Franchising (& Distribution) Currents

Jason J. Stover, C. Griffith Towle, and David M. Byers

ANTITRUST

***Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 2010 WL 819059, Bus. Franchise Guide (CCH) ¶ 14,329 (N.D. Ohio Mar. 9, 2010)**

Plaintiff Toledo Mack Sales & Services, Inc. (Toledo) was a longtime distributor of Mack Trucks, Inc. (Mack). The parties' relationship ultimately unraveled, resulting in the termination of the distributorship and multiple lawsuits.

In 2002, Toledo filed an antitrust action against Mack in the U.S. District Court for the Eastern District of Pennsylvania. Mack asserted counterclaims for misappropriation of trade secrets. The matter was tried to a jury, and judgment was entered in favor of Mack and against Toledo in the amount of $1.6 million. Allegedly on the basis of evidence discovered during this lawsuit, Mack believed that Toledo had improperly disclosed trade secrets to one of Mack's competitors (PAI). As a result, Mack served a notice of termination of the distributor agreement. In response, Toledo filed a protest with the Ohio Motor Vehicle Dealers Board (Board). The Board found that Mack did not have "good cause" to terminate Toledo, and the Franklin County Court of Common Pleas agreed. Mack appealed to the Ohio Court of Appeals.

While the matter was pending before the appellate court, Toledo discovered evidence suggesting that PAI was not a competitor of Mack. Toledo brought this evidence to the attention of the Board, the court of commons pleas, and the appellate court in an unsuccessful effort to derail the pending termination. The appellate court ultimately found that there was good cause for termination. The Ohio Supreme Court declined review, and Mack terminated Toledo's franchise.

The parties' agreement required that upon termination, Mack purchase Toledo's inventory and vehicles. Mack paid cash for the vehicles but offset the price of the parts against the $1.6 million Toledo owed Mack from the earlier antitrust lawsuit. As a result of Mack's decision not to pay cash for the parts, Toledo defaulted on a loan, and more than $1 million in personal assets pledged as collateral for the loan was liquidated. Toledo subsequently filed a new lawsuit in the U.S. District Court for the Northern District of Ohio.

Toledo asserted claims for, among other things, conversion, breach of contract, and abuse of process. Mack responded by filing a Rule 12(b)(6) motion to dismiss, which the court granted.

Toledo's conversion claim was based on Mack's allegedly wrongful refusal to pay cash for the parts it was required to repurchase pursuant to the parties' agreement. The court dismissed the conversion claim because under Ohio law, a tort exists only if a party breaches a duty that he owes to another independent of the contract.

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Mack sought to dismiss Toledo's breach of contract claim on the ground that there was nothing in the distributor agreement that precluded Mack from offsetting the amounts owed to Toledo by the judgment that it had obtained. The court agreed. In so holding, the court found that the provisions in the agreement prohibiting Toledo from offsetting amounts owed to Mack gave rise to an inference that payment in cash would not be required and the credit offsets would otherwise be appropriate under the principal of expressio unius est exclusio alterius (the listing of certain items implies the exclusion of those not listed). The court was persuaded by the fact that the lack of reciprocity with respect to the provisions in the agreement evidenced a general concern on the part of Mack regarding the creditworthiness of Toledo and protecting Mack from "having to bear the risk of a distributor's insolvency."

The court also dismissed Toledo's abuse of process claim because Toledo was unable to establish any "ulterior purpose" on the part of Mack "for which the proceedings were not designed." Under Ohio law, the improper purpose is typically some form of coercion intended to obtain a collateral advantage by the use of process as a "threat or a club." As alleged by Toledo, the "improper purpose" was simply that Mack wanted to terminate Toledo's distributorship. Thus, the court found that Mack's termination of the distributorship could not be improper for purposes of an abuse of process claim because it was the very matter at issue before the lower courts.

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ARBITRATION

***Gruma Corp. v. Morrison*, 2010 WL 1253093, Bus. Franchise Guide (CCH) ¶ 14,346 (Ark. Apr. 1, 2010)**

In this action by a distributor against its supplier, the court held that the arbitration clause in their agreement was enforceable under federal law and that the applicable state franchise statute could still provide enforceable remedies within the arbitration forum.

After the supplier terminated the parties' food products distribution agreement, the distributor sued in Arkansas state court, alleging violations of the Arkansas Franchise Practices Act (AFPA). The supplier moved to dismiss based on the arbitration provision in the agreement, but the trial court denied the motion, holding that compelling arbitration would conflict with the AFPA (the appellate opinion does not make clear the specific basis for the trial court's holding). On appeal, the Arkansas Supreme Court reversed, holding that the Federal Arbitration Act (FAA) compelled enforcement of contractual arbitration provisions. The court also found no fundamental incompatibility between the AFPA and enforcing the FAA because the substantive rights granted under the franchise statute could be enforced within the arbitration provision, thereby allowing the distributor any statutory protection to which it was entitled.

***Mussetter Distrib., Inc. v. DBI Beverage Inc.*, 2010 WL 395638, Bus. Franchise Guide (CCH) ¶ 14,322 (N.D. Cal. Feb. 3, 2010)**

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

BANKRUPTCY

***In re All Am. Props., Inc.*, 2010 WL 891685, Bus. Franchise Guide (CCH) ¶ 14,330 (Bankr. M.D. Pa. Mar. 10, 2010)**

The U.S. Bankruptcy Court for the Middle District of Pennsylvania denied Petro Franchise Systems' (Petro) motion to "annul" an automatic stay to enforce an order entered by a U.S. district court in Texas awarding both damages and injunctive relief against Petro's former franchisee and debtor, All American Properties, Inc. (All American). Petro and All American entered into a franchise agreement pursuant to which All American operated a Petro-branded travel center in Pennsylvania. All American failed to pay royalties, and Petro terminated the franchise agreement. Notwithstanding, All American refused to de-identify its Petro travel center. As a result, Petro filed a lawsuit in the U.S. District Court for the Western District of Texas and obtained an injunction requiring All American to cease utilizing the Petro trademarks. Thereafter, All American rebranded the travel center under a new name. In response, Petro filed an amended complaint seeking, among other things, an injunction prohibiting All American from violating the post-term covenant not to compete in the franchise agreement.

During the pendency of the litigation, Petro filed a motion to compel further discovery, which the district court granted. All American failed to comply, and the court held a hearing on an order to show cause why sanctions should not be imposed against All American for failing to comply with the court's discovery order. The court imposed sanctions against All American and further required it to comply with the court's order by January 14, 2010. On that date, the court held another hearing as a result of All American's continuing failure to comply with the court's order. At the hearing, the court awarded damages to Petro of approximately $500,000 and enjoined All American from violating the covenant not to compete. "Mere minutes" after the hearing, but prior to the formal docketing of the district court's order, All American filed a Chapter 11 petition.

In considering Petro's request to lift the automatic stay, the bankruptcy court weighed All American's conduct with the adverse impact that enforcing the district court's order would have on All American's creditors. Although the bankruptcy court was troubled by All American's conduct, which it characterized as "reprehensible," and viewed the timing of the bankruptcy petition as "suspect," it denied Petro's request to lift the automatic stay on the ground that if the district court's order were to be enforced, it would prejudice All American's other creditors because the order provided for significant damages that would be liquidated and enforced against the estate.

CHOICE OF FORUM

***Candela Mgmt. Group, Inc. v. Taco Maker, Inc.*, 2010 WL 1253552, Bus. Franchise Guide (CCH) ¶ 14,351 (S.D. Ohio Mar. 31, 2010)**

Candela Management Group (Candela) entered into several development and franchise agreements with Taco Maker, Inc. (Taco Maker) pursuant to which Candela was granted the right to operate Taco Maker locations in Ohio and other states. Each of the agreements included forum selection clauses requiring that any dispute between the parties be brought in Puerto Rico. Notwithstanding, Candela and two individuals (all residents of Ohio) filed a lawsuit in the U.S. District Court of the Southern District of Ohio against Taco Maker and others, asserting claims for statutory franchise fraud, common law fraud, and breach of contract. Taco Maker filed a motion to transfer the action to Puerto Rico pursuant to 28 U.S.C. § 1406(a) and 28 U.S.C. § 1404(a).

Taco Maker's motion was initially heard by a magistrate judge who issued a report and recommendation denying the motion. The magistrate judge found that the action should not be transferred pursuant to § 1406(a), which authorizes the dismissal or transfer of an action if it was filed in the "wrong" district, because a substantial part of the events or omissions giving rise to Candela's claims occurred in Ohio. In reaching this decision, the magistrate judge rejected Taco Maker's argument that the forum selection clauses in the agreements rendered all venues other than the District of Puerto Rico improper. The magistrate judge also denied Taco Maker's motion to transfer pursuant to § 1404(a). As a threshold matter, the magistrate judge first determined that

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Taco Maker had the burden of proving that transferring the action would facilitate the convenience of the parties and witnesses and be in the interest of justice. This decision turned out to be outcome-determinative because the magistrate judge concluded that the convenience of the parties and witnesses did not weigh in favor of or against transfer, that the relevant documents were located in both Ohio and Puerto Rico, and that "the locus of operative facts [did] not favor one venue over the other." Because the magistrate judge believed that the burden of proof was on Taco Maker, he concluded that "this state of equipoise" militated against transferring the action and denied the motion. Taco Maker filed objections to the magistrate judge's recommendations.

The district court agreed with the magistrate judge's factual determinations (i.e., that the factors neither supported nor weighed against a transfer) but granted Taco Maker's motion to transfer pursuant to § 1404(a). The difference was the district court's conclusion that the burden of proof was on Candela because the parties' agreement contained an enforceable forum selection clause. As a result, because the factors were "neutral," the district court found that Candela had failed to meet its burden of demonstrating why the action should not be transferred.

***Hardee's Food Sys., Inc. v. Hallbeck*, 2010 WL 1141343, Bus. Franchise Guide (CCH) ¶ 14,344 (E.D. Mo. Mar. 22, 2010)**
The court denied these franchisees' motion to dismiss for improper venue and alternative motion to transfer, based on the franchisees' failure to demonstrate that the forum court lacked a connection to the claims and failure to demonstrate that the alternative venue was the better forum.

This case involved claims by a St. Louis–based franchisor against a group of franchisees that had operated an Illinois franchise but that were personally based in Wisconsin. The franchisor brought the suit in its home district in Missouri. The franchisees moved to dismiss for improper venue and alternatively moved to transfer the lawsuit to the Illinois district in which the franchised business was located.

The court denied the motion to dismiss because the franchisees failed to establish that the court lacked a substantial connection to the claims. The court found that the two subject agreements were signed and accepted by the franchisor in Missouri and that extensive correspondence and communication between the parties originated from or were directed to the franchisor's office in Missouri. Also, the counterclaims that the franchisees stated they intended to assert had to do with the franchisor's decisions and actions taken at its Missouri office. Holding that a motion to dismiss based on improper venue did not pose the question of the best venue but only whether the venue in which the litigation was taking place had a substantial connection to the claims, the court denied the motion to dismiss.

The court also denied the franchisees' motion to transfer. The franchisees claimed that a Missouri court would be inconvenient for the ninety-four customer witnesses the franchisees intended to call; and though the court found that those witnesses' testimony was largely cumulative, it held that the convenience of the witnesses factor favored the franchisees. The court held that the convenience of the parties favored the franchisor, particularly because the franchisees' proposed forum (Illinois) was not their home state (Wisconsin), so the forum state was not significantly less convenient than the forum that the franchisees were proposing. The court also held that the interests of justice favored the franchisor, based largely on the same analysis as the other factors. Combining its analysis on those three factors, the court held that Missouri was the proper venue for the action.

***Toyz, Inc. v. Wireless Toyz, Inc.*, Case No. C 09-05091, Bus. Franchise Guide (CCH) ¶ 14,313 (N.D. Cal. Jan. 25, 2010)**
This case is discussed under the topic heading "Jurisdiction."

CLASS ACTION

***Green v. SuperShuttle Int'l, Inc.*, Case No. 09-2129, Bus. Franchise Guide (CCH) ¶ 14,315 (D. Minn. Jan. 29, 2010)**
Plaintiffs claimed that defendants had wrongfully characterized them as franchisees rather than employees, thus depriving plaintiffs of wages that they were allegedly due. Plaintiffs commenced a class action against defendants in state court, alleging that plaintiffs had violated the Minnesota Fair Labor Standards Act. Defendants removed the case to the U.S. District Court for the District of Minnesota pursuant to the Class Action Fairness Act (CAFA), and plaintiffs moved to remand.

Plaintiffs argued that the amount in controversy in their case was less than the $5 million required by the CAFA and that there were fewer than the required 100 class members. The court found that defendants had received in excess of $5 million in franchise fees since January 1, 2006, thus meeting the amount in controversy requirement. With respect to the class size, plaintiffs argued that the applicable statute of limitations was only three years for an action to recover unpaid wages. Plaintiffs argued that defendants had employed fewer than 100 drivers during the most recent three-year period, thus depriving the federal court of jurisdiction. The court found, however, that plaintiffs sought to recover fees that they had affirmatively paid to defendants, not amounts that defendants had failed to pay to plaintiffs. That distinction caused plaintiffs' claims to be subject to a six-year statute of limitations. Applying that longer limitations period, the court found that more than 100 drivers had been employed by defendants.

The court also rejected plaintiffs' argument that an exception to the CAFA applied. Plaintiffs argued that the court lacked jurisdiction because SuperShuttle Minnesota, one of named defendants, was an entity from which significant relief was sought. Because that entity was a citizen of the same state as plaintiffs, plaintiffs argued that federal jurisdiction was inappropriate. The court disagreed, finding that Minnesota defendant could not be considered a significant one. That entity did not have any assets of its own and was dependent on SuperShuttle International, a Delaware

company, for its survival. Because any judgment would have to be paid by another entity, SuperShuttle Minnesota could not be considered a significant defendant and did not interfere with federal jurisdiction under the CAFA.

***Moua v. Jani-King of Minn., Inc.*, 2010 WL 935758, Bus. Franchise Guide (CCH) ¶ 14,335 (D. Minn. Mar. 12, 2010)**

In this case, the U.S. District Court for the District of Minnesota denied a motion for class certification filed by current and former Jani-King franchisees on the ground that plaintiffs had failed to prove that common questions of fact predominated. The franchisees asserted claims against Jani-King International and its regional business division (Jani-King of Minnesota) for breach of the franchise agreement, breach of the implied covenant of good faith and fair dealing, violations of the Minnesota Franchise Act, and fraud. In particular, plaintiffs alleged that (i) they had been told that they would be provided with a certain amount of monthly business, (ii) many of the accounts offered to them were underbid such that they were not profitable, (iii) the offered accounts were geographically inconvenient, (iv) the same accounts were offered to multiple franchisees, (v) they were required immediately to accept an account when it was offered, and (vi) accounts were unilaterally taken away from plaintiffs under the pretense that the franchisees' services were substandard.

Plaintiffs sought class certification pursuant to Federal Rule of Civil Procedure 23(b)(3), which requires that common questions of law or fact predominate over any questions affecting individual members and that a class action must be "superior to other available methods for fairly and efficiently adjudicating the controversy." Jani-King's principal argument in opposition to the motion was that plaintiffs could not satisfy the predominance and superiority requirements of Rule 23(b)(3). Because plaintiffs did not meet their burden of showing that common questions predominate, the court did not address the threshold requirements of Rule 23(a) or the requirement that class resolution be "superior" pursuant to Rule 23(b)(3).

In support of class certification for their beach of contract claim, plaintiffs alleged that the conduct that constituted the breach was "employed consistently across the class." Notwithstanding, the court found that individual testimony would be required from each class member to prove that Jani-King employed the "tactics" against it and that individualized proof would be necessary to establish that such tactics prevented each class member from achieving the minimum amount of monthly business that had allegedly been promised to it. The court further noted that Jani-King would likely present contrary evidence and challenge the credibility of the evidence offered by the class members in support of the claims, which would require numerous minitrials.

Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing was for the most part based on the same conduct that gave rise to the breach of contract claim. Jani-King argued that individualized proof would again be necessary to determine whether and to what extent the alleged conduct was used against each class member. The district court agreed.

The court then considered plaintiffs' fraud-based claims under the Minnesota Franchise Act, the Minnesota False Statement in Advertising Act, and common law. The court noted that each of these claims required that plaintiffs prove that they had relied on the alleged misrepresentations, omissions, and deceptive conduct. Although some of the misrepresentations were contained in the Uniform Franchise Offering Circular (UFOC), the court found that individualized inquiries would still be required of all class members to establish that they both received and relied on the alleged misrepresentations, omissions, and deceptive conduct. The court distinguished other cases that had permitted class treatment of fraud-based claims based on brochures and the like on the basis that in those cases it was undisputed that class members had been shown identical documents and/or received uniform oral statements. The court further noted that although courts had relaxed the reliance requirements for fraud claims under the Minnesota consumer protection laws, it had not eliminated defendants' right to present contrary evidence, and that Jani-King had submitted evidence establishing that there were variations in what had allegedly been told to the class members. Accordingly, the court found that plaintiffs had also failed to sustain their burden of proving that common issues would predominate over individualized ones with respect to the fraud-based claims.

CONTRACT ISSUES

***Ammirato v. Duraclean Int'l, Inc.*, 2010 WL 475303, Bus. Franchise Guide (CCH) ¶ 14,320 (E.D.N.Y. Feb. 8, 2010)**

Fact issues precluded a franchisor's effort to defeat by summary judgment claims that third-party loans to a franchisee were effectively made to the franchisor or to the franchisee as agent for the franchisor.

A Duraclean franchisee obtained a series of loans from acquaintances (plaintiffs) to finance cleaning projects by the Duraclean "National Team." The National Team was marketed in varying ways, sometimes appearing to be a franchisee or group of franchisees and other times appearing to be a division or agent of the franchisor. To make matters more confusing, the owner of the primary franchisee involved eventually purchased a one-half ownership interest in the Duraclean franchisor. When the franchisee failed to repay the loans, plaintiff lenders sued the franchisor, alleging that they believed that the franchisor was the recipient or ultimate beneficiary of the funds.

The franchisor moved for summary judgment, but the court held that fact issues precluded summary judgment on the contract claims. Despite the fact that the franchisee was the only person from the Duraclean system in contact with plaintiffs and that he told most of plaintiffs he needed the money for his "Duraclean franchise," the court held that the ambiguous marketing of the Duraclean National Team raised an unresolved question about whether the franchisor or franchisee was the intended recipient of the funds. The court rejected the franchisor's argument that the loans

would be void because of their usurious interest rate, based on the factual question about whether the franchisee and the lenders had a "special relationship" that the franchisee used to induce the lenders to presume the legality of the loans.

The court granted summary judgment to the franchisor on plaintiffs' deceptive trade practices and Racketeer Influenced and Corrupt Organizations Act (RICO) claims, finding that the allegations involved solely private transactions, that New York's deceptive trade practices statute does not govern, and that the complaint failed to allege sufficient facts to support a RICO claim.

***B.A. Constr. & Mgmt., Inc. v. Knight Enters., Inc.*, 2010 WL 545504, Bus. Franchise Guide (CCH) ¶ 14,324 (6th Cir. Feb. 17, 2010)**

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

***Bird Hotel Corp. v. Super 8 Motels, Inc.*, Case No. 06-4073, Bus. Franchise Guide (CCH) ¶ 14,337 (D.S.D. Feb. 16, 2010)**

Plaintiffs were a class of franchisees in the Super 8 Motels franchise system. Plaintiffs' franchise agreements required plaintiffs to pay a 2 percent fee on their gross sales to fund a customer loyalty program. Super 8 later attempted to impose a separate 5 percent fee to fund a new "TripRewards" program. Plaintiffs objected to that additional fee, claiming that it was not authorized by their franchise agreements.

The court agreed with plaintiffs and granted plaintiffs' motion for summary judgment. Super 8 argued that it retained the ability to implement its new TripRewards program because plaintiffs had agreed that Super 8 could change its system standards and that the new program fell within that language. The court disagreed, finding that the franchise agreements did not give Super 8 the right to impose a new fee even if the program itself were permissible under the franchise agreements.

The court denied, however, plaintiffs' motion for summary judgment as to their damages claims. Plaintiffs sought to recover damages in the full amount of the 5 percent fee that franchisee class members had paid to Super 8. Super 8 argued that the class members had not suffered any damages at all because the TripRewards program had resulted in increased sales for plaintiffs and saved them the expenses associated with the old customer loyalty program. Because material issues of fact existed as to the amount of plaintiffs' damages, the court held that the grant of summary judgment was inappropriate.

***Boon Rawd Trading Int'l Co. v. Paleewong Trading Co.*, 2010 WL 668063, Bus. Franchise Guide (CCH) ¶ 14,354 (N.D. Cal. Feb. 19, 2010)**

This case is discussed under the topic heading "Statute of Limitations."

***Cal. Sun Tanning USA, Inc. v. Elec. Beach, Inc.*, 2010 WL 827725, Bus. Franchise Guide (CCH) ¶ 14,332 (3d Cir. Mar. 11, 2010)**

In this case, the U.S. Court of Appeals for the Third Circuit upheld the U.S. District Court for the Eastern District of Pennsylvania's decision enforcing a putative settlement agreement between California Sun Tanning (California Sun) and its former franchisee, Electric Beach, Inc. (Electric Beach). California Sun terminated the parties' franchise agreement after learning that Electric Beach had systematically underreported revenues and failed to pay royalties estimated to be in excess of $50,000. California Sun subsequently filed a complaint seeking, among other things, to preclude Electric Beach from continuing to use the California Sun trademarks. In addition, California Sun filed a separate arbitration action for damages in accordance with the terms of the franchise agreement.

Shortly after the lawsuit was filed, the parties entered into settlement discussions, which culminated in a series of e-mails setting forth the principal terms of a settlement. As set forth in the e-mails, the parties agreed that California Sun would buy Electric Beach's franchise and related assets for $85,000 (less certain expenses) and exchange mutual general releases. Thereafter, counsel for California Sun advised the district court that the parties had "agreed in principal [*sic*] to amicably resolve their differences" and requested thirty days in which to document the agreement and "consummate all aspects of that agreement." Before the agreement could be documented, disputes arose regarding the condition of the facility; Electric Beach's failure to have paid rent, taxes, and other items; and Electric Beach's removal of merchandise and other items that were to be covered by the parties' settlement. Electric Beach ultimately agreed to "modify" the parties' purported settlement by deducting the unpaid rent and other items from the purchase price but refused to make additional deductions from the settlement proceeds as insisted by California Sun. The parties were unable to bridge their differences, and Electric Beach filed a motion to enforce the settlement agreement in the district court.

The district court found that the parties had reached an enforceable settlement agreement and that the various e-mails evidenced that agreement. The court found that Electric Beach's assets were to have been purchased free of all liens and encumbrances and confirmed the deduction in the purchase price for the back rent and other items and further ordered Electric Beach to return the items that had been removed from the location. Finally, the court ordered California Sun to pay Electric Beach the amount due after accounting for the deductions. California Sun appealed to the Third Circuit.

California Sun initially raised procedural arguments claiming that the district court did not have jurisdiction because California Sun had obtained the relief it had sought in the complaint (i.e., Electric Beach was no longer using its trademarks) and that the amount in controversy no longer supported subject matter jurisdiction. The Third Circuit promptly rejected these arguments and observed that they "test the boundaries of good faith."

The Third Circuit then addressed the substance of California Sun's claims as to why the alleged settlement

agreement should not be enforced: (i) the e-mails did not constitute an enforceable agreement because the parties contemplated a written document evidencing the terms of the settlement; (ii) the doctrines of mutual and/or unilateral mistake precluded the enforcement of the agreement; and (iii) even if there was an enforceable agreement, the agreement should not be enforced because Electric Beach breached the agreement and had unclean hands. The court analyzed the parties' exchange of e-mails and concurred with the lower court's finding that because the parties had agreed to the essential terms of the contract, the fact that they had intended to formalize the agreement in writing did not prevent the enforcement of the agreement. The court also rejected California Sun's claim that the doctrine of mutual mistake or unilateral mistake was applicable because California Sun actually received exactly what it wanted; and, thus, there could be no mutual or unilateral mistake. Finally, the court rejected California Sun's argument that Electric Beach was not entitled to specific performance because Electric Beach had breached the agreement and had unclean hands, holding that if any party had breached the agreement, it was California Sun in that it was seeking to retain the benefit of the bargain (i.e., possession and ownership of the location) without satisfying its obligation to pay the amounts owed.

***Constr. Crane & Tractor, Inc. v. Wirtgen Am., Inc.*, 2010 WL 1172224, Bus. Franchise Guide (CCH) ¶ 14,345 (Tenn. Ct. App. Mar. 24, 2010)**

In this action by a terminated equipment distributor, the court held that the parties' discussions about new contract terms and their changes to their course of dealing did not constitute a new agreement, and therefore the parties' relationship was not governed by a relationship statute that went into effect after their written agreement was executed.

The manufacturer and distributor in this action first entered into an agreement in 1988 and entered into additional agreements in 1990 and 1992. Those agreements governed the distributor's purchase and resale of the manufacturer's milling equipment and parts in areas of Delaware, Pennsylvania, and New Jersey. In 1999, the manufacturer's home state of Tennessee enacted a relationship law prohibiting suppliers of construction equipment from terminating or not renewing a supply agreement without good cause; prior to its enactment, Tennessee had no statutory restrictions on such agreements, and the agreement of these parties allowed termination on ninety days' notice for any reason.

In 2000, the distributor proposed that the manufacturer grant it additional territory, but those discussions did not generate a concrete contract amendment. In 2001, the distributor asked for the right to sell additional product lines that the manufacturer had acquired. The manufacturer allowed it, but the parties did not rewrite their contract or enter into a new written agreement. In 2002, the manufacturer sent the distributor a draft of a new sales and service agreement, but the parties never signed it and discussed it only briefly. Over the next five years, the parties' relationship continued to have broad gray areas, with no clear delineation of the breadth of the distribution rights granted, and seemingly inconsistent rights were granted to other distributors in the system. In June 2007, the manufacturer eliminated the distributor's New Jersey territory; and after the distributor sought injunctive relief to prevent that, the manufacturer terminated the distribution agreement altogether. The trial court held that the 1992 agreement was controlling and did not restrict termination and that the 1999 statute did not apply to the preexisting contractual relationship.

The appeals court affirmed, finding no evidence that the parties' post-1999 discussions were sufficiently definite to form an enforceable contract. The distributor was allowed to expand its product lines, but only "at its own risk" and without any assurance of continued rights as it had been granted for the initial product line in the 1992 agreement. Also, the addition of those product lines was consistent with the basic framework of the 1992 agreement, so the addition alone was insufficient to establish a mutual intent to fundamentally change the relationship. The court also observed that the 2002 agreement had never been signed and, more importantly, that both parties continued to cite and rely on the earlier agreements as establishing the definitive terms of their relationship.

***JOC, Inc. v. Exxon Mobil Oil Corp.*, 2010 WL 1380750, Bus. Franchise Guide (CCH) ¶ 14,352 (D.N.J. Apr. 1, 2010)**

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

***Kellogg USA, Inc. v. B. Fernandez Hermanos, Inc.*, Case No. 07-1213, Bus. Franchise Guide (CCH) ¶ 14,319 (D.P.R. Jan. 27, 2010)**

BFH was a party to a distribution agreement with Kellogg. Since approximately 1910, BFH was responsible for the sale and distribution of Kellogg cereal products in Puerto Rico. The parties' first written distributorship agreement was signed in 1961. In 1966, the parties entered into a new agreement that added terms to the 1961 agreement. Between 1967 and 1992, the parties entered agreements that contained the same terms as the 1966 agreement.

One of Kellogg's subsidiaries began selling and marketing Kellogg's products in Puerto Rico. In response, BFH filed suit alleging that Kellogg had breached Puerto Rico's Law 75, which prohibits the termination of distributors such as BFH. The court granted BFH's motion for preliminary injunction, requiring Kellogg to continue distributing its products in Puerto Rico solely through BFH. The appellate court later reversed that decision, finding that the district court should have joined Kellogg's Puerto Rican subsidiary as an indispensable party. Joining that party as a defendant would have deprived the court of diversity jurisdiction. Accordingly, on remand the district court dismissed BFH's complaint for lack of jurisdiction.

Kellogg then sued BFH, seeking to execute on the bond that BFH had posted to secure its injunction. BFH brought a counterclaim alleging the same wrongful termination claims

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it had asserted in its original action. Both parties moved for summary judgment. Kellogg argued that it was entitled to summary judgment on BFH's Law 75 claim as that law was not passed until 1964. Kellogg argued that the parties' relationship predated 1964 and that Law 75 could not be applied retroactively to it. The court found that although Law 75 could not be applied retroactively, it would apply to the extent the parties had extinctively novated their original contract sometime after the law took effect. The court added that the novation issue was one of fact that the court could not resolve on summary judgment as a reasonable jury could find that the parties' contracts entered after 1964 constituted novations of the original 1961 agreement. Accordingly, the court denied Kellogg's motion for summary judgment.

The court also rejected BFH's motion for summary judgment on its claim that Kellogg had committed fraud by misrepresenting the terms of a later agreement between the parties. The court found that BFH could not have reasonably relied on any misrepresentations by Kellogg as a matter of law. The court reasoned that BFH was a sophisticated party whose counsel had reviewed the agreement at issue, thus preventing BFH from arguing that it was fraudulently induced to enter the agreement.

Because fact issues remained to be resolved as to whether Kellogg had breached the underlying distribution agreement, the court denied Kellogg's motion to execute on the bond BFH had posted to secure its injunction. Such execution was appropriate only if Kellogg demonstrated it had been wrongfully enjoined, a decision that could not be made via summary judgment given the presence of disputed fact issues.

***Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 2010 WL 819059, Bus. Franchise Guide (CCH) ¶ 14,329 (N.D. Ohio Mar. 9, 2010)**

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

DAMAGES

***Century 21 Real Estate LLC v. Perfect Gulf Props., Inc.*, Case No. 6:08-cv-1890-Orl-28KRS, Bus. Franchise Guide (CCH) ¶ 14,336 (M.D. Fla. Feb. 17, 2010)**

Plaintiff entered into numerous franchise agreements with defendant as well as a Development Advance Promissory Note. That note was in the form of a forgivable loan, such that plaintiff would forgive the entire amount of the note if defendant met certain performance criteria. When defendant failed to pay amounts due under the franchise agreements, plaintiff terminated those agreements and sought to collect past due fees along with the full balance of the note.

Plaintiff sought summary judgment, and defendant argued that plaintiff's claims were barred by various affirmative defenses. Defendant argued that the personal guarantors of the note could not be held liable because plaintiff had misled them as to the purpose of the loan. Defendant claimed that plaintiff had represented that the loan would be used for the expansion of defendant's business, but in reality a large percentage of the loan amount was withheld by plaintiff to pay past due franchise fees owed by defendant. The court found that plaintiff itself had not made the representations complained of by the guarantors. Instead, those representations had been made by defendant's principal. The court also rejected defendant's argument that plaintiff failed to mitigate its damages because plaintiff should have known that defendant did not qualify for a loan before it made that loan. The court found, however, that the doctrine of mitigation of damages applies only after a contract is breached, not before.

Defendant also argued that plaintiff waived its right to collect amounts owed by permitting defendant to extend its agreements and acquire new franchises even as defendant was in default under its existing agreements and the note. The court rejected that argument, finding that plaintiff had the right, but not the obligation, to pursue defendant's breach of contract. The court also rejected defendant's related defense of laches, finding that plaintiff had not waited an unreasonably long amount of time in enforcing its contract rights.

***Kiddie Acad. Domestic Franchising LLC v. Faith Enters. DC, LLC*, 2010 WL 673112, Bus. Franchise Guide (CCH) ¶ 14,326 (D. Md. Feb. 22, 2010)**

The court limited the award of future damages against a terminated franchisee and the amount awarded to the franchisor in attorney fees.

After terminating its franchisees for failure to pay royalties, the franchisor sued for breach of contract and prevailed on summary judgment on its claims. The franchisor claimed over $600,000 in lost future royalties, based on the remaining thirteen years in the term of the franchise agreement. Although the franchisor had not yet located a replacement franchisee in the three years following termination of one of defendant franchisees, the court found that the franchisor "may well secure a replacement franchisee" and that awarding lost royalties going forward may allow a double recovery of contract damages. As a result, the court limited the future royalties award to the latter of the period from termination through the earlier of the date of judgment or the date on which a replacement franchisee is secured. Also, because the franchisor had not shown the costs that it avoided in terminating the franchise, which must be deducted from the anticipated future royalties, the court denied summary judgment on the future royalties claim. With respect to a second terminated franchisee, the court denied the franchisor its claimed expenses for securing a new franchisee because the franchisor had failed to show that those expenses were costs of enforcing the prior franchisee's agreement. The court similarly denied the franchisor's claim for employee pay based on time spent enforcing the franchise agreements because the franchisor had presented those expenses as a lump sum and had not established the reasonableness of those expenses.

Finally, the court reduced the attorney fees award sought by the franchisor. The reduction was partly based on the imprecision of the time entries but was also based on a finding of excessive hourly rates, holding that the "upward departure

[from rates suggested by Local Rules] is not justified by the novelty or difficulty of this case—a relatively routine contract dispute—and no special legal skill was required to litigate it." Although the court acknowledged "the superior experience" of the franchisor's counsel, it nonetheless held that such experience did not justify their higher hourly rates.

DEFINITION OF FRANCHISE

***BJB Elec., L.P. v. N. Cont'l Enters., Inc.*, Case No. 09 C 3022, Bus. Franchise Guide (CCH) ¶ 14,317 (N.D. Ill. Feb. 9, 2010)**

BJB Electric brought suit against North Continental Enterprises (NCE) claiming that NCE had failed to pay for goods delivered by BJB Electric. BJB Electric sold electrical component parts manufactured in Germany. BJB Electric and NCE were parties to a distribution agreement whereby NCE would purchase products from BJB Electric and resell them to customers in North America. The parties agreed that NCE would have the exclusive right to sell those components to customers in North America. The parties operated under that agreement for twenty-five years until BJB Electric terminated it.

When BJB Electric brought suit, NCE filed a counterclaim alleging that BJB Electric terminated the parties' distribution agreement in violation of the Illinois Franchise Disclosure Act. BJB Electric moved to dismiss that counterclaim, arguing that its relationship with NCE was not a franchise and that NCE had failed to plead the elements necessary to find a franchise relationship under Illinois law. The court agreed and granted BJB Electric's motion. The court found that NCE had failed to allege that it received the right to use BJB Electric's name or trademark in marketing the products it purchased from BJB Electric. The court also observed that NCE had not alleged that it paid any type of franchise fee to BJB Electric. Because those two allegations were necessary to find the existence of a franchise relationship, the court dismissed NCE's counterclaim.

***S&S Sales, Inc. v. Pancho's Mexican Foods, Inc.*, 2010 WL 749562, Bus. Franchise Guide (CCH) ¶ 14,328 (E.D. Ark. Mar. 3, 2010)**

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

FRAUD

***Jones v. Petland, Inc.*, 2010 WL 597503, Bus. Franchise Guide (CCH) ¶ 14,323 (S.D. Ohio Feb. 12, 2010)**

The court dismissed franchisees' fraud claim against a third-party vendor for lack of particularity in the complaint.

The franchisees owned a Petland franchise in Tennessee. Defendant Loveland Pet Products, Inc. is an approved supplier of merchandise to Petland franchisees. The franchisees sued Petland and a series of suppliers, claiming that merchandise was overpriced and that Petland received kickbacks from its approved vendors. The franchisees brought a claim of aiding and abetting fraud against Loveland, on the basis that Loveland sold overpriced merchandise to franchisees and paid kickbacks to Petland in exchange for being approved by Petland as a system vendor.

On Loveland's motion to dismiss, the court held that the franchisees' complaint failed to plead the underlying fraud of Petland with sufficient particularity, which was therefore fatal to the aiding and abetting claim against Loveland. The court held that the franchisees had failed to allege facts that would establish Loveland had knowledge of any Petland fraud and also held that there was a "complete disconnect" between any fraud of Petland, which induced the franchise purchase, and the purported fraud of Loveland, which related to merchandise sold to the franchisees after they had executed the franchise agreement.

***Colo. Coffee Bean, LLC v. Peaberry Coffee, Inc.*, 2010 WL 547633, Bus. Franchise Guide (CCH) ¶ 14,325 (Colo. Ct. App. Feb. 18, 2010)**

The court held that the poor financial performance of a franchisor's parent company could give rise to a franchisee's claim for fraudulent nondisclosure against the parent.

This action was brought by a group of franchisees in the Peaberry Coffee system. Peaberry franchises are sold by Peaberry Coffee Franchise, Inc., which is a wholly owned subsidiary of Peaberry Coffee, Inc. Each of plaintiff franchisees was provided with a UFOC, which included an earnings claim disclosing gross sales figures of Peaberry's company-owned stores. The UFOC and franchise agreement also contained common provisions disclaiming any contrary or other information, effectively notifying the franchisees not to rely on any other representations, although the franchisor also sent them an information packet that included a local newspaper article in which the president of the parent company was quoted as saying that "Peaberry is profitable now." The franchisees alleged that the company stores were, in fact, unprofitable and that the parent company had suffered significant financial losses annually. The franchisees sued the franchisor and its parent company, with claims of fraudulent nondisclosure, negligent misrepresentation, alter ego, and violation of Colorado's Consumer Protection Act. They also sued the franchisor's law firm on similar claims. After trial of the claims against Peaberry, the court found in favor of defendants and also dismissed the claims against the law firm. The franchisees appealed.

On the franchisees' fraudulent nondisclosure claim, the trial court had found that Peaberry did conceal material financial facts from the franchisees but that the franchisees could not reasonably rely on that nondisclosure because the nonreliance provisions in the UFOC precluded reliance on information outside the transactional documents. The appellate court concurred that the UFOC language precluded reliance on the company stores' net losses. However, the appellate court held that the UFOC and the franchise agreement did not preclude reasonable reliance on the nondisclosure of the parent company's losses. Despite the breadth of the UFOC and contractual disclaimers of reliance, the court held (with somewhat tortured logic) that the

purpose of the disclaimers was to put franchisees on notice that their success is not assured; but the potential insolvency of the franchisor's parent company could destroy the value of a franchise regardless of the franchisee's efforts, and the franchisees may have reasonably relied on the nondisclosure of those facts, giving rise to a claim. The court also rejected the franchisor's argument that the FTC Franchise Rule prohibited disclosure of parent financials absent a parent guaranty of the franchisor's performance. Despite the explicit prohibition on disclosing parent financials in the Franchise Rule, the court distinguished full financial statements from "merely informing prospective franchisees that the franchisor's parent has been—or is—unprofitable." Finding the former different from the latter, the court held that a state common law requirement to disclose "financial information at issue" was permitted, based on the FTC's statement that the Franchise Rule did not preempt state laws unless inconsistent (and these were not inconsistent). The court remanded on the fraudulent nondisclosure claim because of inconsistencies in the court's factual findings.

The appellate court also upheld the pretrial dismissal of the Colorado Consumer Protection Act claim, holding that Peaberry's marketing practices did not significantly impact the public, based on the small volume of people who responded to solicitations and the lack of any affirmative misstatement in the materials.

The appellate court upheld the trial court's enforcement of the contractual jury waiver, where plaintiffs had not argued that the provision was unfair, unreasonable, or beyond their ability to understand. The appellate court further upheld the dismissal of the negligent misrepresentation claim against the company's law firm because plaintiffs had failed to identify any specific language in the UFOC that constituted an affirmative misrepresentation and because Colorado law did not support the notion that general portrayals of financial viability could be the basis for a negligent misrepresentation claim.

***S&S Sales, Inc. v. Pancho's Mexican Foods, Inc.*, 2010 WL 749562, Bus. Franchise Guide (CCH) ¶ 14,328 (E.D. Ark. Mar. 3, 2010)**

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

GOOD FAITH AND FAIR DEALING

***JOC, Inc. v. Exxon Mobil Oil Corp.*, 2010 WL 1380750, Bus. Franchise Guide (CCH) ¶ 14,352 (D.N.J. Apr. 1, 2010)**

JOC, Inc. and Sung Eel Chang Auto, Inc. (collectively, plaintiffs) operate a number of Exxon Mobil (Exxon) gas stations in New Jersey pursuant to Petroleum Marketing Practices Act (PMPA) agreements. Among other things, Exxon has the exclusive right to determine and change the wholesale gasoline price (known as the dealer tank wagon, or DTW, price), determine the quantities of gasoline that the franchisees are expected to purchase each year, establish the terms and conditions pursuant to which the gasoline is delivered, and exercise a certain degree of control over the stations that plaintiffs lease from Exxon.

Plaintiffs alleged that they were unable to operate at a profit or even remain economically viable under their current PMPA agreements with Exxon for various reasons, including that Exxon's pricing practices were preventing them from being able to charge competitive prices. Plaintiffs also contended that Exxon had engaged in various actions that demonstrated bad faith in response to their financial difficulties. Specifically, plaintiffs alleged that Exxon denied their requests for permission either to convert their service bays into convenience stores or purchase their stations and become independent operators, and to waive the rent.

Plaintiffs filed suit in the U.S. District Court for the District of New Jersey asserting claims for (1) breach of contract under New Jersey's equivalent of § 2-305 of the Uniform Commercial Code, (2) breach of the implied covenant of good faith and fair dealing, (3) breach of the New Jersey Unfair Motor Fuels Practices Act (UMFPA), and (4) conspiracy to discriminate against plaintiffs in the prices charged for gasoline. Exxon filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

Plaintiffs alleged that Exxon breached its contractual obligations because the DTW pricing charged to plaintiffs was discriminatory and set in bad faith with the intention to prevent plaintiffs from competing. Exxon moved to dismiss on the ground that plaintiffs had not provided the required notice of the alleged breach. In response, plaintiffs argued that Exxon knew that plaintiffs were struggling and, thus, had been given sufficient notice to comply with the notice provision of the New Jersey Commercial Code. The court disagreed. Plaintiffs did not allege in the complaint that they had specifically notified Exxon that the PMPA agreements had been breached as a result of high prices or their financial difficulties. As a result, the ourt dismissed the breach of contract claim without prejudice and with leave to amend to allege that the required notice of breach of contract had been given to Exxon.

In their claim for breach of the implied covenant of good faith and fair dealing, plaintiffs alleged that Exxon exercised its discretionary authority regarding DTW pricing, rental rates, and other decisions in an arbitrary, unreasonable, or capricious manner. Additionally, they alleged that Exxon knew that its prices and other decisions prevented plaintiffs from receiving the contractual rewards or benefits they reasonably expected. The court found that these allegations were sufficient to state a claim for a breach of the implied covenant of good faith and fair dealing. Moreover, the court held that although a claim for breach of the implied covenant of good faith and fair dealing is a contract claim, it can give rise to an independent cause of action under New Jersey law. In this case, the independent cause of action arose under Article 1 of the New Jersey Commercial Code (and not Article 2), and therefore the notice requirement in Article 2 was not applicable. As a result, the motion to dismiss the claim for breach of the implied covenant of good faith and fair dealing was denied.

In their cause of action for breach of the UMFPA, plaintiffs claimed that Exxon "acted with the intent to destroy or substantially lessen competition." Plaintiffs alleged that Exxon offered different prices to different sellers and controlled plaintiffs' operating costs and was thereby responsible for their financial problems. The court held that these allegations were insufficient to support an inference that Exxon was implementing its policies in a discriminatory manner in violation of the UMFPA. Accordingly, plaintiffs' UMFPA claim was dismissed without prejudice and with leave to amend to plead with greater clarity that Exxon's pricing and other policies were implemented to discriminate and with intent to restrain competition.

The fourth claim for conspiracy to discriminate against plaintiffs in the prices charged for gasoline was not addressed by the court.

INJUNCTIVE RELIEF

***LaBelle Chevrolet, LLC v. Gen. Motors, LLC*, 2010 WL 1325445, Bus. Franchise Guide (CCH) ¶ 14,353 (D. Mass. Apr. 2, 2010)**

LaBelle Chevrolet, LLC (LaBelle) is a so-called wind-down Chevrolet motor vehicle dealer of General Motors, LLC (GM). LaBelle filed suit against GM and sought to enjoin GM from relocating a competing dealership into LaBelle's Area of Primary Responsibility.

LaBelle was one of the approximately 1,000 GM dealers that were terminated in connection with the "old" GM's bankruptcy. As a wind-down dealer, LaBelle was permitted to continue selling Chevrolet cars until October 31, 2010, at which time it would receive a termination payment. LaBelle sought to continue as a Chevrolet dealer pursuant to the Federal Consolidated Appropriations Act (Act), pursuant to which terminated dealers could seek to be reinstated through an arbitration process. LaBelle filed a demand for arbitration seeking to be reinstated. Shortly thereafter, LaBelle learned that Chevrolet had authorized a competitive dealer to relocate its business into LaBelle's Area of Primary Responsibility. In response, LaBelle sought to enjoin GM from relocating the competitive dealer into LaBelle's Area of Primary Responsibility pending the outcome of the arbitration regarding whether LaBelle would be reinstated as a regular dealer.

The district court undertook the traditional analysis of whether an injunction was appropriate pursuant to Federal Rule of Civil Procedure 65. LaBelle argued that it was likely to succeed on the merits because it had met or exceeded the criteria for reinstatement. In response, GM argued that it had issued a letter of intent reinstating LaBelle as an authorized Chevrolet dealership, thus rendering the arbitration moot. LaBelle claimed that the terms of the letter of intent were somewhat different from the parties' original dealer agreement. The court found this argument to be "underwhelming" because whether LaBelle had been reinstated or not had no bearing on whether the court should grant the requested injunctive relief. The court concluded that there was nothing in the dealer agreement that precluded Chevrolet from relocating an existing dealer into LaBelle's Area of Primary Responsibility. Thus, the court reasoned that LaBelle was unlikely to succeed on the merits. Although this determination was essentially dispositive of LaBelle's request for a preliminary injunction, the court considered the other relevant injunction factors.

The court noted that LaBelle's claim of irreparable harm was "overstated" because GM had agreed to reinstate LaBelle's dealership, and the dealer agreement precluded LaBelle from challenging the relocation of an existing competitor into its territory. The court also ruled that the balance of the hardships weighed against entering an injunction. In particular, the court found that the risk of harm to LaBelle was minimal given that it essentially had no basis to contest the relocation of an existing dealer into its Area of Primary Responsibility, whereas the risk of harm to GM and the third-party dealer was substantial. The court was particularly concerned about the potential harm to the competitive dealer who claimed to have already invested significant time and resources into the relocation and had apparently already obtained a number of customers at its new location. The court also felt that there would be at least some tangential harm to GM's reputation and customer goodwill in the event an injunction was issued. Finally, the court found that it did not appear the public interest would be impacted one way or another upon either entering or denying the requested injunctive relief.

JURISDICTION

***Domino's Pizza Franchising, LLC v. Yeager*, Case No. 09-14704, Bus. Franchise Guide (CCH) ¶ 14,312 (E.D. Mich. Jan. 25, 2010)**

Domino's Pizza terminated defendants' franchise agreements and brought suit to enforce defendants' post-termination obligations, including the obligation to remove the franchisor's trademarks from the premises of defendants' stores and abide by the terms of a post-termination covenant against competition. Although defendants' stores were located in Nevada and California, Domino's brought suit in Michigan (Domino's home state), arguing that defendants were subject to personal jurisdiction in that state.

The court agreed that it could exercise personal jurisdiction over defendants and ultimately entered the injunctive relief Domino's requested. The court found that personal jurisdiction was appropriate because defendants had entered their franchise agreements in Michigan; submitted monthly payments to Domino's in Michigan; used the Domino's computer system that was located in Michigan; and received benefits "such as advertising, products, and system development, all emanating from Michigan." Turning to the request for injunctive relief, the court found that Domino's had established a strong likelihood of succeeding on its trademark infringement and restrictive covenant claims. Although defendants argued the covenant against competition was unconscionable because they were not aware of that clause

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when they entered the franchise agreements, the court nonetheless found the scope of the restriction reasonable.

***Green v. SuperShuttle Int'l, Inc.*, Case No. 09-2129, Bus. Franchise Guide (CCH) ¶ 14,315 (D. Minn. Jan. 29, 2010)**
This case is discussed under the topic heading "Class Action."

***Toyz, Inc. v. Wireless Toyz, Inc.*, Case No. C 09-05091, Bus. Franchise Guide (CCH) ¶ 14,313 (N.D. Cal. Jan. 25, 2010)**
Plaintiff franchisees brought suit against their franchisor and some of its past and present officers, alleging that the franchisor and its officers had misrepresented the franchise opportunity. The franchisor's principal place of business was located in Michigan, and individual defendants also resided in Michigan. Plaintiffs commenced their action in the state courts of California, their home state. Defendants removed the case to federal court and brought a motion to dismiss individual defendants for lack of personal jurisdiction. The franchisor also sought transfer of the action to a federal court in Michigan. Simultaneously, plaintiffs moved to remand the case to the state court in which it had originated.

The court first denied plaintiffs' motion to remand. Plaintiffs argued that defendants filed their notice of removal more than thirty days after the first defendant had been served with the complaint, though the notice of removal had been filed within thirty days of the date the last defendant was served with process. Plaintiffs asked the court to adopt the so-called first-served rule to hold that a notice of removal must be filed within thirty days of the date on which the first defendant is served. The court rejected plaintiffs' argument, endorsing instead the last-served rule, which provides that a notice of removal is timely if filed within thirty days of the date on which the last defendant is served with process.

Turning to individual defendants' motion to dismiss, the court found that plaintiffs had failed to show that individual defendants had sufficient personal contacts with the state of California to justify the exercise of personal jurisdiction over them. Although plaintiffs alleged that individual defendants had personally made misrepresentations to them, they did not offer any evidence to show that the misrepresentations had been made in California. Moreover, considering the factors articulated by the U.S. Court of Appeals for the Ninth Circuit, the court concluded that the exercise of personal jurisdiction would be unreasonable due to the limited contacts between individual defendants and the state of California. The court thus granted individual defendants' motion but elected to transfer plaintiffs' claims rather than dismiss them outright.

Finally, the court granted the franchisor's motion to transfer the case to a federal court in Michigan. The court found that it would be inconvenient for plaintiffs to litigate the same case twice, once against the franchisor in California and again against the officers in Michigan. Instead, the court ordered that the entire matter be transferred to a federal court in Michigan.

STATUTE OF LIMITATIONS

***Boon Rawd Trading Int'l Co. v. Paleewong Trading Co.*, 2010 WL 668063, Bus. Franchise Guide (CCH) ¶ 14,354 (N.D. Cal. Feb. 19, 2010)**
Plaintiff and counterdefendant Boon Rawd Trading International Co. (BRTI) is an exporter of Singha beer and other Boon Rawd products. Defendant and counterclaimant Paleewong Trading Co. (PTC) was a long-time U.S. importer and distributor of Singha beer. BRTI terminated its relationship with PTC, and litigation ensued.

The factual background regarding the parties' dispute is convoluted. PTC alleged that it had been the de facto exclusive importer and distributor of Singha beer in numerous states for thirty-two years and that its territory had included portions of California and New York for twenty-six of those years. BRTI became the exporter of Singha beer in 2000. Prior to that date, a different entity was the exporter. It was undisputed that there was never any written contract evidencing the claimed exclusive agreement between PTC and the prior exporter. Rather, PTC alleged that a "course of conduct" with the prior exporter formed the basis for such agreement. PTC further claimed that there was a "mutual understanding" with BRTI that PTC would continue to be the exclusive importer and distributor of Boon Rawd products (including Singha beer), that PTC's rights could not be terminated without good cause, and that PTC was entitled to compensation in the event the agreement was terminated.

According to PTC, BRTI engaged in a scheme beginning in 2002 to "strip" PTC of its exclusive importation rights by, among other things, appointing a subsidiary as a "dual importer" of Boon Rawd products to compete with PTC; and the dual importer engaged in price discrimination, misappropriation of PTC's confidential propriety information, and other alleged wrongdoing. Continuing through 2006, BRTI allegedly attempted either to terminate and/or acquire for a nominal amount PTC's exclusive importation rights. In 2006, BRTI proposed that its subsidiary and PTC form a joint venture that would share importation rights to Boon Rawd products while leaving PTC with its exclusive distribution rights in the alleged exclusive territories. During negotiations regarding the proposed venture, BRTI began exporting its products to the subsidiary. The negotiations were ultimately unsuccessful. BRTI then allegedly offered to purchase PTC's importation rights for $3 million, and the parties executed a memorandum of understanding to this effect. However, BRTI refused to go forward with this transaction and allegedly renewed its efforts to "force" PTC out of the import business by improper pricing, continuing to allow its subsidiary to import Boon Rawd products into California, fabricating complaints, and making unreasonable demands. Further negotiations occurred during 2008 but were unsuccessful. During that period of time, BRTI's subsidiary also allegedly sold products to distributors in California below the cost that BRTI was selling those products to PTC and engaged in other wrongdoing. In 2009, BRTI sent PTC notice that it intended to terminate PTC's

importation rights effective December 31, 2009.

Shortly after serving the notice of termination, BRTI filed a declaratory relief action in the U.S. District Court for the Northern District of California. PTC responded by asserting counterclaims for, among others, breach of implied contract, intentional interference with prospective economic advantage, breach of the implied covenant of good faith and fair dealing, promissory estoppel, conversion, unjust enrichment, and violations of the California Franchise Relations Act (CFRA). BRTI filed a motion to dismiss.

BRTI argued that PTC's breach of the implied contract claim based on the dual importation of Boon Rawd's products (which began in 2006) was barred by the applicable two-year statute of limitations. In response, PTC argued that BRTI had not actually breached the implied agreement until after 2006 (and, thus, the cause of action had accrued within the two-year period); that BRTI was equitably estopped from asserting a statute of limitations defense; and/or that BRTI's conduct amounted to a series of successive breaches, and, as a result, there was a continuous accrual. In rejecting PTC's arguments, the court concluded that PTC knew BRTI had actually breached the alleged implied contract regarding exclusive importation rights in 2006, and, thus, the cause of action had accrued at that time. The court further found that nothing BRTI had said or done amounted to a misrepresentation regarding PTC not needing to file a suit in a timely manner, and, therefore, there could be no equitable estoppel claim. Finally, the court disposed of PTC's argument that BRTI's conduct amounted to a series of separate breaches of the implied agreement because the agreement in question was not a severable contract like an installment agreement. Accordingly, there was no continuous accrual for the breaches.

PTC's intentional interference with prospective economic advantage was based on BRTI's alleged "scheme and pattern of tortious conduct" that began in 2002 when BRTI's subsidiary was appointed dual importer of Boon Rawd products. BRTI argued that the applicable two-year statute of limitations also barred this claim. In response, PTC argued that the "continuing tort" doctrine was applicable and that the statute of limitations did not begin to run until the date of its last injury or when the tortious conduct ceased. The court was unwilling to extend the continuing tort doctrine to the tort of intentional interference with prospective economic advantage but found that there were discrete wrongful acts that had occurred within the two-year limitations period. Thus, the court granted BRTI's motion to dismiss with respect to acts that occurred prior to December 2007 but denied it for acts that occurred after December 2007. Similarly, the court permitted PTC to assert claims for breach of the implied covenant of good faith and fair dealing to the extent that the alleged breaching conduct occurred after December 2007.

BRTI sought to dismiss PTC's promissory estoppel claim arising out of the alleged exclusive importation rights on the ground that it was not applicable. This doctrine is only applicable when the alleged promise lacks adequate consideration. Here, the court agreed with BRTI that the alleged promises made by BRTI were bargained for and given in exchange for PTC's future performance. Thus, because PTC's performance was requested at the time the promises were made and such performance was bargained for, the doctrine of promissory estoppel was inapplicable.

The court granted BRTI's motion to dismiss PTC's claim that BRTI had converted PTC's customer goodwill. The court found that although the trend in California is to permit a claim of conversion of intangible property rights, there was no law upholding a conversion of customer goodwill claim; and the court was unwilling to extend existing law.

The court also granted BRTI's motion to dismiss the unjust enrichment claim on the ground that such a claim only exists when there is no enforceable agreement or when the agreement was "procured by fraud or is unenforceable or ineffective for some reason." PTC had failed to allege either that there was no binding agreement or that the express contract was procured by fraud or was otherwise ineffective. Thus, the court found that PTC had not alleged the requisite facts to support such a claim.

Finally, the court granted BRTI's motion to dismiss PTC's claim for violations of the CFRA. The court concluded that PTC had failed to allege adequately the necessary factual predicate to establish that BRTI was a franchise within the meaning of the CFRA.

***Guirguis v. Dunkin' Donuts Inc.*, Case No. 09-5118, Bus. Franchise Guide (CCH) ¶ 14,338 (D.N.J. Mar. 1, 2010)**

Plaintiff alleged that Dunkin' Donuts violated the parties' Store Development Agreement (SDA) by denying him permission to open a Dunkin' Donuts shop at a location where Dunkin' Donuts later approved a different franchisee. Plaintiff brought suit against Dunkin' Donuts, claiming breach of contract. Dunkin' Donuts moved to dismiss, arguing that plaintiff's claim was barred by the SDA's statute of limitations and arbitration clause.

The court granted Dunkin' Donuts' motion. The court found that the parties had agreed to be bound by a two-year statute of limitations and that plaintiff discovered the facts underlying his breach of contract claim more than two years before filing suit. The court also found that the SDA required arbitration unless plaintiff agreed to waive any claims for punitive damages and his right to a jury trial. Looking to the face of plaintiff's complaint, the court held that plaintiff had not waived those rights and was thus bound to arbitrate his claims.

***Pinnacle Pizza Co., Inc. v. Little Caesar Enters., Inc.*, Case No. 08-3999, Bus. Franchise Guide (CCH) ¶ 14,341 (8th Cir. Mar. 22, 2010)**

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

STATUTORY CLAIMS

***Al's Serv. Ctr. v. BP Prods. N. Am., Inc.*, 599 F.3d 720, Bus. Franchise Guide (CCH) ¶ 14,347 (7th Cir. Mar. 26, 2010)**

In this action by a dealer against its oil company supplier, the U.S. Court of Appeals for the Seventh Circuit held that

the termination of the franchise relationship was caused by the dealer's abandonment of its business, not by any actions of the supplier, and that the dealer therefore had no valid claim under the PMPA.

Plaintiff in this action was a BP dealer operating under BP's Amoco brand. In 2003, after learning that the state would be condemning a small (but critical) portion of the gas station for a highway-widening project, BP notified the dealer that it would terminate their franchise agreement ten days before that condemnation took effect. Under the PMPA, partial condemnation of the marketing premises is a valid basis for termination of the franchise. But after the condemnation took place in 2005, and despite another notice from BP asserting that the franchise had been terminated, the dealer continued to operate and BP continued to supply gasoline. In 2006, following allegations that BP had ceased supplying fuel to the dealer, the dealer obtained a preliminary injunction prohibiting BP from terminating the franchise. Later that year, in connection with the highway project, the state removed the dealer's roadside sign. The dealer asked BP to replace the sign, but BP refused; the dealer did not invoke the injunction or seek any court relief at that time. In 2008, the dealer abandoned the business and pursued its suit against BP. The trial court ultimately granted summary judgment in favor of BP.

On appeal, the court held that BP was entitled to terminate the franchise based on the condemnation. Even though the size of the condemned parcel was small, the state had condemned one of the two entrances on the highway side of the gas station, which "significantly degraded the marketing premises." The court held that the alleged interruption in supply and BP's refusal to replace the sign may have altered the parties' relationship, but neither constituted a termination of the franchise or failure to renew the franchise relationship. Instead, it was the dealer's own abandonment of its business that caused the termination of the franchise. The court noted that the dealer could still pursue its state law claims in state court.

***Ammirato v. Duraclean Int'l, Inc.*, 2010 WL 475303, Bus. Franchise Guide (CCH) ¶ 14,320 (E.D.N.Y. Feb. 8, 2010)**

This case is discussed under the topic heading "Contract Issues."

***Awuah v. Coverall N. Am., Inc.*, 2010 WL 1257980, Bus. Franchise Guide (CCH) ¶ 14,349 (D. Mass. Mar. 23, 2010)**

The court held that, under Massachusetts law, cleaning service franchisee plaintiffs were employees of the franchisor because both franchisees and franchisor were fundamentally in the cleaning service industry.

Plaintiffs in this action were a group of franchisees in the Coverall cleaning service system. They brought this lawsuit claiming that the franchisor had misclassified them as independent contractors and had committed unfair or deceptive trade practices. The franchisees moved for summary judgment under Massachusetts's Independent Contractor Statute, asserting that they were in fact employees.

The trial court agreed. Under Massachusetts law, an individual performing a service is considered an employee unless the would-be employer can establish, among other things, that "the service is performed outside the usual course of the business of the employer." The franchisor argued that it is not in the commercial cleaning business but in the franchising business, contending that it neither performs any cleaning itself nor employs any cleaners. However, the court found that the franchisor trained its franchisees, provided them with uniforms and badges, contracted with and billed virtually all customers, and received a percentage of the revenue from every cleaning service. Based on these facts, the court found that the franchisor "sells cleaning services, the same services provided by these plaintiffs." As a result, the franchisor could not establish that the franchisees were performing services outside the usual course of the franchisor's business, so those franchisees qualified as employees under Massachusetts law.

Subsequent to this decision, at the beginning of trial, the court dismissed the franchisees' employment claims based on their failure to establish that they had suffered any damages as a result of the misclassification.

***B.A. Constr. & Mgmt., Inc. v. Knight Enters., Inc.*, 2010 WL 545504, Bus. Franchise Guide (CCH) ¶ 14,324 (6th Cir. Feb. 17, 2010)**

The U.S. Court of Appeals for the Sixth Circuit remanded to the district court for further findings on whether a gasoline distributor had violated the PMPA when it terminated its franchise agreement with a gas station dealer.

Under the parties' agreement, the distributor was obligated to provide the dealer with a $130,000 signing bonus to perform improvements to the gas station (the distributor would be reimbursed over time by supplier Citgo if the dealer hit certain sales targets). The distributor's obligation to make that payment was contingent on Citgo's acceptance of the retail outlet and on the distributor's approval of the dealer's retail plans and designs. The distributor did not advance the $130,000, but the dealer began operating anyway. Within a few months, the dealer was giving the distributor bad checks to pay for fuel deliveries and then ceased purchasing fuel from the distributor altogether for several months. The distributor terminated the franchise agreement and foreclosed on the leased property. The dealer sued, claiming that the distributor had breached the contract by not paying the $130,000 signing bonus and by refusing to sell fuel to the dealer. The district court granted the dealer summary judgment on liability, and the distributor appealed.

The Sixth Circuit held that the district court failed to make a factual determination on the distributor's approval of the dealer's retail plans and designs, which was the second precondition of the distributor's obligation to pay the signing bonus. The court reversed the district court's summary judgment order and remanded for further factual findings. The distributor also argued that the franchise agreement was voidable because the dealer had fraudulently represented its historical fuel sales to secure the distributor's agreement to pay the signing bonus. The appeals court found that

the distributor had failed to present any evidence that the dealer's representations about historical fuel sales were inaccurate and held that the district court properly granted the dealer summary judgment on the distributor's fraud claim.

***Clark Invs., Inc. v. Airstream, Inc.*, 2010 WL 1222312, Bus. Franchise Guide (CCH) ¶ 14,250 (Ill. App. 3d Dist. Mar. 23, 2010)**
Clark Investments, Inc., doing business as R&R RV Sales (R&R), entered into a franchise agreement (first agreement) with Airstream, Inc. (Airstream) pursuant to which it was granted the right to sell one model of recreational vehicle (RV) made by Airstream. The agreement included inventory requirements and sales goals and gave R&R the state of Illinois as its exclusive sales territory. Shortly before the expiration of the first agreement, Airstream offered R&R a replacement contract. The replacement contract had no expiration date, no sales goals for R&R, and no exclusive territory for R&R. R&R refused to sign the replacement agreement because it did not include an exclusive territory. When the first agreement expired, the parties continued to do business without a written agreement until R&R eventually signed another written agreement (second agreement), which had reduced inventory requirements, no sales goals, and no exclusive territory and granted R&R the right to sell additional Airstream products. Airstream then "entered into an agreement with another dealer to locate an Airstream franchise . . . about 90 miles from R&R's franchise location" that would sell some of the same products as R&R.

R&R filed suit in Illinois state court asserting claims against Airstream for, among other things, violations of the Illinois Motor Vehicle Franchise Act (Franchise Act) based on Airstream's decision to locate another dealer within ninety miles of R&R's business. Airstream filed a motion for summary judgment, which was granted. R&R appealed the trial court's grant of summary judgment.

The appellate court held that Airstream had not violated the Franchise Act because the second franchise was not located within fifteen miles of R&R's franchise and, thus, was not prohibited by the express terms of the Franchise Act (815 Ill. Comp. Stat. 710/2(q)). The court further found that even if the second agreement was void as R&R claimed, the first agreement had expired by its own terms, and the exclusive sales territory provision included in it would no longer be applicable. Finally, the appellate court also concluded that Airstream had not violated the Franchise Act by failing to extend the first agreement because it had offered a replacement contract to R&R. The replacement contract itself did not violate the Franchise Act because it did not "substantially change or modify the sales and service obligations or capital requirements" of R&R. Accordingly, the trial court's grant of summary judgment for Airstream was affirmed.

***JOC, Inc. v. Exxon Mobil Oil Corp.*, 2010 WL 1380750, Bus. Franchise Guide (CCH) ¶ 14,352 (D.N.J. Apr. 1, 2010)**
This case is discussed under the topic heading "Good Faith and Fair Dealing."

***MacWilliams v. BP Prods. N. Am., Inc.*, Case No. 09-1844, Bus. Franchise Guide (CCH) ¶ 14,316 (D.N.J. Feb. 3, 2010)**
Plaintiff MacWilliams operated two gasoline service stations pursuant to dealer supply agreements with BP's predecessor in interest, Amoco. The dealer supply agreements provided that Amoco would supply gasoline to MacWilliams at a specified price, subject to change at any time with notice. BP also agreed to provide MacWilliams with end-of-month volume allowances, consisting of payments made to MacWilliams based on the volume of gasoline sold at his stations. The agreements provided that those allowances were also subject to change.

BP later assigned its supply responsibilities to a third party, Ocean Petroleum. Ocean advised MacWilliams that Ocean intended to cancel the end-of-month volume allowance program. MacWilliams protested that decision, claiming that the termination of that program constituted a constructive termination of his dealer supply agreement. MacWilliams demanded return of the security deposit he had provided to BP in exchange for the end-of-month volume allowance program. When Ocean refused, MacWilliams brought suit against BP, claiming a constructive termination of his dealer agreement under the PMPA and seeking the return of his security deposit.

The court found that "[t]he PMPA does not expressly provide a cause of action for constructive termination," although it noted that some courts had implied such an action. Even assuming such a cause of action could be brought under the PMPA, the court reasoned that Ocean had the contractual right to discontinue the volume allowance program. In this case the court held that the dealer agreements could not be constructively terminated by conduct that was expressly authorized by the parties' agreements. Accordingly, the court concluded that plaintiff's complaint failed to state a claim for relief for breach of the PMPA. The court did find, however, that MacWilliams had properly stated a claim for relief regarding return of its security deposit and permitted that claim to proceed.

***S&S Sales, Inc. v. Pancho's Mexican Foods, Inc.*, 2010 WL 749562, Bus. Franchise Guide (CCH) ¶ 14,328 (E.D. Ark. Mar. 3, 2010)**
Plaintiff S&S Sales (S&S) is an Arkansas-based wholesale distributor of snack foods, including products manufactured by Pancho's Mexican Foods (Pancho's). S&S alleged that it had an exclusive franchise agreement to sell Pancho's products in parts of Arkansas and that Pancho's breached this agreement when it entered into a separate agreement with Associate Wholesale Grocers (AWG) pursuant to which AWG began distributing Pancho's products in S&S's purported territory. S&S sued Pancho's for violations of the Arkansas Franchise Practices Act (AFPA), the Arkansas Deceptive Trade Practices Act (ADTPA), fraud, and civil conspiracy. Additionally, S&S sued AWG for intentional interference with contract, violations of the ADTPA, and other claims. Both Pancho's and AWG filed motions for summary judgment.

Pancho's argued that S&S was not a franchisee and

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that the AFPA did not apply because the parties did not "contemplate" that S&S maintain a "place of business" in Arkansas as required by the statute. Although there was no documentation or contract between the parties specifically requiring S&S to establish a place of business in Arkansas, S&S operated a warehouse in Arkansas. Pancho's argued, however, that the warehouse did not constitute a place of business within the meaning of the AFPA because S&S did not display and sell Pancho's products directly from the warehouse as also required by the statute. The court held that there was a triable issue of fact as to whether S&S's warehouse operations constituted a place of business under the AFPA because it was undisputed that S&S sold at least some Pancho's products directly from its warehouse, and there was some evidence that S&S actually "displayed" Pancho's products at its warehouse.

Pancho's also sought summary judgment on the grounds that S&S's claims were barred by the applicable statutes of limitations and/or the doctrine of laches. Pancho's argued that S&S had known for a number of years that Pancho's directly sold its products to Walmart stores in S&S's claimed territory. The court found, however, that there was a triable issue of fact as to whether direct sales by Pancho's to Walmart were factually or contractually analogous to sales by Pancho's to a "middleman" distributor like S&S (and AWG).

In addressing AWG's motion for summary judgment, the court noted that the parties' respective arguments relied on conflicting deposition testimony that effectively "undercut" AWG's arguments that there were no triable issues of material fact. S&S alleged that AWG violated Arkansas's consumer protection statute, which makes illegal any trade practice that is unconscionable. Based on the conflicting deposition testimony, the court ruled that whether AWG's conduct was unconscionable was a question for the jury to resolve. The court similarly found that the testimony of the witnesses established triable issues of material facts regarding each of the elements of S&S's tortious interference with contract claim.

TERMINATION AND NONRENEWAL

***Al's Serv. Ctr. v. BP Prods. N. Am., Inc.*, 599 F.3d 720, Bus. Franchise Guide (CCH) ¶ 14,347 (7th Cir. Mar. 26, 2010)**
This case is discussed under the topic heading "Statutory Claims."

***Clark Invs., Inc. v. Airstream, Inc.*, 2010 WL 1222312, Bus. Franchise Guide (CCH) ¶ 14,250 (Ill. App. 3d Dist. Mar. 23, 2010)**
This case is discussed under the topic heading "Statutory Claims."

***Constr. Crane & Tractor, Inc. v. Wirtgen Am., Inc.*, 2010 WL 1172224, Bus. Franchise Guide (CCH) ¶ 14,345 (Tenn. Ct. App. Mar. 24, 2010)**
This case is discussed under the topic heading "Contract Issues."

***Ganley v. Mazda Motor of Am., Inc.*, 2010 WA 697360, Bus. Franchise Guide (CCH) ¶ 14,333 (6th Cir. Mar. 2, 2010)**
Ganley, Inc. (Ganley) owned and operated a number of automobile dealerships in Ohio, including a Mazda dealership. Thomas Ganley was its principal shareholder. The Ganley Mazda dealership was unprofitable and was the worst-performing dealership in Ohio based on Mazda's sales and other criteria. Mazda served a notice of pending termination of the dealership pursuant to the procedures required by the Ohio Motor Vehicle Dealers Act (Dealers Act). Ganley filed a protest of the impending termination with the Ohio Motor Vehicle Dealers Board (Board). As a result, Mazda was prohibited from enforcing the termination until the Board had determined whether there was good cause for the termination.

Shortly before the Board hearing, Ganley requested approval from Mazda to transfer the controlling interest in Ganley from Thomas Ganley to his son, Kenneth Ganley. After the Board hearing, but before any decision had been issued, Mazda denied the proposed transfer on the ground that Ganley had failed to submit information necessary to evaluate the proposal. Thereafter, Ganley submitted additional supporting information, including Kenneth's proposed business plan for making the dealership profitable. Mazda refused to consent to the proposed transfer on the basis that (i) the dealership had been terminated and, thus, there was nothing to transfer; (ii) even if the dealership could be transferred, Kenneth had failed to meet Mazda's criteria; and (iii) in any event, Mazda intended to exercise its right of first refusal. In response, Kenneth filed a separate protest with the Board claiming that Mazda's decision to deny the proposed transfer was without "good cause."

The Board ultimately determined that Mazda had good cause to terminate the franchise. As a result, Mazda terminated the franchise, and Ganley ceased selling Mazda cars. Kenneth subsequently withdrew his transfer protest, which the Board then dismissed "with prejudice."

Plaintiffs contested the termination principally on the ground that Mazda had failed to properly apply its own criteria in considering the proposed transfer of the controlling interest in Ganley from Thomas to Kenneth. Plaintiffs claimed that if Mazda had properly applied its criteria, the transfer would have been approved. In response, Mazda argued that the criteria was simply a "threshold barrier" and "merely the first step in [the] approval process." The parties filed cross-motions for summary judgment. The district court denied plaintiffs' motion and entered summary judgment in favor of Mazda, finding that (i) plaintiffs' Dealers Act claim was barred by res judicata because the Board had dismissed Kenneth's transfer protest, and (ii) plaintiffs could not establish damages. Plaintiffs appealed to the Sixth Circuit.

The Sixth Circuit held that the lower court was incorrect in finding that the Dealers Act claim was barred by res judicata because the claim had not actually been litigated. However, the court went on to consider the merits of plaintiffs' Dealers Act claim and concluded that the undisputed evidence

established that plaintiffs could not prevail on the merits of their claim. Although it was undisputed that Mazda had failed to strictly follow its own written criteria, the court found that this was simply "one factor to be considered" and that Mazda's deviation from the evaluation criteria was minor under the circumstances. The court further found that "nothing else in the record weigh[ed] against a finding of good cause" for the termination. On the other hand, the court held that there were two significant factors that weighed in favor of finding that the termination was with good cause. First, the court believed that Kenneth's proposed business plan was inadequate under the circumstances in that it did not address potential relocation of the dealership, facility upgrades, or replacement of any of Ganley's existing management. Given Ganley's poor performance, the court felt that significant changes were necessary. Second, and most importantly, the court found that regardless of whether Thomas or Kenneth was the majority shareholder of Ganley, the termination of the franchise was imminent; and even if the proposed transfer "had been approved, the pre-existing termination proceeding would not have been mooted." Thus, even if the transfer had been approved, all that Kenneth would have acquired was the "'stock in a dealership . . . [that was] subject to . . . termination.'"

The court also considered plaintiffs' claim that Mazda breached the parties' agreement by unreasonably withholding consent to the transfer. The district court did not reach the issue of whether Mazda had unreasonably withheld its consent, instead concluding that plaintiffs could not establish damages as a result of the alleged breach. The Sixth Circuit agreed, finding that Thomas could not have suffered damages as a result of Mazda's denial of the proposed transfer because his intent was to gift his interest in Ganley to Kenneth for free. The court further found that Ganley suffered no damages because the franchise would have been terminated regardless of who was the controlling shareholder and that "[a]ny assertion that Ganley . . . would have become profitable under Kenneth's majority ownership" was speculative.

***Kellogg USA, Inc. v. B. Fernandez Hermanos, Inc.*, Case No. 07-1213, Bus. Franchise Guide (CCH) ¶ 14,319 (D.P.R. Jan. 27, 2010)**

This case is discussed under the topic heading "Contract Issues."

***Maita Distribs., Inc. of San Mateo v. DBI Beverage Inc.*, 667 F. Supp. 2d 1140, Bus. Franchise Guide (CCH) ¶ 14,321 (N.D. Cal. Nov. 3, 2009)**

The court held that California's beer distribution statute neither grants a termination right nor prohibits termination of beer supply agreements and is solely intended to provide a mechanism to value terminated distribution rights.

Plaintiff Maita Distributors was a distributor for both Miller and Coors. Those contracts were terminable only for cause and did not grant any right to terminate upon the manufacturer's transfer of products or brands to another manufacturer. When Miller and Coors formed a joint venture (MillerCoors) in 2008, they transferred their respective brands to the joint venture. Shortly thereafter, the joint venture gave Maita notice that both distribution contracts would be terminated and that the distribution rights would be granted to defendant DBI Beverage. Maiti objected, and under California's beer distribution statute (Cal. Bus. & Prof. Code § 25000.2), Maiti engaged in negotiations with DBI to resolve the dispute. When negotiations were unsuccessful, DBI attempted to invoke statutorily mandated arbitration, and Maita resisted. Maiti, DBI, and MillerCoors eventually ended up in federal court, where Maita argued that the beer distribution statute did not permit termination of the distribution agreement, and DBI and MillerCoors argued that the statute did grant that termination right.

The court held that the statute neither granted a termination right nor prohibited termination, opining that

> [t]his appears to be an unusual case in which the legislature focused on providing a solution to so narrow an issue—providing a means to efficiently determine the fair market value of beer distribution rights to be paid to an existing distributor—that it failed to address the problem in a sufficiently thorough context.

In other words, the statute did not speak to the parties' termination rights (or protection from termination without cause); instead, it merely established what is, in effect, a mechanism for negotiating and measuring damages in the event of a wrongful termination. Having held that the statute did not provide a termination right, the court did not address arguments that the statute was an unconstitutional impairment of contracts.

***Mussetter Distrib., Inc. v. DBI Beverage Inc.*, 2010 WL 395638, Bus. Franchise Guide (CCH) ¶ 14,322 (N.D. Cal. Feb. 3, 2010)**

The court held that the arbitration requirement in California's beer distribution statute was not an unconstitutional impairment of contracts because it was not a substantial impairment of rights and was consistent with other longstanding regulations imposed on the beer industry.

The facts of this case closely followed that of *Maita Distributors, Inc. of San Mateo v. DBI Beverage Inc.*, also reported in this issue. After the consolidation of Miller and Coors into a joint venture, the newly combined manufacturer terminated existing contracts with Mussetter Distributing and replaced that distributor with DBI Beverage. Also, as in *Maita*, the parties contested whether California's beer distribution statute (Cal. Bus. & Prof. Code § 25000.2) permitted or prohibited termination without cause; and the court, which also presided over the *Maita* case, adopted its holding in that case that the statute neither permitted nor prohibited termination.

In this action, the terminated distributor also argued that the statute was an unconstitutional impairment of contracts, on the grounds that it required the parties to engage in arbitration to determine the fair market value of the terminated distribution rights. Mussetter contended that

the arbitration requirement deprived it of the benefit of its bargain and imposed significant costs, which amounted to a constitutional violation. The court disagreed, holding that the arbitration requirement "has not operated a substantial impairment" of the contractual relationship. The arbitration requirement only applied in a narrow set of circumstances, i.e., where a successor manufacturer acquires a brand and replaces a distributor and the successor and prior distributors cannot agree on the value of the prior distributor's involuntarily transferred rights. The court also held that the cost of arbitration was comparable to litigation and, at least to some degree, within the control of the parties. Finally, the court held that California had been regulating the beer industry for decades in comparable ways, including by restricting the effect of contractual provisions that required litigation outside the state or that allowed termination for failure to meet an unreasonable quota.

***Prudence Corp. v. Shred-It Am., Inc.*, 2010 WL 582597, Bus. Franchise Guide (CCH) ¶ 14,334 (9th Cir. Feb. 18, 2010)**
Franchisor Shred-it America, Inc. (SAI) appealed a judgment in favor of Prudence Corporation (Prudence) for breach of the franchise agreement between SAI and Prudence. The U.S. District Court for the Central District of California found that "SAI had breached the franchise agreement by failing to . . . submit proposed renewal terms" for the franchise agreement in a timely manner. As a result, the district court ordered that the franchise agreement be renewed at the original royalty rate and awarded attorney fees and costs to Prudence.

The Ninth Circuit upheld the judgment finding that the district court had discretion to order specific performance at the original royalty rate because the express terms of the franchise agreement provided that "where a party improperly withholds its approval of any action provided for in the [agreement], specific performance is the [appropriate] remedy." Additionally, the Ninth Circuit found that by improperly delaying renewal of the agreement for "well over a year," SAI had waived its right to negotiate different terms than those provided for in the original agreement.

***Volvo Trucks N. Am. v. Wausau Truck Ctr., Inc.*, 779 N.W.2d 423 (2010), Bus. Franchise Guide (CCH) ¶ 14,331 (Wis. Ct. App. Mar. 11, 2010)**
Volvo Trucks North America (Volvo) terminated its dealer, Wausau Truck Center, Inc. (Wausau Truck) on the ground that it had breached the parties' dealership agreement. Wausau Truck contested the termination, claiming that it had cured the breach.

Wausau Truck sold both Volvo and Peterbilt trucks but decided to sell its Volvo dealership and focus exclusively on its Peterbilt dealership. As part of that decision, Wausau Truck implemented a so-called Volvo Elimination Plan, pursuant to which, among other things, it promoted Peterbilt trucks at the expense of Volvo trucks. After notice and an opportunity to cure, Volvo terminated Wausau Truck's dealership agreement. Wausau Truck admitted that its policy of favoring Peterbilt trucks constituted a breach of the parties' agreement but argued that it subsequently changed its mind about selling its Volvo dealership and had "recommitted itself to promoting Volvo products" prior to the termination. After a hearing, the Wisconsin Division of Hearings and Appeals (Division), which is responsible for resolving wrongful termination disputes under the Wisconsin Motor Vehicle Dealer Law (Dealer Law), found that Wausau Truck had cured the breach and ordered Volvo to rescind the termination. Both the Wisconsin circuit court and appellate court agreed. Wausau Truck appealed to the state Supreme Court.

The issue on appeal was whether Wausau Truck had "cured" its breach within the required cure period. In addressing this issue, the court first considered the Division's interpretation of the word *cure* as used within the Dealer Law. Volvo argued that to cure the breach, Wausau Truck was effectively required to undo the effects of its breach and restore matters to the way they were before the breach. The Division disagreed with Volvo's interpretation and concluded that in order to cure its breach, Wausau Truck had to both stop the offending conduct and to substantially perform the contract. The court agreed.

The court then addressed the ultimate issue of whether Wausau Truck had cured the breach. In essence, Volvo argued that Wausau Truck had not cured the breach because some parts of the Volvo Elimination Plan remained in place (e.g., the dealership no longer included Volvo in its name) and that the steps it had taken to cure the breach were taken merely to bolster Wausau Truck's "litigation position." The court carefully considered what steps Wausau Truck had undertaken to implement the Volvo Elimination Plan and what step it had taken to "recommit" to Volvo (i.e., cure the breach). The court found that there was substantial evidence supporting the Division's finding that Wausau Truck had, in fact, cured its breach of the dealership agreement, and it upheld the rescission of the termination notice.

TRADEMARKS

***Pinnacle Pizza Co., Inc. v. Little Caesar Enters., Inc.*, Case No. 08-3999, Bus. Franchise Guide (CCH) ¶ 14,341 (8th Cir. Mar. 22, 2010)**
Pinnacle Pizza filed suit against its franchisor Little Caesar Enterprises (LCE), claiming that LCE wrongfully appropriated the "Hot-N-Ready" concept that Pinnacle developed as a Little Caesar's franchisee. Pinnacle began running a Hot-N-Ready advertising campaign in 1997. When that campaign proved successful, Pinnacle shared that idea with LCE and other franchisees, encouraging other franchisees to offer a similar promotion. LCE eventually incorporated the Hot-N-Ready concept into its marketing materials and obtained a trademark for that phrase. Pinnacle then brought suit, claiming that LCE had breached the franchise agreement by wrongfully appropriating Pinnacle's concept. The district court granted summary judgment to LCE, and Pinnacle appealed.

On appeal, the court found that Pinnacle's claim for breach of the franchise agreement was barred by the applicable statute of limitations. The court held that Pinnacle's claim accrued as of the first date that LCE had used the phrase *Hot-N-Ready*, which fell outside the applicable limitations period. For that reason, the court also found that plaintiff's claim under the South Dakota Franchise Act was barred.

The court further denied plaintiff's motion to cancel LCE's trademark of the phrase *Hot-N-Ready*. Pinnacle argued that LCE had registered that trademark in bad faith in its application for registration by relying on the date Pinnacle had first used that phrase. The court observed that evidence alone was insufficient proof of bad faith. The court added that even if LCE knew Pinnacle believed that Pinnacle owned the rights to that phrase when LCE registered it, that fact alone would not justify cancellation.

VICARIOUS LIABILITY

***Braucher v. Swagat Group, LLC*, 2010 WL 1241825, Bus. Franchise Group (CCH) ¶ 14,355 (C.D. Ill. Mar. 18, 2010)**

Defendants Himanshu M. Desai; Vasant Patel; Vijay C. Patel; Swagat Group, LLC (LLC); and Vaidik International, Inc. (collectively, Swagat Defendants) and defendant Choice Hotels Int'l, Inc. (Choice Hotels) were sued in the U.S. District Court for the Central District of Illinois on behalf of two women who became ill (one of whom died) after staying at a Comfort Inn owned by defendant LLC and operated under a franchise agreement with Choice Hotels. The two women were diagnosed with Legionnaires' disease, which is caused by bacteria that was found in the Comfort Inn's pool and spa.

The franchise agreement required, among other things, that the Swagat Defendants comply with Choice Hotels' Rules and Regulations for operating the hotel as a Comfort Inn and authorized Choice Hotels to periodically conduct Quality Assurance Reviews (QARs) of the hotel. The purpose of the QAR was to confirm that the Swagat Defendants were complying with the Rules and Regulations and identify areas where the Comfort Inn did not meet the minimum standards for the brand as set forth therein. The QAR was not intended to determine compliance with federal, state, and local laws and regulations, which was the sole responsibility of the Swagat Defendants.

With respect to the pool and spa, the QAR inspector conducted a visual inspection of the pool and checked to make sure that the water was being regularly tested by reviewing the pool records maintained by defendant LLC but did not conduct any tests of the water himself. The inspector had the authority to shut down the pool if the water was cloudy because of the safety hazard that cloudy water could pose. Defendant Vasant Patel maintained the Comfort Inn's pool and spa on behalf of defendant LLC. Choice Hotels did not provide him with any training for his position. Periodic tests of the hotel's pool and spa conducted by the Illinois Department of Health revealed inappropriate chlorine and pH levels on a number of occasions, as a result of which the pool and spa were shut down each time until the problems were corrected. The water in the pool and spa was never tested by Choice Hotels.

The franchise agreement also included an indemnification clause requiring that the Swagat Defendants indemnify Choice Hotels in the event that Choice Hotels was subject to a claim for loss or damage but was not at fault. The business relationship provision in the franchise agreement stated that defendant LLC was an independent contractor. The Swagat Defendants placed a plaque in the Comfort Inn lobby stating that the hotel was independently owned and operated. Additionally, both Choice Hotels' website and the 2006 Choice Hotels' Worldwide Hotel Directory contained a statement that each hotel was independently owned and operated.

Plaintiffs filed suit against the Swagat Defendants and Choice Hotels, alleging negligence, wrongful death counts, survival act counts, and funeral expense counts (collectively, Duty Counts); res ipsa counts on behalf of each plaintiff (Res Ipsa Counts); and agency counts (Agency Counts) against Choice Hotels. Choice Hotels filed cross-claims against the Swagat Defendants for express indemnity under the indemnification clause in the franchise agreement, implied indemnity, and contribution.

Before the court were the following motions: (i) a motion to strike and bar opinions by plaintiffs' expert (Expert Motion), (ii) Choice Hotels' motions for summary judgment regarding plaintiffs' claims (Choice Hotels Summary Judgment Motions), (iii) the Swagat Defendants' motions for partial summary judgment regarding Choice Hotels' cross-claims (Swagat Partial Summary Judgment Motions), and (iv) the Swagat Defendants' motions for summary judgment regarding plaintiffs' claims (Swagat Summary Judgment Motions).

The court granted the Expert Motion, finding that although plaintiffs' expert was an expert in water safety and water rescue procedures with some experience in maintaining swimming pools, he was not qualified to render an opinion regarding who had a legal duty to maintain the pool and spa properly. He was permitted, however, to offer opinions about how the pool and spa should have been maintained.

With respect to the Choice Hotels Summary Judgment Motions, the court held that there was no evidence that Choice Hotels went beyond the limited activity necessary to maintain the required level of quality associated with the franchised brand. Choice Hotels did not impose additional requirements for controlling the bacteria levels in the pool and spa and never took any action to test the water for quality and, therefore, did not exercise sufficient control to be considered an operator of the Comfort Inn at issue. As a result, the court granted the Choice Hotels Summary Judgment Motions on the Duty Counts. Because Choice Hotels did not exercise exclusive control over the Comfort Inn, the court also granted summary judgment on the Res Ipsa Counts. The court further found that Choice Hotels

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did not hold the Swagat Defendants out as its agents and, in fact, displayed disclaimers in relevant locations stating that the Comfort Inn was independently owned and operated; it therefore also granted summary judgment on the Agency Counts.

With respect to the Swagat Partial Summary Judgment Motions, the court held that the Swagat Defendants were not entitled to summary judgment on the express indemnity cross-claim because an issue of fact remained regarding whether the Swagat Defendants were legally responsible for the bacteria in the pool and spa. The court also held that "Choice Hotels [was] not vicariously liable for the acts of the Swagat Defendants, so there [was] no implied indemnity." As a result, the Swagat Defendants were granted summary judgment on the implied indemnity cross-claim.

Finally, with respect to the Swagat Summary Judgment Motions, the court held that defendants Vijay C. Patel, Desai, and Vaidik International were entitled to summary judgment because as members of a limited liability company, they were not personally liable for the tortious acts of defendant LLC. Moreover, although the individuals had signed the franchise agreement in their personal capacities and were thus liable on the contract, this fact did not thereby make them liable for any other obligation of the LLC. The court held that "Vasant Patel [was] entitled to partial summary judgment to the extent that . . . [p]laintiffs [were] seek[ing] to hold him liable as a member of . . . [defendant] LLC," but that did not protect him from personal liability for his own actions. The court denied the motion for summary judgment on the Res Ipsa Counts because the evidence presented in the form of expert opinions about the causation of plaintiffs' illness was sufficient to establish that an issue of fact existed for summary judgment purposes. The court also held that defendants LLC and Vasant Patel had a duty to plaintiffs as guests of the Comfort Inn, and the expert opinion regarding causation was sufficient for the court to deny the motion for summary judgment as to the Duty Counts.

NOMINATING COMMITTEE ISSUES REPORT

I am pleased to let you know that Edward Wood Dunham, chair of the Nominating Committee, has reported the results of the committee's deliberations.

The nominees are:

Chair Elect–(2-year term)*
Joseph J. Fittante
Larkin Hoffman Daly & Lindgren Ltd.

Governing Committee–(3-year terms)*
Kerry L. Bundy
Faegre & Benson LLP
Kathryn M. Kotel
Carlson Restaurants Worldwide
Eric H. Karp
Witmer, Karp, Warner & Ryan LLP
James A. Goniea
American Driveline Systems, Inc.

Governing Committee–(2-year terms)*
Michael K. Lindsey
Paul, Hastings, Janofsky & Walker LLP
Diane Green-Kelly
Reed Smith

Forum members will vote on these nominations during our annual business meeting on Friday, October 15, 2010, in San Diego, California.

* All terms start in August 2011.

Ronald K. Gardner
Chair
Forum on Franchising

