MSI's decision to offer Medicap franchises was an offering sufficient to trigger the "most favored nations" clause in plaintiffs' agreements.

The court granted MSI's summary judgment motion, however, as to plaintiffs' other contract claims relating to alleged breaches of MSI's obligations to provide advertising, training and guidance, and accounting and bookkeeping services. The court found that plaintiffs' contracts explicitly stated that advertising services would "be at the sole discretion of [MSI]," and that plaintiffs' dissatisfaction with the level of service was insufficient as a matter of law to establish a claim. Similarly, the court noted that the contracts unambiguously stated that MSI would provide training and guidance as it deemed "necessary or appropriate." Plaintiffs conceded that they had received some training and guidance but contended that they were overpaying for the level of service provided. The court held that plaintiffs' evidence was insufficient to create a question of fact regarding plaintiffs' claim for breach as to the guidance provision.

The court dismissed plaintiffs' claim as to the accounting and bookkeeping provisions based on the parties' renewal agreements. The court acknowledged that plaintiffs' initial contracts with MSI included a provision requiring MSI to furnish accounting services to plaintiffs and that it was undisputed that MSI had received complaints from its franchisees regarding the quality and level of the accounting services it was providing. However, the court also noted that plaintiffs had entered into renewal agreements with MSI that did not include the same provision regarding accounting services and found that such renewal constituted a novation of the contracts, extinguishing any rights that plaintiffs had under the previous accounting provision. The court additionally determined that plaintiffs' decision not to enforce the alleged contractual breach when it occurred and instead to retain their own accountants when MSI's services were inadequate constituted waiver and acquiescence to MSI's nonconforming performance.

Finally, the court denied MSI's motion to dismiss plaintiffs' claims under the NDFIL, which provides a cause of action for material misstatements, fraud, or deceit associated with an offer, sale, or purchase of a franchise. The court

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rejected MSI's contentions that the NDFIL did not apply in this case because "the allegations . . . related to [MSI's] alleged failure to perform under [an] existing franchise agreement," and no private cause of action exists under the NDFIL. The court recognized material questions of fact regarding MSI's statements in its FDD regarding its projected opening of "0-1" Medicine Shoppe stores in North Dakota when, in reality, it intended to offer only Medicap franchises. MSI additionally ignored plaintiffs' claims that the "most favored nations" clause was used to induce their entrance into renewal agreements. The court further held that the plain language of the NDFIL provides that a franchisee is entitled to bring an action against "any person who violates any provision of this chapter" and that actions between franchisees and franchisors under the statute have been litigated in both North Dakota state and federal courts.

***AAMCO Transmissions, Inc. v. Wirth*, Case No. 11-4250, Bus. Franchise Guide (CCH) ¶ 14,727 (E.D. Pa. Dec. 7, 2011)**
This case is discussed under the topic heading "Fraud."

***Cousins Subs Sys. Inc. v. Better Subs Dev. Inc.*, Case No. 09-C-0336, Bus. Franchise Guide (CCH) ¶ 14,705 (E.D. Wis. Sept. 30, 2011)**
This case is discussed under the topic heading "Fraud."

DAMAGES

***Days Inns Worldwide, Inc. v. Inv. Props. of Brooklyn Ctr., LLC*, Case No. 10-609 (MJD/JJK), Bus. Franchise Guide (CCH) ¶ 14,756 (D. Minn. Aug. 26, 2011)**
Days Inns Worldwide, Inc. could not recover lost future profits in this case from a franchisee that unilaterally terminated the parties' agreement by selling the hotel to a third party only three years into its fifteen-year agreement term. Upon learning of the sale, Days Inns acknowledged the termination of the license agreement and advised the franchisee that it was required to pay damages for premature termination as well as all outstanding fees through the date of termination. Days Inns filed suit for those damages, and the franchisee defaulted. Days Inns then sought a default judgment for both types of damages.

Although the court awarded Days Inns damages for fees owed through the date of termination, it denied the request for damages for the remaining twelve years of the agreement term. The court noted that lost profits are recoverable in a breach of contract action if they can be established with a reasonable degree of certainty. The court held, however, that Days Inns could not "estimate, with any reasonable degree of certainty, what [the hotel's] revenues would [have] be[en] over the remaining twelve years . . . of the License Agreement" because many factors could influence profitability during that time. The court explained that Days Inns' evidence amounted to no more than having its representative "do the arithmetic to calculate the average daily revenue for the last twelve months of the hotel's operation and multiply that amount times the 4,505 days left in the agreement term, and reduce that amount to present value." Without proof of competitive market conditions, historical accuracy of forecasting revenue streams, or other evidence to forecast economic trends, the franchisor could not meet the "reasonable certainty" requirement as to that future time frame.

The court also noted that Days Inns presented no evidence that it had attempted to mitigate its damages by finding another franchisee and opening another hotel in this market. The court concluded that allowing Days Inns to obtain a judgment for its requested twelve-year income stream "would be encouraging [Days Inns] to commit economic waste by putting forth no efforts to mitigate its damages."

***Hardee's Food Sys., Inc. v. Jeffrey T. Hallbeck*, Case No. 4:09CV00664, Bus. Franchise Guide (CCH) ¶ 14,693, (E.D. Mo. Sept. 21, 2011)**
The franchisor in this case survived summary judgment on its claim for lost future profit damages from a terminated franchisee. Hardee's Food Systems, Inc. entered into a five-year renewal franchise agreement with defendant franchisees. The franchisees alleged that during the renewal term, Hardee's aired lewd TV commercials that resulted in repeated complaints from the franchisees' customers. The franchisees also claimed that Hardee's closed its other restaurants in the franchisees' market area and provided insufficient support for the franchised business. Allegedly as a result of its declining profitability, the franchisees closed the restaurant with more than a year left on the renewal term. Hardee's then sent a notice of default and termination declaring the franchise terminated as a result of the franchisee's abandonment.

Hardee's sued, seeking damages resulting from the early termination consisting of the fees that Hardee's would have been paid during the remaining term of the agreement. The franchisees filed counterclaims for breach of contract based on the alleged failure of Hardee's to provide adequate advertising and other services. The franchisees then moved for summary judgment, arguing that the claims of Hardee's for prospective royalty and advertising fees were deficient as a matter of law, relying on *Postal Instant Press, Inc. v. Sealy*, 51 Cal. Rptr. 2d 365 (Cal. Ct. App. 1996).

The court rejected the franchisees' argument because, unlike in *Sealy*, the franchisees in this case abandoned the franchise. *Sealy*, the court noted, did not hold that a franchisor can never collect lost future royalties for a franchisee's breaches of the franchise agreement. Instead, entitlement to recovery "depends on the nature of the breach and whether the breach itself prevents the franchisor from earning those future royalties." The *Hardee's* court followed the Fourth Circuit's recent decision in *Meineke Car Care Centers, Inc. v. RLB Holdings, LLC*, 423 F. App'x 274 (4th Cir. 2011), which upheld the franchisor's right to seek lost future profits based on the franchisee's abandonment of the franchise.

The *Hardee's* court also rejected the franchisees' argument that future damages were too speculative. Hardee's submitted a damages expert report analyzing projected sales based on financial schedules submitted by the franchisees, the applicable royalty and advertising fee rates, expenses that Hardee's avoided once the franchise location closed, and the time value

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of money. The court held that Hardee's had provided an adequate basis on which a jury could base a damages award with reasonable certainty. The franchisees complained that the expert report did not take into account the costs associated with the operation of the franchised business or the declining market presence of Hardee's, but the court held that these issues were fact questions to be considered at trial.

DEFINITION OF FRANCHISE

***Echo, Inc. v. Timberland Machs. & Irrigation, Inc.*, 661 F.3d 959, Bus. Franchise Guide (CCH) ¶ 14,714 (7th Cir. Oct. 25, 2011)**

Echo, Inc. terminated its distributor agreement with Timberland Machines & Irrigation, Inc. as a result of Timberland's allegedly eroding financial condition and subsequently awarded Timberland's former territory to defendant Lawn Equipment Parts Company (LEPCO). Echo brought suit in the Northern District of Illinois claiming that Timberland breached the contract and owed it for unpaid invoices and interest. Timberland filed a separate suit, also in the Northern District of Illinois, against Echo and LEPCO, asserting claims for violations of the Connecticut Franchise Act, tortious interference with contract, unjust enrichment, and violations of the Connecticut Unfair Trade Practices Act. The cases were ultimately consolidated. The district court granted Echo's and LEPCO's motions for summary judgment and then found that Timberland owed Echo in excess of $1.6 million plus interest. Timberland appealed.

The Seventh Circuit upheld the district court's grant of summary judgment with respect to Timberland's Connecticut Franchise Act claim on the ground that Timberland failed to establish that it was a "franchise" because "most, if not all, of its business derives" from its relationship with the supplier. The court found that Timberland derived less than 50 percent of its sales and profits from the sale of Echo's products. The court also upheld the district court's award of damages of more than $1.6 million, including over $200,000 in interest at the rate of prime plus 4 percent because Timberland had waived its objection with respect to the interest rate.

The Seventh Circuit also upheld the district court's grant of summary judgment with respect to Timberland's claims against LEPCO. The court agreed that Timberland failed to create a material fact issue with respect to its claim that LEPCO had induced a breach of the supplier agreement with Echo and a subsequent breach of a third-party agreement. Because Timberland's additional claims against LEPCO for violations of the Connecticut Unfair Trade Practices Act and unjust enrichment were based on the same theories, they, too, were dismissed.

***Roberts v. C.R. Eng., Inc.*, Case No. C 11-2586, Bus. Franchise Guide (CCH) ¶ 14,737 (N.D. Cal. Nov. 22, 2011)**

Charles Roberts and Kenneth McKay filed a putative class action in California against C.R. England, Inc. and related entities (collectively, C.R. England), asserting claims under California, Utah, and Indiana law as well as the Federal Telemarketing and Consumer Fraud and Abuse Prevention Act. Plaintiffs had each entered into contracts containing a mandatory forum selection clause identifying Utah as the required forum. C.R. England invoked the clauses and filed a motion to dismiss for lack of subject matter jurisdiction and improper venue and further moved to dismiss or transfer the action under 28 U.S.C. § 1406(a). Alternatively, defendants sought to transfer the action pursuant to 28 U.S.C. § 1404(a) for convenience. Finally, defendants moved under Rule 12(b)(6) to dismiss plaintiffs' claim for violation of the California Franchise Investment Law (CFIL).

C.R. England provides truck freight shipping services to its customers. Although C.R. England employs its own truck drivers, "the majority of [its] goods are transported by drivers who have purchased . . . a 'Driving Opportunity.'" Plaintiffs each enrolled in C.R. England's driver training school, where they were provided with information regarding both company employment and the Driving Opportunity. Plaintiffs allege that defendants made fraudulent income projections and expense estimates regarding the Driving Opportunity and pressured them into purchasing it by telling them that no company employment positions were available and/or that they had to purchase it for a minimum of six months before being considered for company employment. Plaintiffs each agreed to buy a Driving Opportunity and entered into an independent contract operating agreement (ICOA) with C.R. England and a separate truck leasing agreement with one of related defendants. Under the terms of the ICOA, each contractor leased the truck to C.R. England, operated the truck on its behalf, and performed all services from the origin to destination of all shipments offered by C.R. England and accepted by the contractor.

Plaintiffs claimed that the ICOA and truck leasing agreement together constituted a single transaction sale of "business opportunities and/or franchises under applicable law" and constituted a franchise under federal California and Utah law. As defined by the CFIL, a franchise is a contract or agreement by which (i) a franchisee obtains "the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor"; (ii) "[t]he operation of the franchisee's business . . . is substantially associated with the franchisor's trademark" or company symbol; and (iii) "[t]he franchisee is required to pay . . . a franchise fee." The court found that plaintiffs failed adequately to allege all three elements.

First, plaintiffs argued that C.R. England served both as the customer and the franchisor and that plaintiffs had purchased a right to sell transportation services to C.R. England by entering into the ICOA and truck leasing agreement. Although the court acknowledged that the CFIL does not specify that the party who offers, sells or distributes services to another is not a franchisee of another, the court declined to find that this omission was sufficient to indicate that the legislation had purposefully intended to cover the business arrangement described in this case. The court reasoned that such an interpretation would act to transform many independent contractor arrangements into franchises and refused to extend the CFIL in such a manner, barring a clearer signal from the legislature.

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Second, relying on prior precedent, the court found the fact that plaintiffs drove trucks and trailers emblazoned with C.R. England's commercial symbols was insufficient to satisfy the requirement that the operation of the franchisee's business be "substantially associated" with the franchisor's trademark or other commercial symbols. Third, the court rejected plaintiffs' contention that their payment of fees for training, truck rental, computer rental, operation equipment, and other associated items required "for the right to enter the Driving Opportunities" qualified as franchise fees. The court determined that these fees were no more than ordinary business expenses and did not constitute "disguised franchise fees." The court thus dismissed the CFIL claim but granted leave to amend.

The court also enforced the forum selection clauses in the ICOA and truck leasing agreement and held that unless plaintiffs were able to plead a CFIL claim, the clauses would require transfer of the action to Utah. Plaintiffs argued that the forum selection clause should be set aside on two grounds: (i) enforcement of the clause would contravene California public policy in favor of protecting California franchisees because it would mandate resolution of claims concerning a California franchisee in a non-California court; or, in the alternative, (ii) the clause was "incorporated into the contract as a result of fraud, undue influence, or overweening bargaining power." The court dismissed plaintiffs' public policy argument in light of their failure to allege successfully that they had purchased a franchise. Next, the court agreed with defendants that any fraud or undue influence must be specific as to inclusion of the forum selection clause, rather than the contract as a whole, and found that plaintiffs' contentions did not meet this standard. The court also held that the forum selection clause survived a review for fundamental fairness because defendants' principal place of business was located in Utah, plaintiffs and other drivers received training and entered into the ICOA and truck leasing agreement in Utah, and plaintiffs had an opportunity to review the agreements prior to signing them.

The court further held that even if the forum selection clauses were unenforceable, the circumstances warranted transferring the case pursuant to § 1404(a) unless plaintiffs could plead a claim under the CFIL. The factors favoring transfer included the following: (1) the agreements were provided and signed in Utah; (2) the parties had considerable contact with Utah by way of defendants' headquarters in Salt Lake City and plaintiffs' representation of a purported nationwide class of drivers that included many who would likely have had contact with Utah; and (3) the cost of litigation was likely to be more favorable in Utah because the members of the putative class did not necessarily live in California but were distributed throughout the United States, and Utah is more centrally located. The court noted that the remaining factors, including contacts relating to plaintiffs' cause of action in the chosen forum and the ease of access of sources of proof, were neutral or subject to reduced deference (e.g., plaintiffs' choice of forum accorded less weight where, as here, plaintiffs represent a class). The court therefore held that defendants had met their burden and demonstrated that transfer to Utah, barring a successful pleading of a CFIL claim, was warranted.

EMPLOYMENT

***Doctors' Assocs., Inc. v. Uninsured Employers' Fund*, Case No. 2010-SC-000658-WC, Bus. Franchise Guide (CCH) ¶ 14,736 (Ky. Nov. 23, 2011)**

The court considered the question of whether Doctors' Associates, Inc. (DAI), which franchises the right to operate Subway sandwich shops worldwide, qualifies as a contractor under Kentucky's workers' compensation law such that DAI would be liable for paying workers' compensation benefits.

In workers' compensation proceedings, the administrative law judge (ALJ) dismissed the Uninsured Employers' Fund's (UEF) claim against DAI for benefits paid to an employee of an uninsured Kentucky DAI franchisee, ruling that a franchisor-franchisee relationship is not encompassed within the meaning of *contractor* under the Kentucky workers' compensation law. The Subway franchise agreement at issue required the franchisee (Watash), "among other things, to be 'identified at all times . . . as a natural person, an independent contractor and not an agent or employee' of DAI. It required Watash to pay DAI a . . . franchise fee," a weekly royalty, and advertising fund contribution; "to maintain certain product standards;" and to abide by DAI's policies and procedures for operating the shop. The agreement also required Watash to maintain specified insurance coverage "'for the mutual benefit of the parties' and entitled DAI to monthly inspections of the business premises and specified business records."

"The ALJ determined that the vast majority of DAI's business was to act as a franchisor who licensed others to operate Subway stores. Distinguishing th[is] [franchise] relationship . . . from that of a contractor and subcontractor, the ALJ noted that the parties' agreement required [the franchisee] to pay DAI a fee" rather than vice versa. The ALJ's opinion noted that DAI's retention of certain rights, such as the right to be named as an additional insured and be given notice of cancellation of insurance policies, clearly was "a much different arrangement than that which is contemplated" by the Kentucky workers' compensation law.

The Kentucky Workers' Compensation Board affirmed the ALJ's decision, noting that "'the record contained evidence that DAI did not control the day to day activities of its franchisees' and that 'DAI clearly is in the business of developing franchises for the purpose of securing royalties rather than actually operating sandwich shops.'" The Kentucky Court of Appeals reversed the workers' compensation board, however, and remanded for further consideration of whether the work that the uninsured franchisee performed was a regular or recurrent part of DAI's business.

In a unanimous opinion, the Kentucky Supreme Court reversed the Court of Appeals and affirmed the board opinion. The supreme court held that although the ALJ erroneously interpreted the Kentucky workers' compensation law as excluding all franchisors, the ALJ properly found that DAI was not a contractor under the particular facts of the case. The court held that substantial evidence supported the ALJ's

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finding that DAI is in the business of franchising and not in the business of selling sandwiches and that the franchisee did not perform a regular or recurrent part of DAI's business.

Significantly for franchisors, the court clarified that Kentucky law does not preclude a franchisor that meets the statutory definition of *contractor* from being considered as such. The court rejected the public policy argument raised by amicus curiae that "permit[ting] a franchisor to be considered a contractor under any set of facts [would] 'hobble'" the business of franchising. The court noted that franchisors can protect themselves by "including in a franchise agreement provision[s] that require[s] the franchisee to maintain workers' compensation insurance at all times," "to include the franchisor as a named insured," and to permit the inspection of the franchisee's business records to ensure that insurance premiums are timely paid.

FRAUD

***Cousins Subs Sys. Inc. v. Better Subs Dev. Inc.*, Case No. 09-C-0336, Bus. Franchise Guide (CCH) ¶ 14,705 (E.D. Wis. Sept. 30, 2011)**

Cousins Subs, Inc., a franchisor of sandwich shops, sued defendants for breach of development agreements, and defendants counterclaimed against Cousins and its representatives for fraud. Defendants claimed that Cousins made "fraudulent representations regarding personnel and profit forecasts," which induced them to enter into the contracts. Cousins and its representatives moved for summary judgment, which the court denied in substantial part.

Cousins relied primarily on the no-reliance and integration clauses of the parties' franchise and area development agreements, arguing that these clauses barred the fraud claims. The court agreed that these clauses barred claims of negligent fraud and strict liability fraud, but they did not bar the franchisees' claims for intentional misrepresentation. Under Wisconsin law, no-reliance and integration clauses cannot defeat fraud claims based on knowing or reckless misrepresentations. The court held that numerous fact questions existed as to whether Cousins and its representatives made intentional false statements.

The court also rejected Cousins' summary judgment argument based on Wisconsin's economic loss doctrine. The court held that this doctrine applies only in cases involving goods, not services, and the franchise and area development agreements in this case involved primarily the provision of services. In addition, the economic loss doctrine did not apply because the franchisees sought rescission of the agreements rather than contractual remedies.

The court also denied summary judgment on the franchisees' claim of breach of contract for Cousins' alleged failure to use reasonable efforts to provide assistance in site selection. The franchisees presented an expert who opined that the assistance provided by Cousins was below industry standards. Moreover, the court concluded that Cousins appeared not to have made any independent effort at all and instead relied solely on the franchisees' previous review of the area.

Finally, the court denied summary judgment on the franchisees' claims for violation of both the Wisconsin Franchise Investment Law and the Indiana Franchise Disclosure Act. Despite the fact that the franchisees were not based in Wisconsin, the court held that the Wisconsin law could apply because the offer by Cousins originated from Wisconsin. The Indiana Act was applicable because the franchises were based in that state.

***Next Generation Group, LLC v. Sylvan Learning Ctrs., Inc.*, Case No. CCB-110986, Bus. Franchise Guide (CCH) ¶ 14,752 (D. Md. Jan. 5, 2012)**

A franchisee of Sylvan Learning Centers, LLC filed suit against Sylvan and certain affiliates (collectively, Sylvan) arising from the franchisee's purchase of a new Sylvan location in Irving, Texas. The franchisee (NGG) alleged that Sylvan engaged in a bait-and-switch tactic, inducing NGG to purchase the start-up site by promising also to sell NGG two existing sites but then reneged on those deals shortly after NGG opened the start-up site. NGG contended that it was necessary to purchase several franchises in order to achieve its desired level of profits and to minimize the risk associated with purchasing a new location. NGG further alleged that Sylvan refused to permit NGG to resell the Irving center, despite having initially approved a prospective purchaser, unless NGG agreed to drop its lawsuit against Sylvan. NGG advanced claims for breach of contract, fraudulent inducement, intentional misrepresentation, violation of the Maryland Franchise Registration and Disclosure Law and tortious interference with prospective economic advantage.

The court held that NGG's newly added claims against another Sylvan affiliate were not barred by the statute of limitations. The amended claims satisfied the conditions under Federal Rule of Civil Procedure 15(c) to "relate back" to the date of the original pleading because (1) NGG's claim against SLI arose out of the same transaction set forth in the original complaint; (2) the original complaint made it "conceptually clear" whom NGG was suing and on what grounds; and (3) there was an identity of interest between SLI and Sylvan Learning Centers, LLC, which employed the same counsel, so there was no concern that SLI had been caught by surprise by the proposed amendment.

More broadly, the court determined that NGG's claims were not futile. The court rejected Sylvan's argument that NGG's tort claims for fraudulent misrepresentation and intentional misrepresentation were barred by a general integration or merger clause in the Irving license agreement because the integration clause did not disclaim specific oral representations. The court observed that NGG could reasonably have relied upon Sylvan's oral representations given that the negotiations leading up to the execution of the Irving license agreement were not notably lengthy, NGG was not particularly sophisticated or experienced in such transactions, and there was evidence that the parties continued to take steps toward consummating the other two purchases as NGG alleged. The court likewise held that the amended claims were not barred by the statute of frauds because the fraud and negligent misrepresentation were based on misrepresentations

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that induced the contract rather than on the contract itself.

The court found that NGG's amended complaint met the pleading standards for fraud under Federal Rule of Civil Procedure 9(b) as it made sufficiently clear which statements were alleged to have been misleading and the reason or reasons why NGG claimed that the statements were misleading. It also provided the time, place, and contents of the false representations as well as the identity of the parties making the misrepresentations. Observing that "NGG ha[d] already provided some evidence of the misrepresentations in question" through e-mails and other documents, the court also found no evidence that the claims were frivolous.

***AAMCO Transmissions, Inc. v. Wirth*, Case No. 11-4250, Bus. Franchise Guide (CCH) ¶ 14,727 (E.D. Pa. Dec. 7, 2011)**

AAMCO Transmissions, Inc. sued Frank Wirth and Auto Center, LC in the Eastern District of Pennsylvania to enforce the post-termination provisions in the parties' franchise agreement. Defendants counterclaimed for (i) breach of the franchise agreement, (ii) breach of the implied covenant of good faith and fair dealing, and (iii) fraudulent misrepresentation. AAMCO moved to dismiss defendants' counterclaims.

Defendants' fraud claim was predicated on alleged presale representations regarding the profitability of AAMCO's business model. The court observed that this claim had two components: fraud in the inducement and fraud with respect to the performance of the franchise agreement. The court found that the fraud in the inducement claim was barred by the parol evidence rule because the franchise agreement was integrated and explicitly disclaimed any representations regarding profitability, revenues, etc. Defendants sought to avail themselves of the exception under Pennsylvania law to the application of the parol evidence rule in real estate inspection cases, but the court held that it had no application other than to cases involving residential real estate. With respect to the fraud in the performance component of the claim, the court analyzed whether the gist of the claim sounded in contract or tort because under Pennsylvania law a tort claim for fraudulent performance of contract is actionable only if the contract was "collateral" to conduct that was primarily tortious. The court concluded that defendants' claim sounded "entirely in contract" rather than tort and thus dismissed the fraud in the performance claim.

Defendants' breach of contract claim consisted of two alleged breaches: (i) the removal of defendants from AAMCO's national website and central locator and (ii) the licensing of two other franchisees within ten miles of defendants' locations. As to the first contract claim, the court noted that defendants failed to identify any provision in the franchise agreement that created a duty on the part of AAMCO to maintain defendants' center on the national website. Moreover, the court concluded that even if defendants could establish such a duty, defendants' breach of their own obligations with respect to advertising and promotion justified AAMCO's removal of defendants from the website. Defendants' other contract claim fared no better. Under the franchise agreement, AAMCO specifically reserved the right to grant additional franchises, "'limited to a maximum of one center for each 100,000 motor vehicle registrations.'" However, the agreement also specifically provided that the franchisee was not granted a protected trade area. Accordingly, the court dismissed this claim, finding that there was no contractual duty and, even if there was, that defendants had failed to allege that the number of registrations was insufficient to permit the establishment of the two additional franchises within ten miles of defendants' location.

Finally, the court addressed defendants' good faith and fair dealing claim. Under Pennsylvania law, the duty of good faith and fair dealing only applies in limited circumstances and in contracts involving a special relationship between the parties. In the franchise context, the duty of good faith and fair dealing only applies to franchise terminations. The court found that defendants' claim was not based on the termination of the franchise agreement and, therefore, must be dismissed. The court added, however, that even if the covenant could be applied to circumstances other than terminations, the claim would still fail because defendants were attempting to modify or override the express terms of the franchise agreement.

***Samica Enters. LLC v. Mail Boxes Etc., Inc.*, Case No. 10-55433, Bus. Franchise Guide (CCH) ¶ 14,731 (9th Cir. Dec. 1, 2011) (unpublished)**

The Ninth Circuit affirmed the district court's grant of summary judgment to the franchisors, dismissing various state law claims and applying California choice of law provisions in franchise agreements to alleged precontract wrongs. The court first considered appellants' California Franchise Investment Law (CFIL), common law fraud, and misrepresentation claims. Appellants argued that Mail Boxes Etc., Inc., United Parcel Service, and other UPS subsidiaries (collectively, MBE) made untrue statements and omissions of material facts "in connection with the offer and sale of the franchises and . . . the conversion . . . to the new 'The UPS Store' franchise model." The court noted that the CFIL and common law fraud claims all required a showing of reasonable reliance on the alleged misrepresentations. The court determined, however, that appellants provided no evidence of reasonable reliance on any alleged misstatement or omission and affirmed the district court's dismissal of the CFIL and fraud claims.

The court additionally affirmed summary judgment on appellants' claims under California's Unfair Competition Law (UCL). A claimant alleging fraudulent, unfair, and unlawful business practices under the UCL must show that a "reasonable consumer" is likely to be deceived, and appellants provided no evidence to support such a showing.

The court then held that appellants had waived their CFIL claim for failure to register the amendment to the franchise agreement in connection with MBE's conversion from the old franchise model to the new "The UPS Store" model. Appellants had failed to address MBE's argument that the registration claim was barred by the one-year statute of limitations in their opposition to MBE's motion for summary judgment, and they did not raise the argument in their opening appellate brief.

The court also dismissed appellants' claim that MBE had

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breached its duty of "best efforts" under the franchise agreement to obtain incentives for franchisees by failing to make efforts by means of written requests. The court noted that it was undisputed that MBE had engaged in efforts to improve incentives by way of oral persuasion, and it found no authority or merit to appellants' contention that the best efforts requirement could only be satisfied by written means.

Appellants further alleged that appellee UPS breached the implied covenant of good faith and fair dealing by failing to increase the prices under the carrier agreement with the franchisees. The court first agreed with the district court that the implied covenant claim was preempted by the Federal Aviation Administration Authorization Act of 1994, prohibiting states from enacting or enforcing any laws or regulations relating to the price, route, or service of carriers such as UPS. The court further held that even if the claim were not preempted, it failed under state law because an implied covenant of good faith and fair dealing cannot impose an affirmative duty to forbear the enforcement of the terms of a contract or limit the ability of a party to do what is expressly authorized in a contract. In this case, appellants sought to do precisely that by attempting to use the implied duty to impose a duty upon UPS to offer better prices and terms than those dictated by the agreement.

The Ninth Circuit also held that the district court did not err in applying California law to appellants' claims. Although certain franchise agreements contained choice of law provisions for other states, the district court correctly found that appellants' claims would fail even if other states' laws were applied. The appellate court also rejected appellants' contention that California choice of law provisions did not apply to precontract wrongs because the provisions stated that the agreements would be "governed and construed under and in accordance with" California law. Consistent with California state law precedent, the phrase *governed by* in a choice of law provision is interpreted to apply to all disputes arising out of the transaction or relationship.

***G.L.M. Sec. & Sound, Inc. v. LoJack Corp.*, Case No. 10-CV-04701, Bus. Franchise Guide (CCH) ¶ 14,701 (E.D.N.Y. Sept. 30, 2011)**

This case is discussed under the topic heading "Good Faith and Fair Dealing."

GOOD FAITH AND FAIR DEALING

***Stuller, Inc. v. Steak N Shake Enters., Inc.*, Case No. 10-CV-3303, Bus. Franchise Guide (CCH) ¶ 14,722 (C.D. Ill. May 31, 2011)**

Stuller, Inc., a Steak N Shake Enterprises, Inc. (SNS) franchisee, objected to SNS's policy requiring "all franchisees to follow set menu and pricing . . . and [to] offer all company promotions as published." Stuller alleged that the "[p]olicy was contrary to 'long-standing custom, practice, policy, agreement, and representation' that franchisees could set their own prices for menu items" and develop custom menus and the like. Stuller alleged that when it refused to implement the policy, SNS served a notice of default and threatened to terminate Stuller's franchises.

Stuller filed suit in the Central District of Illinois, asserting claims for (i) a declaratory judgment that Stuller was not required to comply with the policy and seeking an injunction to prevent SNS from enforcing the policy; (ii) breach of the implied covenant of good faith and fair dealing and, in the alternative, (iii) violations of the Illinois Franchise Disclosure Act (IFDA) by attempting to enforce the policy despite there being no language to that effect in the franchise agreements and despite the policy allegedly being contrary to the provisions in the Uniform Franchise Offering Circular. SNS filed a motion to dismiss Stuller's second and third claim because Stuller could not allege actual damages. SNS also sought dismissal of the IFDA claim on the grounds that the claim was barred by the IFDA's statute of limitations and Stuller had failed adequately to allege the necessary elements.

With respect to the implied covenant claim, the court found that the allegations that Stuller "has been and will be damaged" were sufficient to allege damages resulting from the claimed breach of the agreement. With respect to the alternative claim for violations of the IFDA, Stuller argued that because SNS had not attempted to enforce the policy until October 2011 (less than one year before the filing of the lawsuit), its claims were timely and/or the limitation period should be equitably tolled. The court found that Stuller had not "pleaded itself out the court" and that "a question remain[ed] whether equitable tolling would be appropriate under the circumstances." The court further found that Stuller had adequately alleged damages in that it was seeking to recover attorney fees and costs in bringing the action and that, in any event, rescission was an alternative to damages. Finally, the court found that Stuller had adequately pleaded the necessary elements of a claim under the IFDA.

***Young Living Essential Oils, LC v. Marin*, No. 20090875, Bus. Franchise Guide (CCH) ¶ 14,713 (Utah Sup. Ct. Oct. 21, 2011)**

The Utah Supreme Court considered a distributor's claim that his failure to meet contractual performance requirements should be excused because of the supplier's alleged breach of the covenant of good faith and fair dealing. Marin entered into a supplier agreement with Young Living Essential Oils, LC to distribute Young Living's products. Marin agreed to meet certain performance guarantees, in exchange for which Young Living agreed to make advance payments to Marin, offset by commissions to be earned. Young Living filed suit against Marin claiming that he had breached the agreement by failing to meet the performance guarantees and sought to recover the difference between the advance payments and the commissions that Marin had actually earned. In response, Marin asserted that Young Living's failure to provide him with marketing materials excused his failure to perform, notwithstanding that the agreement was silent regarding this subject.

Young Living moved for summary judgment on the ground that the parol evidence rule barred evidence of alleged representations regarding its provision of the marketing materials because the agreement was integrated and that no such

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requirement could be inferred by the covenant of good faith and fair dealing. The Utah Supreme Court affirmed the grant of Young Living's motion for summary judgment, noting that although contracting parties must "refrain from actions that will intentionally 'destroy or injure the other party's rights to receive the fruits of the contract,'" a "high bar" existed to infer a new contractual covenant. Under Utah law, a court may only imply a covenant of good faith and fair dealing where it is clear from the parties' "course of dealing" or a settled custom or usage in the trade that the parties would have agreed to the covenant if they had considered it. Additionally, the implied covenant cannot create obligations that are "inconsistent with [the] expressed contractual terms."

The supreme court concluded that the covenant Marin sought to establish, i.e., the requirement that Young Living provide marketing materials, was not "rooted" in an attempt to require Young Living to "refrain from actions that will intentionally destroy or injure the other party's rights to receive the fruits of the contract." Rather, Marin sought to impose an affirmative obligation to provide marketing materials. The court further held that such a duty was not "based in a universally accepted obligation" throughout the industry. The court also rejected Marin's claim that Young Living's representatives had promised to provide certain marketing materials because such alleged representations were barred by the parol evidence rule.

***G.L.M. Sec. & Sound, Inc. v. LoJack Corp.*, Case No. 10-CV-04701, Bus. Franchise Guide (CCH) ¶ 14,701 (E.D.N.Y. Sept. 30, 2011)**

Plaintiff G.L.M. Security & Sound, Inc. (GLM) entered into a distributor agreement with defendant LoJack Corp. pursuant to which LoJack agreed to sell its security systems to GLM for distribution in the New York City area. During the course of their relationship, a dispute arose regarding the prices that LoJack charged GLM for the security systems. GLM claimed that LoJack sold products to its direct-sales customers at a better price than it offered GLM. After GLM confronted LoJack regarding this price discrepancy, the parties' relationship deteriorated, and LoJack ultimately refused to sell any products to GLM except on a prepaid basis and only after amounts that were outstanding had been paid in full. GLM then terminated the agreement on the ground that LoJack had materially breached its provisions, and subsequently filed suit.

GLM moved to amend its complaint to assert eight claims: (i) breach of contract; (ii) breach of the covenant of good faith and fair dealing; (iii) misrepresentation; (iv) tortious interference with business relations; (v) violations of the New York Franchise Sales Act; (vi) violations of the Massachusetts General Law (unfair trade practices); (vii) violations of the Robinson-Patman Act; and (viii) breach of fiduciary duty. LoJack contested GLM's motion to amend on the basis that it was futile.

After resolving choice of law issues, the court addressed LoJack's claims that certain allegations in the proposed amended complaint contradicted the express terms of the agreement and therefore should be disregarded. The court agreed in part, finding that allegations regarding GLM being in a partnership with LoJack, preagreement statements relating to that alleged partnership, and defendant's purported control over GLM's business operations conflicted with specific provisions in the agreement and would be disregarded. However, the court found that other allegations were appropriate, including allegations regarding the alleged oral modifications of the agreement and LoJack's alleged promise to provide its best price to GLM.

The court then analyzed LoJack's claims that GLM's motion to amend should be denied because the asserted claims were futile. The court disagreed with LoJack's arguments regarding the claims for breach of contract and breach of the covenant of good faith and fair dealing, holding that the alleged oral modifications of the agreement upon which the claims were based were not barred by the provisions of the agreement. The court held that the misrepresentation claim, however, failed as a matter of law because it was either barred by the integration clause or amounted to an impermissible effort to "morph" a breach of contract claim into a tort. The court also denied GLM's motion with respect to the tortious interference with business relations claim on the ground that GLM had not adequately pleaded that its customers would have continued to do business with it "but for" LoJack's alleged wrongdoing.

The court similarly denied the motion as to the New York Franchise Sales Act claim. It rejected GLM's novel argument that the agreement had "blossomed" into a franchise in 2008 and that the alleged difference between the prices being charged amounted to a "hidden franchise fee." The court also denied the unfair trade practices claim on the ground that the breach of contract and implied covenant of good faith and fair dealing claims upon which it was based were not sufficient to state a claim for unfair trade practices under Massachusetts law. With respect to the Robinson-Patman Act claim, the court held that GLM failed to allege that the price discrimination had a discriminatory effect on competition (e.g., the diversion of sales or profits from it to other purchasers of LoJack's product). Finally, the court denied the motion with respect to the breach of fiduciary duty claim on the ground that any such claim was expressly foreclosed by the language in the agreement.

***Amar Shakti Enters., LLC v. Wyndham Worldwide, Inc.*, Case No. 6:10-cv-1857-Orl-31, Bus. Franchise Guide (CCH) ¶ 14,798 (M.D. Fla. Dec. 21, 2011)**

A Florida district court dismissed part of the second amended complaint by a group of franchisees suing on their own behalf as well as on behalf of various putative classes. Defendants (collectively, Wyndham) were a group of related hotel franchisors. The franchisees asserted four counts: a claim under New Jersey's Consumer Fraud Act (NJCFA), two breach of contract claims (asserted on behalf of different plaintiffs), and a claim for violations of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA).

The dispute focused on Wyndham's customer loyalty pro-

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gram, known as the Wyndham Rewards program. "When a customer who is a member of the Wyndham Rewards program stays at one of [Wyndham's] hotels, . . . the customer receives points that can be exchanged for various benefits." As part of this program, Wyndham "charge[s] the franchisee who owns the hotel a royalty of up to five percent of the room revenue from that customer." The franchisees claimed that Wyndham had "artificially inflat[ed] membership in the Wyndham Rewards program" and thereby inflated the corresponding fees charged to franchisees by (i) automatically enrolling customers in the loyalty program when they booked an online reservation and (ii) by engaging in "pro-active matching" by automatically searching for customers at their hotels who were "members of the program rather than requiring the guest to present a membership card." The franchisees complained that, as a result, they were being charged a 5 percent royalty for customers who did not know that they were in a "loyalty" program and "did not book their stay at the [franchisees'] hotels because of it."

Wyndham sought to dismiss all four of the franchisees' claims. Wyndham challenged the claims for breach of contract and breach of the implied duty of good faith and fair dealing "on the ground that the [franchisees] failed to plead that [Wyndham's] actions were taken in 'bad faith.'" The court rejected this argument, noting that the franchisees unambiguously alleged that Wyndham's actions were in "bad faith" and that "the purpose [of Wyndham's actions] was to 'grossly inflate' the membership of [the loyalty] program."

The court also found that the franchisees had cured their previously deficient FDUTPA claim brought by plaintiff Orlando Lodging Associates LLP by alleging that Orlando Lodging's primary place of business was located in Florida and that it had suffered injury in Florida. Thus, the court also denied the motion to dismiss as to that count.

In addition, Wyndham contended that the franchise agreements for certain plaintiff subclasses explicitly permitted Wyndham to collect the 5 percent fee and that the practices of automatic enrollment into the loyalty program and/or the pro-active matching did not violate any of the terms of the franchise agreements. The court rejected the franchisees' counterarguments that Wyndham had billed for and collected fees for nonmembers and retained collected fees as opposed to spending them on expenses identified in the franchise agreements because neither assertion was included in the second amended complaint. The court noted, however, that the franchisees adequately alleged a breach of the implied duty of good faith and fair dealing under New Jersey law governing the agreements. Although the court acknowledged that such an implied duty "cannot alter the clear terms of an agreement," the court determined that the franchisees were not seeking to alter a clear term or express a right by seeking to stop defendants' automatic enrollment or proactive billing.

Finally, the court granted Wyndham's motion to dismiss as to the NJCFA claim. The NJCFA prohibits, among other things, "unconscionable commercial practices . . . in connection with the sale or advertisement of any merchandise or real estate," with *merchandise* defined to include "any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale." Neither party disputed that Wyndham "does not offer its franchises for sale to the general public," but the franchisees contended that the NJCFA applied because Wyndham had made misrepresentations regarding the services that it would provide in administering the Wyndham Rewards program and that such services qualified as merchandise under the NJCFA. The court disagreed, noting that the franchisees had not purchased program administrative services but rather a long-term hotel franchise not available to the general public, so the NJCFA did not apply.

***AAMCO Transmissions, Inc. v. Wirth*, Case No. 11-4250, Bus. Franchise Guide (CCH) ¶ 14,727 (E.D. Pa. Dec. 7, 2011)**
This case is discussed under the topic heading "Fraud."

INJUNCTIVE RELIEF

***Kraft Power Corp. v. Gen. Elec. Co.*, Case No. 11-6073 (JLL), Bus. Franchise Guide (CCH) ¶ 14,730 (D.N.J. Dec. 1, 2011)**
A New Jersey distributor of industrial engines and generators did not succeed in its motion for a preliminary injunction to reinstate its distribution agreement with GE pending arbitration of its termination dispute. GE provided notice of termination as required under the parties' agreement and appointed another distributor to sell its products in Kraft's distribution territory. Kraft sued in federal court in New Jersey, maintaining that the termination was unlawful under the New Jersey Franchise Practices Act (NJFPA). Kraft also challenged the agreement's choice of law provision requiring the application of Texas law as unenforceable under the NJFPA.

The court noted initially that the parties' agreement to arbitrate their disputes did not preclude the court from granting a preliminary injunction to preserve or restore the status quo provided that Kraft satisfied the standards for preliminary injunctive relief. The court went on to hold, however, that Kraft failed to satisfy the irreparable harm element because, under Third Circuit precedent, financial or economic injury does not constitute irreparable harm necessary to support an award of injunctive relief. Kraft argued that without the injunction, it would lose one-third of its total business, would be unable to maintain skilled employees or an adequate inventory of parts, and would suffer a loss of goodwill. The court held that these alleged injuries all were compensable with money damages and therefore did not constitute irreparable harm.

The court also held that the forum selection and choice of law clauses in the parties' agreement were enforceable, and it rejected Kraft's request to declare that New Jersey was the proper forum and governing law. The court noted that Kraft did not allege that GE committed fraud or exerted undue influence in obtaining the agreement. The court also held that conducting the arbitration in Texas pursuant to the agreement would not preclude application of the NJFPA should the arbitrator determine that statute controlled. Finally, the court noted that neither party was a New Jersey corporation and that the location of the parties, witnesses, and records did not support a greater connection to New Jersey than to Texas.

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***Meineke Car Care Ctrs., Inc. v. Vincent Bica & Dina Bica*, Case No. 3:11-cv-369-FDW-DCK, Bus. Franchise Guide (CCH) ¶ 14,708 (W.D.N.C. Oct. 12, 2011)**

Meineke Car Care Centers, Inc. terminated a Connecticut franchisee for failure to cure payment and reporting defaults. At the franchisees' request, Meineke negotiated and tendered a reinstatement letter outlining requirements for reinstatement, but the franchisees never executed the letter. Meineke sued, seeking a preliminary injunction to enforce the termination and stop the franchisees from continuing to use the Meineke trademarks, as well as to enforce the post-termination noncompetition covenant in the franchise agreement.

The court determined that Meineke met all of the elements for preliminary injunctive relief and granted the motion. Meineke was "likely to succeed on the merits of its trademark infringement claim" because the franchisees continued to operate an automotive repair business on the same premises using Meineke's trademarked name and display signs without Meineke's permission. The franchisees attempted to defend on the grounds that they had painted over the *Meineke* name on the sign, which they claimed would eliminate any confusion. The court gave short shrift to this argument, finding that the former franchisees' use of the *Meineke* name and the same contact information (including phone numbers) indicated that customer confusion was likely.

The court also had little trouble with the other injunctive relief elements. The court relied on older Fourth Circuit precedent to hold that the irreparable injury necessary for injunctive relief regularly flows from a finding of trademark infringement. Interestingly, the court did not cite the U.S. Supreme Court's decision in *eBay, Inc. v. MercExchange*, 547 U.S. 388 (2006), which called into question the continuing validity of a presumption of irreparable harm in intellectual property cases. In light of its prior findings, the court had little trouble concluding that the balance of the equities favored Meineke and that an injunction would serve the public interest.

In addition, the court granted a preliminary injunction to enforce the covenant not to compete contained in the franchise agreement. The court held that the one-year duration and territory consisting of a six-mile radius from the former franchise location were reasonable. The court further found that Meineke would suffer irreparable harm if the injunction were not granted, based on damage to its goodwill and reputation with customers and harm caused by the former franchisees' use of information and training obtained through the former franchise relationship to possibly take away customers within the restricted area. In addition, the court relied upon Meineke's argument that the former franchisees would "be able to draw customers away from other Meineke franchises by offering services at lower prices because [the former franchisees] [we]re no longer paying franchise fees," although there was no discussion of any evidence on this point.

***Interstate Power Sys., Inc. v. Gen. Elec. Co.*, Case No. 11-2564, Bus. Franchise Guide (CCH) ¶ 14,720 (D. Minn. Oct. 21, 2011)**

Plaintiff Interstate Power Systems (IPS) was a long-term distributor for Waukesha Motor Company (Waukesha), which General Electric Company (GE) purchased in early 2011. IPS entered into a distribution, service and commission agreement (distribution agreement) with Waukesha, which Waukesha offered to it and other distributors on a nonnegotiable basis. Among other things, the distribution agreement required IPS to maintain an inventory of replacement parts, maintain suitable service facilities, and employ an adequate number of service personnel. The distribution agreement expired by its terms in 2009 but was continued on a month-to-month basis.

In August 2011, GE advised IPS that the distribution agreement would terminate in ninety-three days. At the same time, Waukesha appointed a new distributor in IPS's territory, "eliminated all discounts provided in the Distribution Agreement, and discontinued the 'stock order discount' program." As a result of the termination letter, IPS was immediately limited to placing only emergency and customer parts orders and was no longer permitted to place stock or forecast orders.

IPS filed suit in the District of Minnesota, claiming that the termination was invalid under the Minnesota Heavy and Utility Equipment Manufacturers and Dealers Act and seeking injunctive relief. GE responded by arguing that the parties had agreed to arbitrate all disputes arising under the Distribution Agreement, and IPS's motion for preliminary injunction therefore should be denied and the case referred to arbitration. The court agreed that the arbitration clause contained in the distribution agreement was applicable and enforceable. The court issued a preliminary injunction, however, "to prevent irreparable harm and to ensure that the arbitration proceedings [would be] meaningful" by requiring that Waukesha provide IPS with discount pricing privileges pending the arbitration.

IPS argued that the arbitration provision was unconscionable because Waukesha reserved for itself the right to seek an injunction in any court of competent jurisdiction, but IPS was required to pursue all claims in arbitration. The court concluded that although this provision was "arguably one-sided," it did not render the entire arbitration agreement unconscionable and, therefore, unenforceable. Rather, the court found that the parties were both "capable of retaining experienced legal counsel" to draft and negotiate their agreements.

In addressing IPS's motion for preliminary injunction, the court held that although the termination letter complied with the ninety-three-day notice period required by the Distribution Agreement, it effectively rendered IPS unable to conduct any Waukesha-related business because it was unable to place stock or forecast orders. "[B]ecause IPS ha[d] dedicated itself to [selling Waukesha products] for twenty-two years, and . . . has been precluded from selling competing products, IPS [did] not have an alternative product source from which to replace . . . lost business." Under these circumstances, the court concluded that GE's discontinuation of discount pricing for IPS effectively amounted to "an immediate termination of the Distribution Agreement." The court further held that "requiring IPS to await [the] arbitration [hearing] while it [was] unable to order Waukesha products at a discount rate would cause irreparable harm . . . , and would substantially change [the] competitive circumstances." Further, under Minnesota law, "which

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prohibit[ed] [the] termination of a distribution agreement without cause and . . . notice," the court held that "IPS [was] likely to succeed on the merits" because GE's action effectively constituted an immediate termination. Finally, the court found that there were significant public policy concerns warranting injunctive relief because permitting a discount pricing program to be terminated pending arbitration would effectively permit manufacturers to circumvent statutory protections for distributors by eliminating the security of a notice period.

JURISDICTION

***A Love of Food, LLC v. Maoz Vegetarian USA, Inc.*, Case No. AW-10-2352, Bus. Franchise Guide (CCH) ¶ 14,684 (D. Md. Sept. 13, 2011)**

Maoz, a national quick-service vegetarian restaurant franchise system with its principal place of business in New York, and two of its individual representatives sought dismissal of claims brought by its Washington, D.C., franchisee for violations of the Maryland Franchise Registration and Disclosure Law and the New York Franchise Sales Act. The court dismissed the franchisee's claims against individual defendants but denied the motion with respect to Maoz.

The court declined to reconsider its ruling that Maoz "transacted business" in Maryland through the acts of mailing its Uniform Franchise Offering Circular (UFOC) and the final franchise agreement to plaintiff's Maryland address and listing the Maryland address in the franchise agreement that Maoz prepared. Maoz claimed that it had no contacts with Maryland and only transacted business there unwittingly because (1) Maoz "did not initiate contact, advertise, or otherwise solicit or pursue" plaintiff in Maryland; (2) plaintiff had "aggressively pursued Maoz for the purpose of" opening a Maoz restaurant in Washington, D.C.; (3) plaintiff's "principal member . . . had a Washington, DC area code and engaged" a Washington. D.C.–based lawyer; (4) the parties' face-to-face meetings took place in Washington, D.C.; (5) the subject franchise was always intended to operate solely in Washington, D.C.; and (6) "Maoz [never] intend[ed] to derive any sales or revenue from Maryland."

The court held that although the Maryland long-arm statute covering defendants who offer "to supply goods, food, services, or manufactured products" in Maryland did "not provide a sufficient basis for jurisdiction," Maoz had established sufficient minimum contacts with Maryland to render the exercise of personal jurisdiction consistent with due process. The court found that by negotiating and finalizing a franchise agreement with plaintiff's Maryland office, which produced "an elaborate and ongoing relationship" involving "continuing significant contractual duties," Maoz had established "substantial" connections with Maryland that were not merely "random" or "fortuitous," notwithstanding "that the franchise itself was slated to operate in Washington, DC."

The court also declined to reconsider its ruling that Maoz triggered the New York Franchise Sales Act by mailing its UFOC and franchise agreement from its representative's New York office to plaintiff in Maryland. Although merely having a principal place of business in New York does not in itself bring a franchisor under the New York Act, the pertinent inquiry is whether the agreement could be deemed to have been made in New York. The court ruled that the New York Act applied to Maoz's offer to sell the franchise because the documents that Maoz mailed to plaintiff originated from New York and were central to the franchise transaction.

The court granted the motions to dismiss filed by individual representatives of Maoz, both of whom were residents of Israel, based upon plaintiff's failure to make any single attempt to effectuate service abroad within eleven months after discovering that individual defendants were citizens of Israel and were residing there. The court rejected plaintiff's argument that its lack of due diligence had not caused any hardship or prejudice to individual defendants, observing that the absence of prejudice alone does not constitute good cause to excuse untimely service. Although the 120-day time limit for service of process did not apply, the court found that it was unreasonable for plaintiff not "to even attempt foreign service of process within a reasonable time of the 120-day limit."

***Ruth's Chris Steak House Franchise, Inc. v. T-Fab, Inc.*, Case No. 6:10-cv-456-Orl-28DAB, Bus. Franchise Guide (CCH) ¶ 14,704 (M.D. Fla. Oct. 5, 2011)**

The Middle District of Florida denied a motion to dismiss filed by Nevada and Colorado franchisees of Ruth's Chris Steak House Franchise, Inc., finding that it had personal jurisdiction over the franchisees under Florida law.

The parties' initial franchise agreements did not contain a contract provision establishing jurisdiction in Florida courts. Ruth's Chris had been based in Louisiana at the time that the franchisees first became Ruth's Chris franchisees, but the company relocated to Florida "shortly after Hurricane Katrina struck in 2005." After several disputes arose between the parties, they signed a Workout and Mutual Termination Agreement in June 2009 that included a Florida choice of law provision as well as a venue provision requiring that either party file suit against the other "only in the federal or state court having jurisdiction where [Ruth's Chris's] principal offices are located at the time suit is filed"; however, the agreement allowed Ruth's Chris the option of filing suit against the franchisees "where [the franchisees] reside or do business; where the Restaurants are or were located; or where the claim arose." The agreement further recited each party's "consent to the personal jurisdiction and venue of those courts over them."

The court determined that these provisions satisfied the statutory requirements for contractual consent to jurisdiction under Florida law. The court found that (1) the case "related to" the workout agreement, which was mentioned several times in the complaint; (2) the phrase *the jurisdiction where [Ruth's Chris's] principal offices are located at the time suit is filed* was sufficient to satisfy the contractual jurisdiction statute; and (3) due process would not be offended where the franchisees had expressed consent "to [the] personal jurisdiction in a freely negotiated agreement" in a commercial setting and where there was no evidence that the provision was unreasonable or unjust.

The court concluded that requiring the franchisees to

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defend the suit in Florida would not result in "injustice or surprise." It observed that since 2005 the franchise relationship "has clearly involved not Louisiana but Florida" given that the franchisees were aware of the relocation to Florida at the time the workout agreement was signed, that Ruth's Chris had required the franchisees to remit contractual franchise payments to Florida since the relocation, and that the parties had renewed at least one of the three franchise agreements at issue after the relocation.

NONCOMPETE AGREEMENTS

***Meineke Car Care Ctrs., Inc. v. Vincent Bica & Dina Bica*, Case No. 3:11-cv-369-FDW-DCK, Bus. Franchise Guide (CCH) ¶ 14,708 (W.D.N.C. Oct. 12, 2011)**

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

STATE DISCLOSURE/REGISTRATION LAWS

***WW, LLC v. Coffee Beanery, Ltd.*, Case No. 05-3360, Bus. Franchise Guide (CCH) ¶ 14,721 (D. Md. Oct. 26, 2011)**

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

STATUTORY CLAIMS

***Red Lion Hotels Franchising, Inc. v. MAK LLC*, Case No. 10-35465, Bus. Franchise Guide (CCH) ¶ 14,724 (9th Cir. Dec. 7, 2011)**

The Ninth Circuit considered whether a California franchisee could assert a claim against a Washington franchisor, Red Lion Hotels Franchising, Inc., under the "franchisee bill of rights" section of the Washington Franchise Investment Protection Act (FIPA), which requires that the parties deal with each other in good faith and prohibits numerous unfair or deceptive acts and practices and unfair methods of competition. FIPA violations are per se unfair trade practices under Washington's Consumer Protection Act (CPA). The court concluded "that an out-of-state franchisee may assert such a claim against a [Washington] franchisor."

Having determined that the franchisee had misrepresented the conditions in its California hotel, Red Lion terminated the franchise agreement and sued the franchisee, its principal, and the principal's wife, "asserting breach of the franchise agreement and its accompanying personal guarantees, and seeking liquidated damages." The franchisee counterclaimed for violations of FIPA's "franchisee bill of rights," the CPA, and breach of the franchise agreement, which contained a Washington choice of law provision. The district court granted summary judgment to Red Lion on the FIPA counterclaim, finding that the "FIPA does not apply extraterritorially." Because the CPA counterclaim was predicated on the FIPA claim, the court also granted summary judgment on the CPA claim. "After a bench trial, the court held for Red Lion on its contract claim."

On appeal, the Ninth Circuit reversed in part, finding that FIPA's bill of rights does apply to the parties' franchise agreement. The court observed that "FIPA's bill of rights does not contain . . . language limiting its application to the relation between a franchisor and franchisee 'in this state.' . . . By contrast, several other FIPA provisions contain an explicit statement that they apply to actions 'in this state,'" meaning Washington. The court found that "the inclusion of explicit territorial limitations in the sale-related provision and the failure to include such a limitation in the bill of rights" suggested "that the Washington legislature made a deliberate choice to impose territorial limitations on some, but not all, of FIPA's provisions." The court remarked that it was "easy to see why the Washington legislature might have wanted to apply FIPA's bill of rights to all . . . franchisees of Washington franchisors," that is, "to reassure potential out-of-state franchisees that they [would] be fairly treated by [Washington franchisors] . . . thereby encourag[ing] them to do business with [the] Washington franchisors." The court also found in a previous decision support for its conclusion that FIPA applies to this dispute: the court found that a subsection of the analogous California Franchise Investment Law "protect[ed] a non-California dealer against the unfair practices of a California [supplier]."

The court "remand[ed] to the district court to consider the merits of [the franchisee]'s FIPA counterclaim . . . and to determine whether [it] is entitled to [relief] under the CPA," which provides the sole remedy for the violation of FIPA's bill of rights. On this issue, the court noted that after recently holding that "the CPA [is] limited to claims brought by Washington residents," the Washington Supreme Court subsequently "withdr[ew] that portion of its opinion," and thus the territorial reach of the CPA remained "an open question."

The franchisee also argued that Red Lion was equitably estopped from terminating the franchise agreement, based upon a letter requiring that the franchisee complete the disputed renovations "in a time frame that is acceptable to us." The franchisee "wrote back immediately . . . with a proposal to finish the work [within two months]" and requested that Red Lion confirm "whether his proposed schedule was acceptable." Instead of responding directly to the letter, Red Lion terminated the agreement roughly six weeks later. The court affirmed the district court's conclusion that Red Lion was not equitably estopped from terminating the franchise agreement because the termination was based upon Red Lion's conclusion that the franchisee "had misrepresented conditions in the hotel," and, under Washington law, "'[a] person may not base a claim of estoppel on conduct induced by'" his own fraudulent representations (internal citation omitted).

***Cohen v. Roll-A-Cover, LLC*, Case No. AC 32430, Bus. Franchise Guide (CCH) ¶ 14,685 (Conn. App. Ct. Sept. 20, 2011)**

Roll-A-Cover, LLC (RAC) and its president (Morris) appealed from a trial court judgment awarding plaintiffs $75,000 in compensatory damages, $350,000 in attorney fees under the Connecticut Business Opportunity Investment Act (CBOIA) and the Connecticut Unfair Trade Practices Act (CUTPA), and $150,000 in punitive damages under the CUTPA.

Defendants manufactured and sold a retractable enclosure for swimming pools and spas. Responding to an in-flight magazine advertisement, plaintiff Cohen met with defendants at their Connecticut manufacturing facility to discuss poten-

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tial distributorship opportunities in New Jersey. As part of their effort to induce Cohen to purchase a distributorship, defendants made a myriad of factual misrepresentations, including that they (1) "were in negotiations with potential distributors worldwide" and "recently had sold distributorships in Florida and five different countries in Southeast Asia," (2) had "a high volume sales history and a backlog of pending sales," and (3) "held six patents and at least four trademarks on their products. . . . [D]efendants [also] misrepresented their product's ability to withstand certain wind velocities and snow loads," and they "prepared and presented a marketing and sales brochure that contained" photographs and descriptions of pool enclosures that in fact were not manufactured by RAC.

Relying on these misrepresentations, plaintiffs entered into a master RAC distributorship agreement and paid a fee of $75,000. Prior to executing the agreement, defendants denied plaintiffs access to any documentation regarding RAC's sales history, maintaining that the information was proprietary and unavailable. The parties' business relationship quickly deteriorated, resulting in the lawsuit.

The court affirmed the trial court's conclusion that "plaintiffs had proven fraud, fraudulent inducement and intentional misrepresentation by clear, precise and unequivocal evidence." Defendants argued that a disclaimer in the distribution agreement operated to exclude the distributorship agreement from the provisions of the CBOIA. The disclaimer noted that this agreement

> is not a franchise, under the laws of the State of Connecticut or any other jurisdiction, which might be applicable to Distributor. . . . Distributor represents that the Products are one of several products or services sold by Distributor and these Products do not constitute the sole or substantial source of sales by the Distributor.

The court rejected this contention, pointing out that the remaining forty-eight paragraphs of the distributorship agreement "establish[ed] clearly that the defendants were offering, and the plaintiffs were purchasing, a distributorship in consideration of a payment of $75,000."

The court also affirmed the trial court's denial of defendants' request for further evidentiary proceedings to determine the applicability of an exemption for certain violations of the CBOIA where the investor purchaser's net worth exceeds $1 million. The court held that this denial was at most harmless error because that exemption did not pertain to one of the sections of the CBOIA upon which the trial court found defendants to be liable.

The court rejected defendants' argument that "CUTPA [was] inapplicable because plaintiffs did not incur an ascertainable loss within the state of Connecticut," noting that the statute applies to injuries caused by unfair trade practices committed in Connecticut, including the offering of services for sale. The court was similarly unmoved by defendants' contention that an individual officer of RAC could not be held individually liable (the trial court had found that Morris personally engaged in tortious conduct). Finally, the court found that even if the trial court, in awarding $75,000 compensatory damages, failed to consider profits or moneys that plaintiffs might have received in connection with the subject distributorship, there was no indication that plaintiffs had been unjustly enriched given "the court's broad discretion to award compensatory damages pursuant to the other claims on which plaintiffs prevailed, including fraud, negligent misrepresentation, and CUTPA."

***Franklin Park Lincoln-Mercury, Inc. v. Ford Motor Co.*, Case No. 3:09 CV 792, Bus. Franchise Guide (CCH) ¶ 14,718 (N.D. Ohio Oct. 31, 2011)**

Franklin Park Lincoln-Mercury brought suit in the Northern District of Ohio against Ford Motor Company, alleging a variety of claims including breach of fiduciary duty and predatory practices under an Ohio statute. The district court granted Ford's motion for summary judgment.

Franklin Park asserted that Ford owed it a fiduciary duty and breached that duty by approving a second Lincoln-Mercury dealership in the Toledo, Ohio, market. To establish the alleged fiduciary duty, Franklin Park relied on provisions in the parties' agreement requiring Franklin Park to (i) use Ford's accounting system; (ii) submit monthly financial reports to Ford in a specific format; (iii) submit sales information to Ford upon completion of a sale and complete sales and other data whenever Ford requested it; (iv) retain records for a certain period of time; and (v) permit Ford "to inspect and audit all aspects of the dealership, including Franklin Park's [business] records." The court found that none of these provisions was unusual, and they did not give rise to a fiduciary relationship. Franklin Park further claimed that the requirements that Franklin Park promote and advertise its business; maintain specific vehicle inventory, minimum capital, and minimum staff; and use Ford's signs evidenced Ford's disproportionate power. The court found that these requirements were typically found in dealer contracts; moreover, Franklin Park's president admitted that Ford gave Franklin Park "wide latitude" with respect to operating its business. The court was similarly unimpressed with Franklin Park's argument that Ford had power to terminate the agreement, noting that Franklin Park had similar, if not greater, power.

Franklin Park's predatory practices claim fared no better. Franklin Park claimed that Ford's approval of a transaction installing and consolidating a dealership with a preexisting Mercury dealership was "a predatory and discriminatory practice." Ford argued that its actions were neither predatory nor discriminatory; the same Ohio statute required Ford to approve the underlying transaction, so it could not be liable under that statutory provision. Franklin Park further claimed that the approval of the new and consolidated dealership was "not based on any scientific or rational process." The court disagreed and found that Ford had legitimate business justifications for approving the transaction because it believed that it was more advantageous to have two dealerships in the Toledo market. The court observed that although Ford's approval of the transaction may not have been optimal and perhaps

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was even a bad decision, the Ohio statute did not prohibit bad decisions, only those that were predatory and discriminatory.

***Atlantis Petroleum, LLC v. Getty Petroleum Mktg., Inc.*, Case No. 11-2517, Bus. Franchise Guide (CCH) ¶ 14,689 (E.D. Pa. Sept. 15, 2011)**

In this Petroleum Marketing Practices Act (PMPA) case, Atlantis, "a gasoline distributor that provides fuel to gasoline dealers throughout the Northeast and Mid-Atlantic United States," operated seventy-five Getty Petroleum Marketing, Inc. (Getty) service stations in Pennsylvania. As a result of "a sudden drop in the price of fuel" in 2008, Atlantis became substantially indebted to Getty, a debt that "ballooned" to almost $10.5 million in January 2009 and fluctuated between $6.5 and $7.5 million during the final months of the franchise relationship. After working with Atlantis for over two years in an attempt to resolve the indebtedness and preserve the relationship, Getty sent a thirty-day notice of termination on March 25, 2011, terminating the parties' distributorship agreement and sublease. Following its subsequent receipt of information that Atlantis "had retained a restructuring consultant" in preparation for bankruptcy, Getty sent a second termination notice on April 11, 2011, terminating all of the parties' agreements effective immediately.

The court observed that a franchisee's failure to adhere timely to payment obligations has consistently been held to be a proper ground for termination under the PMPA. The court therefore upheld Getty's termination because Atlantis's nonpayment constituted a failure to comply with a provision of the franchise that is "both reasonable and of material significance to the franchise relationship" and "as a result of which termination of the franchise . . . is reasonable." The court further concluded that Getty's conduct leading to the termination was reasonable under the circumstances. Although Getty did not always demand immediate payment of all amounts owed by Atlantis, the court found that this did not transform the distributorship agreement into a "pay-what-you-can contract," and it further opined that Getty should not be punished for attempting to work with Atlantis to preserve the franchise relationship.

The court also upheld a cross-default provision in the parties' sublease. Although Atlantis had stayed current on its rental payments under the sublease, the cross-default provision allowed Getty to end entirely the franchise relationship upon a material breach of the distributor agreement, a remedy that the court held was "both reasonable and material to the franchise agreement." For the same reason, the court also awarded summary judgment to Getty on its counterclaims for Atlantis's breaches of the sublease and distributor agreement. Having found that Atlantis's failure to timely adhere to its payment obligations furnished a valid basis for Getty's notice of termination, the court declined to inquire as to whether Getty had an improper or bad faith motive for terminating the franchise relationship, noting that the PMPA contains no requirement of good faith for either of the two statutory grounds for termination upon which Getty relied.

Although the PMPA ordinarily requires a franchisor to provide at least ninety days' notice before a termination can take effect, the court found that both of Getty's shortened notices of termination were reasonable under the circumstances. Getty had a "legitimate fear" that Atlantis's operations would founder given its substantial indebtedness during the five weeks leading up to Getty's issuance of the thirty-day termination notice. The court observed that Getty "was not required to sit idly by while Plaintiff's substantial indebtedness continued to grow." In addition, the court found that Getty's receipt of information that Atlantis had hired a restructuring agent in preparation for bankruptcy made Getty's April 11 notice of immediate termination "an appropriate, and perfectly justified, business decision." The court also found that the termination notices did not violate the PMPA's time bar because Atlantis's failure to pay past due amounts constituted an ongoing default, and Getty had frequently informed Atlantis between 2009 and 2011 that Atlantis's "late payments could not continue indefinitely."

The lone issue on which the court denied summary judgment to Getty was whether a February 17, 2011, telephone call between the parties was a "termination" within the meaning of the PMPA. In that five-minute phone call, one of Getty's executives told Atlantis that Getty was shutting off its supply of fuel to Atlantis as of midnight that night and that "we can't supply you product anymore . . . you'll have to go out and find your own source." The court found that "[t]here [was] a genuine issue of material fact as to whether [Getty's] cessation of fuel delivery following the . . . phone call [was] a suspension or termination" under the distributor agreement.

***BP Prods. N. Am., Inc. v. Hillside Serv., Inc.*, Case Nos. 9-4210, 9-5143, Bus. Franchise Guide (CCH) ¶ 14,691 (D.N.J. Sept. 14, 2011)**

The District of New Jersey resolved a single dispositive legal question presented in two factually related cases involving BP Products North America, Inc., holding that a franchisor's failure "to renew a franchise agreement that contains no express right of renewal" violates the New Jersey Franchise Practices Act's (NJFPA) prohibition against a franchisor terminating, canceling, or failing to renew a franchise agreement without good cause.

Pursuant to a Commission Marketer Agreement (CMA), each of the franchisees operated a BP service station in New Jersey to which "BP provide[d] . . . fuel and the franchisee earn[ed] a commission on each gallon sold." The CMAs provided that they would last for a term of four years and that the franchisees would have the option of renewing the agreement for two additional four-year terms. The franchisees "leased their respective service stations from BP pursuant to [l]ease [a]greements. . . . BP [then] informed the [f]ranchisees that it intended to withdraw from the CMAs at the expiration of the term of each individual agreement." Although BP offered each franchisee the option of converting its station to one of two types of nonfranchised BP operations, BP did not dispute that its notice constituted a nonrenewal under the NJFPA and that the parties would no longer be operating a "franchise" under either proposed alternative option.

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The court found that under the clear language of the NJFPA, BP must show good cause for its nonrenewal. Instead of arguing that it had good cause, however, BP maintained that because the CMAs expressly provided for only two renewal periods and contained no express right to renewal after those two periods, the agreements contemplated at most a twelve-year franchise relationship, and the franchisees had no expectation or right of renewal beyond that period. BP contended that the NJFPA only prohibits a franchisor from failing to exercise an otherwise voluntary right of renewal created by contract and does not create a right of renewal beyond what exists in the franchise agreement. BP also sought "to limit the application of the NJFPA to those situations in which the franchisor seeks to arbitrarily and capriciously terminate the franchise agreement" or "seeks to terminate the . . . agreement during [its] pendency." The court rejected each of these positions.

The court noted that the statute specifically limits the good cause allowing a franchisor to not renew an agreement to a franchisee's failure to "substantially comply" with those requirements imposed upon it by the franchise. The court relied on previous decisions of the New Jersey Supreme Court that (1) under the NJFPA, a franchisee "receives the benefit of an 'infinite' franchise," which "cannot be terminated or refused renewal" as long as the franchisee complies substantially with the terms of the agreement; and (2) "the terms of a franchise agreement cannot circumvent the protections provided by the NJFPA." The court thus concluded that unless BP could show good cause—something BP had not even attempted to do—its refusal to renew any of the franchise relationships would violate the NJFPA.

The court cautioned, however, that it would not compel BP to reward the franchisees with permanent franchises where the CMAs did not provide for them. The court distinguished a previous ruling of the same court that held that BP's termination of a New Jersey franchisee governed by an agreement similar to the CMAs here did not violate the NJFPA. In the previous case, however, "BP did not own the property upon which the [service] station sat; rather, BP leased the property from a third-party landlord. . . . The pertinent franchise agreements were explicitly limited by BP's right to possess the underlying property" so that "if BP lost its right to possess the property, it would terminate the franchise." BP eventually "did not renew the underlying property lease, and notified the franchisee that it intended to terminate the franchise at the expiration of its [third-party] lease." Under those circumstances, the court found that BP "'had "good cause" for terminating the relationship because it merely exercised a negotiated-for right that [was] part of the . . . contractual framework'" for the franchise. In contrast, BP owned the subject properties in the instant cases, so there could not be any third-party landlord interference with the parties' franchise relationships.

***Poquez v. Suncor Holdings—COPII, LLC*, Case No. 11-00328, Bus. Franchise Guide (CCH) ¶ 14,699 (N.D. Cal. Sept. 15, 2011)**

Poquez brought a claim for violation of the Petroleum Marketing Practices Act (PMPA) as well as state and common law claims for specific performance and declaratory relief against several defendants, who collectively were the lessor and franchisor of her Union 76 branded motor fuel station in California. Upon defendants' motion, the court dismissed the matter with prejudice, noting that a franchisee may only bring a civil action in federal court to enforce the provisions of the PMPA where a franchisor terminates or fails to renew a franchise relationship in violation of § 2805 of the Act. The court found no evidence that defendants had terminated or failed to renew Poquez's franchise agreement or that there had otherwise been "an actual severance of the legal relationship."

Poquez pled that she "currently operates a Union 76" station on the property. Her complaint alleged an "intent" on defendants' part to terminate the franchise relationship, as reflected by (1) defendants' November 2010 notice of nonrenewal, which was subsequently withdrawn, at which time the parties entered into a new three-year franchise agreement commencing in March 2011; (2) defendants' issuance of a "sham" three-year lease in March 2011, which could be terminated upon the expiration of the underlying lease in February 2012, notwithstanding that the March 2011 franchise agreement was for a three-year term; and (3) defendants' sale of the subject property in April 2011 to a national real estate developer that intended, according to Poquez, to develop the property, terminate the franchise, and evict her upon the expiration of the lease in February 2012.

The court rejected Poquez's arguments, pointing out that a franchisor's "intent" to terminate is irrelevant to a claim under the PMPA. The court observed that the question of whether defendants or the real estate developer would act to terminate the franchise agreement in this case "is a matter of pure conjecture at this time." The court also noted that there is nothing in the PMPA precluding the parties from entering into a franchise agreement that is subject to a lease of shorter duration. Because there had not been an actual termination or nonrenewal of Poquez's franchise, the court dismissed her claim for violation of the PMPA as premature. Having dismissed Poquez's only claim for relief under federal law, the court declined to exercise supplemental jurisdiction over her state law claims, so it dismissed the second amended complaint in its entirety.

***Arata Equip. Co. v. Lodal, Inc.*, Case No. A128547, Bus. Franchise Guide (CCH) ¶ 14,703 (Cal. Ct. App. Oct. 6, 2011)**

This dispute turned on the question of whether the term *customers* as used in a manufacturer's direct sales clause was unambiguous. In the subject distributorship agreement, Lodal, Inc. granted Arata Equipment Company the nonexclusive right "to sell refuse disposal and collection trucks manufactured by Lodal. The agreement included a clause reserving to Lodal the right to make direct sales to customers" in Arata's area and quoted Arata's agreement that it was "'not entitled to any compensation for any direct sales made by LODAL'" in Arata's area.

In September 2008, one of Lodal's largest customers in the country, a customer that had been served by Arata, declared that it no longer wished to do business with Arata due to dis-

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paraging remarks about the customer that had been made by a competing entity in which Arata's principal was an investor. Shortly after this declaration, Lodal made direct sales of trucks to that customer. Arata then sued Lodal for breach of contract, intentional interference with prospective economic advantage, unfair business practices, and breach of the implied covenant of good faith and fair dealing.

In an unpublished decision applying Michigan and California law (and noting that both would lead to the same result), the court affirmed the trial court's grant of summary judgment in favor of Lodal, finding that the direct sales clause unambiguously authorized Lodal to make the sales in question as a matter of law. The court rejected Arata's contentions (1) that the term *customers* could reasonably be interpreted to mean solely "end users of Lodal products that Arata had not cultivated," (2) "that the trial court should have considered extrinsic evidence to determine the intent of the parties in connection with [the Direct Sales] [C]lause," and (3) that the circumstances under which the parties entered into the agreement were relevant to show that the parties did not intend the clause to allow Lodal to sell directly to Arata's customers.

The court noted that the Sixth Circuit, applying Michigan law, had faced a similar question and concluded that a distributorship agreement reserving to the franchisor "the right to sell to any customer within the area served by the Distributor" was unambiguous. Although the direct sales clause at issue did not also include the word *any* before the term *customer*, the clause did state that Arata was "'not entitled to any compensation for any direct sales made by LODAL in [its] area." The court further observed that Lodal made the direct sales only after the customer "made clear that it was no longer willing to do business with Arata," and the fact that Lodal did not exercise its contractual right to make such direct sales until the relationship between the customer and Arata had irrevocably broken down did not alter Lodal's contractual right to make such sales without limitation.

***Stuller, Inc. v. Steak N Shake Enters., Inc.*, Case No. 10-CV-3303, Bus. Franchise Guide (CCH) ¶ 14,722 (C.D. Ill. May 31, 2011)**
This case is discussed under the topic heading "Good Faith and Fair Dealing."

***JMF v. Med. Shoppe Int'l, Inc.*, Case No. 3:09-cv-73, Bus. Franchise Guide (CCH) ¶ 14,692 (D.N.D. Sept. 19, 2011)**
This case is discussed under the topic heading "Contract Issues."

***Samica Enters. LLC v. Mail Boxes Etc., Inc.*, No. 10-55433, Bus. Franchise Guide (CCH) ¶ 14,731 (9th Cir. Dec. 1, 2011) (unpublished)**
This case is discussed under the topic heading "Fraud."

***Smith's Sports Cycles, Inc. v. Am. Suzuki Motor Corp.*, Case No. 1100400, Bus. Franchise Guide (CCH) ¶ 14,711 (Ala. Oct. 14, 2011)**
This case is discussed under the topic heading "Termination and Nonrenewal."

***A Love of Food, LLC v. Maoz Vegetarian USA, Inc.*, Case No. AW-10-2352, Bus. Franchise Guide (CCH) ¶ 14,684 (D. Md. Sept. 13, 2011)**
This case is discussed under the topic heading "Jurisdiction."

***Cont'l Cars, Inc. v. Mazda Motor of Am., Inc.*, Case No. C11-5266BHS, Bus. Franchise Guide (CCH) ¶ 14,688 (W.D. Wash. Sept. 9, 2011)**
This case is discussed under the topic heading "Contract Issues."

***Cousins Subs Sys. Inc. v. Better Subs Dev. Inc.*, Case No. 09-C-0336, Bus. Franchise Guide (CCH) ¶ 14,705 (E.D. Wis. Sept. 30, 2011)**
This case is discussed under the topic heading "Fraud."

TERMINATION AND NONRENEWAL

***Ruth's Chris Steak House Franchise, Inc. v. T-Fab, Inc.*, Case No. 6:10-cv-456-Orl-28DAB, Bus. Franchise Guide (CCH) ¶ 14,709 (M.D. Fla. Oct. 12, 2011)**
One week after finding that it had personal jurisdiction over three Nevada and Colorado franchisees of Ruth's Chris Steak House Franchise, Inc., the Middle District of Florida granted partial summary judgment to Ruth's Chris on its claim that it had validly terminated the parties' Las Vegas, Nevada, franchise agreement. The court rejected the franchisees' contention that Ruth's Chris had waived its right to terminate the agreement based upon its statements and conduct following issuance of its September 2009 notice of termination, including that (1) the parties attempted, though unsuccessfully, to work out an arrangement whereby Ruth's Chris would forbear enforcement of the termination and the franchisees could continue to operate the restaurant; (2) Ruth's Chris continued to send the franchisees "corporate communications regarding recipes, customer service, and other franchise operation matters"; (3) Ruth's Chris continued to list the restaurant on its website and booked reservations at that location through that website; and (4) Ruth's Chris accepted royalty payments from the franchisees for that location from October 2009 through February 2010.

The court concluded that the foregoing "conduct . . . [did] not amount to waiver as a matter of law" and that there had not been an "intentional relinquishment" of Ruth's Chris's right to enforce the termination. The court noted that the "forbearance of enforcement of termination provisions and obligations is not the equivalent of 'waiver of termination,'" and it held that "allow[ing] the continued operation of the restaurant during the negotiation period," which was in the interest of both parties, "[did] not negate the termination or preclude [Ruth's Chris] from enforcing the termination that had already occurred." The court also noted the presence of "a [n]on-[w]aiver provision [in the franchise agreement] [by] which the parties agreed that [Ruth's Chris's] failure . . . to demand strict compliance would not constitute a waiver of

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[its] rights," a clause that had previously been found to be valid and enforceable.

***Smith's Sports Cycles, Inc. v. Am. Suzuki Motor Corp.*, Case No. 1100400, Bus. Franchise Guide (CCH) ¶ 14,711 (Ala. Oct. 14, 2011)**

The Supreme Court of Alabama affirmed the trial court's judgment in favor of American Suzuki Motor Corporation on a franchisee's wrongful termination claim, finding that the termination neither breached the franchise agreement nor violated the notice, good faith, or good cause requirements of the Alabama Motor Vehicle Franchise Act. Suzuki's primary basis for the termination was the continued refusal of the franchisee to maintain the dealership, service area, and equipment in an attractive, neat, and clean condition.

The court rejected the franchisee's contention that the termination violated the Act's 180-day requirement, which prohibits a termination that is based upon a breach of which the manufacturer had actual or constructive knowledge more than 180 days before issuing the termination notice. Although Suzuki had notice of the appearance and condition of Smith's dealership at least twenty-two months before it issued the notice of termination, the court found that those problems were "both evolving and continuous," and thus the termination did not violate the 180-day notice requirement of the Act.

The court further held that Suzuki had good cause for terminating the franchise relationship because the franchise agreement specifically allowed for termination in the event that Smith failed to keep the dealership "'in a proper state of repair and in an orderly, clean and attractive condition and appearance.'" "Photographs introduced at the trial depicted" various crates, trash, clutter and debris, disorganized tools, leaking oil tanks and containers, and overturned batteries. The trial court noted that Smith had consistently and "defiantly contested any efforts by Suzuki" to correct the issue and made no reasonable attempt to accommodate Suzuki's requests.

The court also found record support for the trial court's decision that Suzuki acted in good faith in terminating the agreement as required under the Act, notwithstanding the trial court's finding that Smith had breached only two of the six sections of the franchise agreement that Suzuki identified as grounds for the termination. The court reasoned that the trial court's determination "that Smith had not violated the other four sections as alleged by Suzuki [did] not mean that Suzuki did not act in good faith in alleging [the remaining] grounds as a basis for . . . termination."

***H&R Block Tax Servs. LLC v. Wild*, Case No. 7711426610, Bus. Franchise Guide (CCH) ¶ 14,718 (D. Colo. Oct. 7, 2011)**

Wild, a franchisee of H&R Block Tax Services, LLC, commenced arbitration seeking a declaration that Block could not force her to use its tax preparation software (TPS) or its financial information network (FIN) in her Block franchise location. A three-arbitrator panel ruled in Block's favor, and the District of Colorado confirmed the award.

A forty-year tax preparer and Block franchisee since 1978, Wild refused for eight years to implement TPS and FIN in her franchise location. She cited concerns regarding client privacy; personal privacy; performance of the TPS software, which she claimed was slower and less efficient than her current software; and surrender of some of her "freedom" to maintain her relationship with Block. Block, on the other hand, maintained that uniformity of operations across all of its offices nationwide is essential to its mission and services. Block asserted that TPS and FIN allow for improved compliance with Internal Revenue Service regulations, better delivery of Block's services, and the ability of Block clients to access their records in Block offices across the country. Block programs such as Second Look, Peace of Mind, and Emerald Card are only available to customers in offices that use TPS. Wild's Block location thus did not provide the full range of services that Block offers to its customers systemwide.

Despite this ongoing refusal, Block renewed Wild's franchise agreement in 2006 for an additional five-year term, which expired shortly after the arbitration, in June 2011. Block issued a notice of material breach to Wild in March 2010, stating that her continued failures to use TPS and FIN were "significant violations" of Block's policies and procedures, and Block gave Wild until May 1, 2010, to install its software and convert her existing client data to TPS. Although Wild still had not complied with Block's demand more than one year later, she continued to operate as a Block franchisee as of the commencement of the arbitration hearing on May 23, 2011.

Applying Missouri law, the arbitration panel held that Block had not clearly and unequivocally waived its right to force Wild to adopt TPS and FIN. The panel observed that Block had demonstrated considerable patience in trying to persuade Wild to convert before requiring that she do so. The panel further found that it would be inequitable to find that Block had thereby waived its right to require Wild to follow system standards and noted that such a finding would serve to encourage franchisors to act in a more peremptory and less flexible fashion in managing system change, an outcome that the panel believed would be unnecessary and counterproductive.

The panel concluded that Wild had failed, by a substantial margin, to prove her allegations of breach of contract based on the implied covenant of good faith and fair dealing and that she likewise had failed to prove a breach of any express contract terms. The panel found that (1) Block was entitled to expect that its franchisees would comply with its standards of operation, subject to the covenant of good faith and fair dealing; (2) Block had a legitimate interest in establishing a uniform procedure for the preparation of all tax returns that are submitted to the Internal Revenue Service under the *Block* name; (3) Block's evolving requirements concerning TPS and FIN were good franchisor practice; and (4) Block "arguably had a duty to insist on uniformity and the right to insist on monitoring every franchisee's compliance with the uniform procedures [that] it establish[es]." The panel further found that, in effect, Wild wanted to operate an independent, unsupervised tax preparation business under the Block trademark with little regard to her clients' overall interests as users of Block's services, an untenable position that "completely repu-

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diates the franchise relationship."

The panel also found that the post-termination noncompete provision in the franchise agreement was enforceable under Missouri law because there was no evidence that it was overbroad either geographically or temporally, and Wild had failed to establish any basis on which the panel could conclude that it should not be enforced.

The panel identified an "intriguing" potential disclosure issue in connection with Wild's 2006 renewal in that Block failed to disclose that she might be required under her 1981 franchise agreement to migrate to TPS during the next renewal period or that Wild might be required to sign additional contracts in order to remain in compliance with the franchise agreement. Because Block never disclosed to Wild in a Uniform Franchise Offering Circular that she could be required under her 1981 franchise agreement (or in any renewal from 1986 through 2006) to use TPS, the panel observed that any attempt by Block to require Wild to do so would be an inherent violation of the FTC Rule. At the arbitration hearing, however, Wild elected not to pursue this issue because Block presumably would be able to correct this possible error, and Wild eventually would be faced with the same result, i.e., the loss of her franchise if she failed to comply with the franchise agreement. In Wild's view, her franchise relationship was irreparably broken, and she was not interested in pursuing an argument that would merely "buy time" before she was required to migrate to TPS. The panel accepted Wild's "knowing and intentional" waiver of this potential argument, and it therefore made no findings as to whether Wild had been entitled.

***Red Lion Hotels Franchising, Inc. v. MAK LLC*, Case No. 10-35465, Bus. Franchise Guide (CCH) ¶ 14,724 (9th Cir. Dec. 7, 2011)**

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

***BP Prods. N. Am., Inc. v. Hillside Serv., Inc.*, Case Nos. 9-4210, 9-5143, Bus. Franchise Guide (CCH) ¶ 14,691 (D.N.J. Sept. 14, 2011)**

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

TRADEMARK INFRINGEMENT

***Firehouse Rest. Group, Inc., v. Scurmont LLC*, Case No. 4:09-CV-00618-RBH, Bus. Franchise Guide (CCH) ¶ 14,738 (D.S.C. Oct. 17, 2011)**

The District of South Carolina rejected Firehouse Restaurant Group, Inc.'s posttrial motion challenging a jury verdict that the franchisor had committed fraud on the U.S. Patent and Trademark Office (USPTO) in connection with the franchisor's application to register the word *Firehouse* as a restaurant services mark. Firehouse claimed that two South Carolina franchisees committed trademark infringement by operating nonfranchised restaurants under names incorporating the *Firehouse* mark. The franchisees responded by seeking a declaratory judgment for noninfringement and also sought to cancel Firehouse's trademark due to its alleged fraud on the USPTO in obtaining that mark. At trial, the jury found that defendants had not infringed any of the trademarks asserted by Firehouse and further found that the franchisees had proved by clear and convincing evidence that Firehouse obtained its trademark registration through fraud on the USPTO. Firehouse moved for judgment as a matter of law on the claim of fraud or, in the alternative, for a new trial, which the court denied.

Firehouse claimed that there was insufficient evidence of fraud to support the jury's verdict. The court noted that fraud on the USPTO requires evidence of a false representation of a material fact, a person knowingly making a false representation, an intent to deceive the USPTO, reasonable reliance on the misrepresentation, and damage proximately resulting from such reliance. Firehouse challenged both intent to deceive and materiality elements. The franchisees presented evidence that prior to Firehouse's application for its trademark, Firehouse knew of a restaurant in Tampa, Florida, operating under the name *Firehouse Grill & Pub*. Firehouse's representative contacted the owner of that restaurant and sought a coexistence agreement, but no formal agreement was ever reached. Nonetheless, in its trademark application, Firehouse represented under oath that no other person or entity had the right to use the *Firehouse* mark in commerce either in identical form or in such near resemblance as to be likely to cause confusion or mistake or to deceive. Viewing the evidence in the light most favorable to the franchisees, the court held that Firehouse's knowledge of the existing restaurant and unsuccessful attempts to obtain a coexistence agreement constituted sufficient evidence for a reasonable jury to conclude that Firehouse knew of a senior use of the word *Firehouse* and believed that there was a likelihood of confusion with that use at the time it submitted its trademark application. This evidence supported the jury's finding of intent to deceive the USPTO.

The court likewise found that there was sufficient evidence to support the jury's verdict on the issue of the materiality of the misrepresentation. Firehouse's own actions in attempting to obtain a coexistence agreement constituted evidence that Firehouse was concerned about the Tampa restaurant's superior rights and a likelihood of confusion. Finally, the court affirmed the jury's award of nearly $250,000 in attorney fees to the franchisees because the jury's finding of fraud on the USPTO rendered the case "exceptional" under the Lanham Act.

***Buffalo Wild Wings Int'l, Inc. v. Grand Canyon Equity Partners*, Case No. 11-3287 (RHK/LIB), Bus. Franchise Guide (CCH) ¶ 14,728 (D. Minn. Dec. 9, 2011)**

Buffalo Wild Wings International, Inc. (BWW) filed suit against three terminated franchisees and several individual guarantors for trademark infringement and breach of the post-termination obligations in the franchise agreements. BWW claimed that defendants "breached their [f]ranchise agreements by failing to pay required royalty and advertising fees, make certain vendor payments, and accept credit cards." After defendants failed to cure these noticed defaults, BWW terminated the franchise agreements. BWW agreed to a lim-

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ited reinstatement agreement for a period of ninety days for the sole purpose of allowing the franchisees to sell or assign their interests in the restaurants, but the reinstatement period passed without any agreement for a sale. After the expiration date, the franchisees continued to operate their businesses using the BWW marks and signage, BWW continued to withdraw money from their bank accounts for royalty and advertising fees, and BWW continued to send franchise information to defendants. During this period, the franchisee entities filed for Chapter 11 bankruptcy protection. BWW moved for preliminary injunctive relief in the bankruptcy proceeding, but that proceeding was later dismissed. Ultimately, BWW filed this district court action and moved for a preliminary injunction to stop the franchisees' ongoing operation of the restaurants using BWW's marks and system.

The franchisees defended primarily on the basis that BWW had acquiesced in their continuing use of the BWW marks and system by continuing to deal with them after BWW purported to terminate the agreements. The franchisees also contended that this course of conduct amounted to a modification of the parties' agreements. The district court rejected the franchisees' arguments and held that the "franchisor's continued support of [the] terminated franchisees' operations [did] not preclude [the franchisor] from obtaining an injunction."

The court relied on *Burger King Corp. v. Lee*, 766 F. Supp. 1149 (S.D. Fla. 1991), explaining that a terminated franchisee's refusal to cease operations under the franchisor's marks put the franchisor "'in a position of choosing between two evils,'" i.e., continuing to sell to the terminated franchisee approved materials and supplies in order to ensure the quality of the products or cease selling approved supplies knowing that the terminated franchisee would sell unapproved products under the franchisor's marks. The court held that it was a "reasonable and valid decision under the circumstances created by" defendants for BWW to continue dealing with them in this way after the termination. The court also rejected the franchisee's reliance on BWW's automated bank withdrawals of royalty and advertising fees, holding that such conduct did not "constitute implied consent to [d]efendant's use of BWW's marks or modification" of the parties' franchise agreements. The court noted that "BWW [had] put [d]efendants on notice numerous times both before and after the expiration of the Limited Reinstatement Agreement that it did *not* consent to [the franchisee's] continued use of the marks" and that BWW "intended to enforce its trademark rights."

***Century 21 Real Estate, LLC v. Destiny Real Estate Props.*, Case No. 4:11-CV-38, Bus. Franchise Guide (CCH) ¶ 14,759 (N.D. Ind. Dec. 19, 2011)**

This case raises the unsettled issue of whether a franchisee's unauthorized post-termination trademark use can constitute counterfeiting under the Lanham Act. Century 21 terminated a real estate brokerage franchisee for failure to make required payments under the agreement, but the former franchisee continued to operate the business under Century 21's marks. Century 21 sued the franchisee and its president, who allegedly was the "'moving, active, and conscious force' behind the trademark infringement." After defendants failed to answer the complaint, the clerk entered a default, and Century 21 moved for a default judgment and permanent injunction.

The court had no trouble finding that the franchisee breached the franchise agreement and committed trademark infringement. In addition to traditional trademark claims for infringement of a registered mark (§ 1114) and false designation of origin (§ 1125(a)), Century 21 claimed that defendants' conduct constituted counterfeiting under the Lanham Act, which allows a successful plaintiff to recover enhanced damages and attorney fees. Counterfeiting requires four elements beyond mere infringement: (1) "the mark must be 'counterfeit,' meaning 'a spurious mark which is identical with, or substantially indistinguishable from, a registered mark'"; (2) "the mark must be registered on the . . . principal register for use on the same goods or services for which the defendant uses the mark"; (3) "the defendant must not have been authorized to use the mark at the time the [challenged] goods or services were manufactured or produced"; and (4) "the defendant must have acted with knowledge and intent." The court noted a split in authority as to whether the continued use of a formerly authorized mark by a holdover franchisee constitutes use of a counterfeit mark. The Sixth Circuit has expressly held that such use is not counterfeiting, while the Ninth Circuit has held otherwise. *Compare* U.S. Structures, Inc. v. J.P. Structures, Inc., 130 F.3d 1185 (6th Cir. 1997), *with* Idaho Potato Comm'n v. G&T Terminal Packaging, Inc., 425 F.3d 708 (9th Cir. 2005).

Relying on the plain language of the Lanham Act and analogous Seventh Circuit precedent, this court held that the former franchisee's unauthorized use of Century 21's trademarks in reference to services that had no connection with, or approval from, Century 21 constituted the use of counterfeit marks. The court noted that the risk of confusion was even greater when an original mark is used to designate inauthentic goods or services. The court did not, however, award Century 21 all of the Lanham Act damages it sought because some of those damages overlapped with the contract damages that the court awarded, including liquidated damages as specified in the franchise agreement. Finally, the court declined to hold the franchisee's owner personally liable for trademark infringement and counterfeiting because Century 21 made nothing more than general allegations regarding his ownership and control of the company rather than showing specific facts that he was personally involved in controlling or approving the actual acts of infringement.

***Meineke Car Care Ctrs., Inc. v. Vincent Bica & Dina Bica*, Case No. 3:11-cv-369-FDW-DCK, Bus. Franchise Guide (CCH) ¶ 14,708 (W.D.N.C. Oct. 12, 2011)**

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

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