Franchising (& Distribution) Currents

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ANTITRUST

***Mathew Enter., Inc. v. Chrysler Grp. LLC*, Bus. Franchise Guide (CCH) ¶ 15,956, Case No. 13-cv-04236-BLF, 2017 WL 1408010, ___ F. Supp. 3d ___ (N.D. Cal. Apr. 4, 2017)**

A Chrysler, Jeep, Dodge, and Ram (CJDR) dealer (Stevens Creek) filed a complaint against Chrysler Group LLC in the U.S. District Court for the Northern District of California, asserting several claims, including a claim for price discrimination under the Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13 (RPA or Robinson-Patman). The claims arose out of a dispute regarding a "Volume Growth Program," which provides incentives to dealers if they meet monthly sales objectives.

Stevens Creek was a long-time CJDR dealer in San Jose, California, and the largest such dealer in Northern California. In 2012, a new CJDR dealer (Fremont) entered the marketplace in close proximity to Stevens Creek's dealership. Stevens Creek claimed that Chrysler violated the Robinson-Patman by discriminating against Stevens Creek in the manner in which Chrysler set Stevens Creek's monthly sales objectives to qualify for the incentive payments under the Volume Discount Program. As an existing dealer, Stevens Creek's sales objectives were based on a formula pegged to its prior year's sales plus a projected percentage increase in sales. As a new dealer with no prior sales, Fremont's sales objectives were based on its projected sales. Stevens Creek claimed that its sales objectives should have been reduced because the two dealerships were only fourteen miles apart and Steven Creek's sales objectives were based on a period of time in which there was no competition from Fremont.

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After a seven-day trial on the RPA claim, the jury returned a verdict in favor of Chrysler, finding that Stevens Creek had not proved price discrimination by a preponderance of the evidence. Stevens Creek filed a motion for new trial, challenging a jury instruction and a verdict form question regarding the judicially created "functional availability" doctrine. Under this doctrine, a plaintiff cannot recover damages for more favorable prices paid by a competitor if those same prices "were available to the plaintiff from a practical standpoint and on equal terms with its competitors." Stevens Creek advanced three arguments in its post-trial motion: (1) the jury instruction and verdict form improperly assigned the "full burden of proof" on this issue to Stevens Creek, (2) the jury instruction did not properly set forth the elements of functional availability, and (3) the jury instruction and verdict form were confusing because they "toggl[ed] between concepts of 'functional availability' and 'functional unavailability.'"

As to its first argument, Steven Creek contended that the doctrine of functional availability is an affirmative defense and, therefore, a defendant must prove the favorable prices were functionally available to the plaintiff. Chrysler argued that because functional availability negates two elements of an RPA claim—price discrimination and competitive injury—it is a plaintiff's burden to address this issue. As an initial matter, the court noted there was no binding authority in the Ninth Circuit and the model jury instructions do not address the issue. Given this, the court started its analysis by first addressing the basics regarding affirmative defenses, holding that an affirmative defense "raises new facts and arguments" that defeat a plaintiff's claim, even if the plaintiff establishes all of the elements of such claim; whereas, a defense that simply identifies a "defect in the plaintiff's prima facie case is not an affirmative defense." Relying on a number of decisions from various circuit courts, the court held that because the functional availability doctrine "negates" two of the elements of a price discrimination claim, it was not an affirmative defense.

The court was equally unpersuaded by Stevens Creek's alternative argument that even if functional availability negated an element of its price discrimination claim, the burden would shift to the defendant to prove "the discounts were justified" once a plaintiff established the elements of an RPA claim. As support for this burden-shifting argument, Stevens Creek relied on a Sixth Circuit case involving a motion for summary judgment on a price discrimination claim. The court found this case to be inapposite because the burden-shifting scheme on a motion for summary judgment with respect to a claim or issue as to which the defendant does not bear the burden of proof is of a "different sort" and does not apply to the burden of proof at trial. The court further found, without explanation, that even if the burden should not have been assigned to Stevens Creek, it was harmless error.

The court then turned to Stevens Creek's argument that the jury instruction misstated the elements of functional availability. Stevens Creek contended that the jury instruction was defective because it did not state that the incentives must be available "on an equal basis" and instead only stated that the objectives must have been practically available if Stevens Creek had engaged in commercially reasonable efforts to achieve them. Chrysler argued that it was not necessary to instruct the jury on the issue of evenhandedness because a discount that is practically attainable is functionally available "because a buyer acting in a commercially reasonable manner would earn it," and that even if evenhandedness was required, Stevens Creek had not challenged the evenhandedness of the Volume Discount Program.

Again there was no binding authority on this question. However, the court found that the recently published *ABA Model Jury Instructions*, which state that the functional availability defense "only applies when the lower price was known to and obtainable by most competing purchasers," provided some guidance. Notwithstanding, because the court found this to be persuasive, but not "dispositive," it engaged in a thorough review of a number of cases. Based on this review, the court concluded that functional availability does not have two elements (i.e., "practical attainability" and "evenhandedness"), but rather is a "concept that can be captured in multiple ways," including references to either or both practical availability and evenhandedness. Accordingly, the court was persuaded that the jury instruction was an accurate statement of the law, albeit not as detailed as Stevens Creek wanted. The court also noted that Stevens Creek had failed to explain what needs to be "evenhanded" for the Volume Discount Program to be functionally available and that its real complaint was that its sales objectives were higher than those set for Fremont. However, the court held that evenhandedness does not require that the objectives be equal, but rather that there be objective standards "to guide the dealers in qualifying for the [program] and that the standard for each dealer is similar, or on 'equal terms.' "

Finally, the court turned to Stevens Creek's argument that the jury instruction and verdict form question regarding functional availability were confusing because they referred to both "functional availability" and "functional unavailability." The court first noted that Stevens Creek had waived this argument because it had not originally objected to the instruction and verdict form. The court nonetheless considered Stevens Creek's arguments, but found them to be meritless because the jury had not expressed any confusion, "expressing a negative in an alternative way is unlikely to cause confusion," and other courts had used the identical language in describing the functional availability doctrine.

ARBITRATION

***Charging Bison, LLC v. Interstate Battery Franchising & Dev., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,950, Civil Action No. 3:16-CV-3479-G, 2017 WL 1296454 (N.D. Tex. Apr. 7, 2017)**

The U.S. District Court for the Northern District of Texas denied Charging Bison, LLC's motion to stay an arbitration with its franchisor Interstate Battery Franchising & Development, Inc.

Charging Bison entered into a franchise agreement with Interstate Battery pursuant to which it acquired the rights to operate an Interstate Battery franchise in Cheyenne, Wyoming. The franchise agreement provided that "any claim or controversy between the parties . . . arising out of or related to this Agreement, the relationship between Franchisor and Franchisee, or Franchisee's operation of the franchised business shall be submitted to arbitration" conducted by JAMS. However, the franchise agreement also provided that "any claim or dispute involving the propriety of any termination of this Agreement" was not subject to arbitration.

Several years after entering into the franchise agreement, Charging Bison allegedly discovered that the FDD "contained materially misleading statements, skewed figures, and misrepresentations of the financial strength and revenues" of Interstate Battery's franchisees. The parties disagreed whether Charging Bison, which continued to operate its Interstate Battery business, was entitled to terminate the franchise agreement on the basis of the claimed misrepresentations in the FDD and on other grounds, and whether their dispute was subject to arbitration.

Interstate Battery filed a demand for arbitration with JAMS seeking, among other things, a declaration that there were no grounds for Charging Bison to terminate the franchise agreement. Charging Bison filed objections with JAMS, contending that claims involving the propriety of any termination of the franchise agreement were excluded from the arbitration requirement. Interstate Battery, on the other hand, argued that the carve-out was limited to whether a decision to actually terminate the franchise agreement was proper. JAMS denied Charging Bison's objections and refused to stay the arbitration.

Charging Bison subsequently filed a lawsuit in Texas state court seeking a determination on whether it was entitled to terminate the franchise agreement and to stay the pending JAMS arbitration. Interstate Battery removed the matter to federal court, and the court addressed Charging Bison's motion to stay.

The issue before the court was whether Charging Bison's claim for a declaration that it was entitled to terminate the franchise agreement fell within the exception to arbitration set forth in the agreement. Interstate Battery argued that it did not because the franchise agreement had not been terminated and, therefore, the "propriety of an actual termination [was] not at issue." Interstate Battery further argued that the parties' dispute over whether Charging Bison was fraudulently induced into signing the franchise agreement was covered by the arbitration clause because it arose out of and related to the parties' relationship and agreement.

As an initial matter, the court noted there is a strong public policy favoring arbitration and arbitration was mandatory "on issues as to which the arbitration agreement was signed" under the Federal Arbitration Act. With respect to the gateway issue of whether the parties' dispute was subject to arbitration, the court observed that such determination was for the court unless the parties' agreement "clearly and unmistakably provide otherwise." Relying on JAMS Rule 11(b), which provides that "the arbitrator has the authority to determine . . . arbitrability issues as a preliminary matter," Interstate Battery argued that the parties had delegated the arbitrability issue to JAMS. Notwithstanding the seeming clarity of the JAMS Rule, the court elected to address the arbitrability issue as requested by Charging Bison.

Before addressing the arbitrability issue, the court held that Supreme Court precedent mandates that any doubts concerning the scope of the arbitration clause be "resolved in favor of arbitration." With this backdrop, the court made quick work of the arbitrability issue, finding that the "plain meaning" of the arbitration provision did not "cover anticipatory terminations of the franchise agreement;" therefore, the court denied Charging Bison's motion to stay the JAMS proceeding.

***Doctor's Assocs., Inc. v. Repins*, Bus. Franchise Guide (CCH) ¶ 15,962, Civil Action No. 17-CV-323 (JCH), 2017 WL 1745024 (D. Conn. May 4, 2017)**

This case arose out of a dispute between the franchisor of Subway restaurants, Doctor's Associates Inc. (DAI), and related entities and a former Subway franchisee in Wisconsin (Repins). The U.S. District Court for the District of Connecticut granted DAI's petition to compel arbitration, but denied DAI's motion to permanently enjoin Repins from pursuing its claims in a non-arbitral forum.

Subway Real Estate, LLC (SRE), an affiliate of DAI, filed an action in Wisconsin state court seeking a judgment of eviction against Repins (Wisconsin lawsuit). In the Wisconsin lawsuit, Repins asserted various affirmative defenses and claims, including that DAI was an indispensable party that must be joined in the Wisconsin lawsuit and that SRE had waived the arbitration provision in various agreements among DAI, SRE, and Repins by filing the Wisconsin lawsuit. Repins subsequently advised DAI that it intended to add DAI to the Wisconsin lawsuit. In response, DAI filed a lawsuit in the U.S. District Court for the District of Connecticut seeking to compel arbitration (the first federal lawsuit). Repins then advised that it had not decided whether to join DAI in the Wisconsin lawsuit. Based on this representation, DAI dismissed the first federal lawsuit.

Repins subsequently filed a pleading in the Wisconsin lawsuit identifying witnesses who would testify as to topics involving both SRE and DAI, as well as the damages it was seeking to recover, including $60,000 from the "lost sale" of its business, $300,000–$450,000 in lost future profits, and $155,000 in losses associated with improvements to the leased location. As a result, DAI filed another lawsuit in the U.S. District Court for the District of Connecticut, as well as a petition to compel arbitration and a motion for permanent injunction.

The district court first addressed Repins' argument that the amount in controversy requirement for diversity jurisdiction was not met because:

(1) the amount of rent that it allegedly owed SRE was less than $75,000, (2) it was allegedly on the verge of bankruptcy, and (3) it would "probably not be able to prove much more than $50,000" in damages. The court rejected the first argument because the relevant amount at issue was the damages that Repins was seeking to recover. The court also rejected Repins' second argument, noting there was no "connection" between Repins' potential bankruptcy and the amount Repins was seeking to recover in the Wisconsin lawsuit. As to Repins' third argument, the court expressed concern that Repins was being disingenuous in the Wisconsin lawsuit as to the amount at issue or with the court. The court ultimately found that Repins had failed to provide any support for its claim that it would probably not be able to recover more than $50,000.

The court then turned to DAI's petition to compel arbitration. Repins argued that the arbitration provision was unconscionable and any arbitration should occur in Wisconsin and not the designated arbitral forum (Connecticut). The court acknowledged that these arguments implicated gateway issues of arbitrability, but held that the arbitration provision clearly and unmistakably delegated the questions of arbitrability to the arbitrator. Repins also argued that there were no pending claims against DAI that would be subject to arbitration. The court found that this argument was also for the arbitrator to address, but noted that even though DAI was not currently named as a party in the Wisconsin lawsuit, the counterclaims asserted by Repins against SRE appeared to be covered by the arbitration provision in the franchise agreement. The court likewise declined to address Repins' waiver, laches, and good faith arguments, holding that such arguments were properly decided by the arbitrator.

The court next considered and denied DAI's request that Repins be ordered to pay DAI's fees and costs in compelling arbitration, finding that it was premature. In particular, the initial questions of whether the arbitration provision was enforceable and applicable to the claims being asserted by Repins needed to first be decided by the arbitrator before the court could decide if DAI was entitled to recover its fees and costs.

Finally, the court addressed DAI's request that Repins be permanently enjoined from prosecuting any claims that Repins had asserted or could have asserted in the Wisconsin lawsuit. The court denied DAI's request, finding that DAI had not satisfied the four-factor test for injunctive relief and that it ran afoul of the Anti-Injunction Act, which prohibits a federal court from enjoining a state court proceeding "except as expressly authorized by the Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The court found DAI had failed to establish that the balance of hardship between DAI and Repins warranted "a remedy in equity" and that "the public interest would not be disserviced" by the requested permanent injunction. The court further found that it would be premature to permanently enjoin Repins from pursuing its claims because the arbitrator had not yet addressed whether the arbitration provision was enforceable and whether Repins' claims were subject to arbitration. Lastly, the court distinguished several cases from the Second Circuit in which a party was permanently enjoined from taking certain action in a state court proceeding.

***Stevens v. Jiffy Lube Int'l, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,953, Case No. 16-cv-07175-EMC, 2017 WL 512888, ___ F. Supp. 3d ___ (N.D. Cal. Feb. 8, 2017)**

The U.S. District Court for the Northern District of California declined to vacate an arbitration award stemming from a dispute regarding the termination of the plaintiffs' franchise agreement with Jiffy Lube International, Inc. (JLI).

The franchise agreement was terminated in June 2013, and the plaintiffs filed an action against JLI in California state court on February 26, 2015. JLI removed the case to federal court and filed a petition to compel arbitration. The parties ultimately stipulated to arbitration and the federal lawsuit was dismissed on September 3, 2015. As part of the stipulation, JLI agreed to waive the two-year contractual statute of limitations with respect to the claims asserted in the complaint, but not as to "any other rights regarding limitations," provided the plaintiffs commenced the arbitration within one month of the dismissal of the federal court case.

The plaintiffs submitted a demand for arbitration on September 30, 2015, and a Statement of Claim on October 26, 2015. The plaintiffs subsequently filed an Amended Statement of Claim on February 3, 2016, and a Second Amended Statement of Claim on May 16, 2016, which added a claim that JLI violated the California Franchise Relations Act (CFRA). The arbitrator ultimately ruled in JLI's favor, and the plaintiffs filed a motion to vacate the arbitrator's ruling that the CFRA claim was barred by the applicable statute of limitations.

The essential facts involved the lease for the location of the plaintiffs' franchised business. JLI leased the premises from a third party and, in turn, subleased the premises to the plaintiffs. By its terms, the lease expired on June 18, 2013, several years before the expiration of the franchise agreement. The plaintiffs knew at the time they entered into the franchise agreement that the lease expired before the expiration of the agreement. In January 2013, approximately six months before the end of the lease term, JLI advised the plaintiffs that it would not seek to enter into a new lease for the premises and that the plaintiffs would need to execute a direct lease with the owner if they wanted to continue to operate the franchised business at that location. The plaintiffs entered into discussions with the owner, but were unsuccessful in negotiating a new lease. Shortly after the lease terminated, JLI advised the plaintiffs they were in default of the franchise agreement because they had lost the right of possession and that such default was non-curable. Accordingly, the franchise agreement was terminated effective as of June 30, 2013.

The arbitrator found that JLI violated Section 20020 of the CFRA in terminating the franchise agreement without providing an opportunity to cure. However, the arbitrator also found that such claim was barred by the two-year statute of limitations set forth in the franchise agreement because the claim was asserted for the first time in the Second Amended Statement of Claim filed in May 2016.

In addressing the plaintiffs' motion to vacate, the court considered, without deciding, JLI's claim that the motion was untimely because it was not filed within three months of when the arbitration award was served. Pursuant to Section 12 of the Federal Arbitration Act (FAA), a motion to vacate "must be served . . . within three months after the award is filed or delivered." Here, the arbitrator's award was sent to the parties on September 14, 2016, and the plaintiffs filed their motion to vacate on December 15, 2016. The plaintiffs argued that because the FAA does not specify a method of computing time, Federal Rule of Civil Procedure 6(a) applied, which provides that the day of the event that triggers the period is excluded for purposes of calculating the time. The court noted there was conflicting authority regarding this issue, but declined to decide the matter.

The court then turned to the plaintiffs' contentions that the arbitrator manifestly disregarded the law or that his decision was "completely irrational" because the doctrines of equitable tolling and relationship back applied and, therefore, the CFRA claim was not time-barred. The court disagreed. The court held that even if the plaintiffs were correct that the equitable tolling and relationship back doctrines saved the claim, more than a "mere error in the law or failure on the part of the arbitrator[] to understand and apply the law" was required to overturn the arbitrator's ruling. Instead, the arbitrator must have must been both aware of the law and chosen to "intentionally disregard it." The court found there was no evidence the arbitrator knew or was aware of the law and rejected the plaintiffs' argument that the arbitrator had somehow prevented them from addressing the issue at the arbitration. The court noted that the arbitrator permitted the plaintiffs to add their CFRA claim, but expressly withheld making any ruling on whether it was barred by the statute of limitations. The court further noted that the plaintiffs specifically addressed the statute of limitations issue in their pre-hearing brief and two post-hearing briefs, but did not argue that the statute of limitations was equitably tolled or that the CFRA claim related back to the initial complaint.

***Theo's Pizza, LLC v. Integrity Brands, LLC*, Bus. Franchise Guide (CCH) ¶ 15,967, Civil Action Number: 3:17-cv-0039-MBS, 2017 WL 1684869 (D.S.C. May 3, 2017)**

The U.S. District Court for the District of South Carolina denied a pizza franchisor's motion to dismiss a franchisee's complaint for lack of personal jurisdiction after determining that the parties had not signed a franchise agreement requiring them to arbitrate their disputes.

Integrity Brands, LLC is the Georgia-based franchisor of Uncle Maddio's Pizza Joint franchises. In April 2012, Integrity Brands and Thea and Theo's, LLC (T&T) entered into a market development agreement for the establishment of multiple pizza restaurants. The market development agreement contained a dispute resolution provision requiring arbitration in Georgia. Pursuant to the market development agreement, T&T would enter into a separate franchise agreement prior to opening and operating each pizza restaurant. T&T's owners also established a separate company, Theo's Pizza, LLC, which began operating an Uncle Maddio's Pizza Joint franchise in South Carolina. Theo's did not, however, sign a separate franchise agreement with Integrity Brands for the establishment of the South Carolina restaurant.

In March 2014, Theo's sent an email to Integrity Brands noting that Integrity Brands had broached the topic of the parties signing a franchise agreement on several occasions. In that email, Theo's stated that it could not execute any agreement that, among other things, was one-sided to Integrity Brand's benefit. Theo's attached to the e-mail a copy of a draft amended franchise agreement that eliminated a requirement that the parties arbitrate certain disputes. The parties did not, however, execute the form of amended franchise agreement proffered by Theo's.

Theo's subsequently sued Integrity Brands in South Carolina state court for violation of the state Business Opportunity Sales Act, declaratory judgment and, in the alternative, breach of contract. Integrity Brands removed the case to the district court on the basis of diversity jurisdiction and then moved to dismiss the case for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b). Integrity Brands argued that Theo's claims were directly related to the market development agreement and, as such, were subject to binding arbitration.

Noting that the Fourth Circuit has held that to compel arbitration, a party must demonstrate: (1) the existence of a dispute between parties; (2) a written contract that includes an arbitration provision purporting to cover the dispute; (3) the relationship of the transaction to interstate or foreign commerce pursuant to the underlying agreement; and (4) the failure, neglect, or refusal of the other party to arbitrate the dispute, the court stated that neither party had provided evidence that the other had accepted either the original or proposed amended franchise agreement. Dismissing Integrity Brands' argument that it would be impossible for Theo's to operate a restaurant without the permission of Integrity Brands and T&T, the court held that the record was bereft of a signed contract or any other agreement by Theo's to submit the dispute to arbitration.

Accordingly, noting that Theo's had continued to operate the restaurant, the court declined to impute an agreement to Theo's and denied Integrity Brands' motion to dismiss for lack of personal jurisdiction.

CHOICE OF LAW

***Noble Roman's, Inc. v. B&MP*, LLC, Bus. Franchise Guide (CCH) ¶ 15,955, Case No. 15 CV 9446, 2017 WL 1163866 (N.D. Ill. Mar. 29, 2017)**

In a case involving contractual breach and fraud claims, the U.S. District Court for the Northern District of Illinois denied cross-motions for summary judgment filed by a pizza and Italian-style sub sandwich franchisor and its franchisee so that the parties could address the threshold issue of whether a company that subsequently operated the franchised businesses must be joined as a necessary party to the case.

In March 2010, Noble Roman's, Inc. and B&MP, LLC entered into two franchise agreements granting B&MP the right to operate a Noble Roman's pizza restaurant and an Italian-style sub sandwich shop in a convenience store and gas station located in Bloomingdale, Illinois. The franchise agreements required B&MP to comply with all of Noble Roman's standards and specifications relating to the operation of the franchised businesses and to use and sell only those designated products and ingredients that conformed to Noble Roman's standards and specifications. The franchise agreements stated that they were to be interpreted and construed under Indiana law.

In August 2010, Leslie and Bradley Perdriau, B&MP's owners, established a company called Army Trail Shell Deli, Inc. In September 2010, the gas station opened and began operating the Noble Roman's restaurants. The Perdriaus claimed that Army Trail assumed B&MP's obligations as a franchisee and became B&MP's successor in interest to the station as of January 2011. In April 2012, B&MP was involuntarily dissolved by the Illinois Secretary of State.

In 2014, Noble Roman's audited the restaurants and discovered, among other things, that the station had failed to purchase cheese and pepperoni specified by Noble Roman's. Noble Roman's also discovered that the franchisee had underreported its gross sales and underpaid royalties. The franchisee prematurely closed its Noble Roman's restaurants in May 2014.

Noble Roman's sued B&MP and the Perdriaus, alleging four claims: (1) breach of contract for the sale of nonconforming pizzas and subs and for underreporting gross sales; (2) violation of the Lanham Act for B&MP's sale and distribution of unapproved pizza products and subs using Noble Roman's marks without Noble Roman's authorization or consent, likely causing confusion or deceiving customers; (3) deception in violation of Indiana law for B&MP's misapplication of property in a manner that B&MP knew was unlawful; and (4) injunctive relief against B&MP and the Perdriaus to prevent them from violating Noble Roman's trademark rights and the franchise agreements' post-termination covenants. Although the matter was originally filed in the U.S. District Court for the Southern District of Indiana, it was transferred under the venue provisions of 28 U.S.C. § 1404.

Noble Roman's moved for summary judgment on three issues, seeking rulings that (1) Noble Roman's method of audit was permitted by the franchise agreements, IRS recommendations, and industry practice; (2) once the amount of an underpayment is determined, it is due and payable immediately by the underreporting party; and (3) B&MP breached the franchise agreements when it terminated them early and ceased to report sales and pay royalties after January 2014, entitling Noble Roman's to recover future fees and other amounts. B&MP and the Perdriaus cross-moved for summary judgment on each of Noble Roman's claims. The defendants claimed, among other things, that they were entitled to summary judgment because Illinois law, not Indiana law, governed the franchise agreements, and there was substantial evidence that B&MP assigned the franchise agreements to Army Trail and that Noble Roman's accepted the assignment.

The court determined that Indiana's choice of law rules applied due to long-standing precedent that when a case is transferred from another district, the court applies the choice of law rules that the court in the transferring state would apply. Here, because the case was transferred from Indiana, Indiana's choice of law rules applied to Noble Roman's state law claims. The court observed that Indiana choice of law provisions generally favor contractual stipulations regarding governing law. The parties' underlying franchise agreements provided that they were to be interpreted and construed under Indiana law. Accordingly, the court applied Indiana law to the breach of contract claims. It rejected the defendants' argument that the choice of law provision in the franchise agreements was not controlling due to language in the Illinois addendum to the disclosure document. The court observed that the Illinois addendum did not contain any language evidencing an intent that Illinois law govern all of the parties' claims under the franchise agreements. Instead, it simply preserved additional rights and remedies that an Illinois franchisee might have under Illinois law.

Similarly, the court rejected the defendants' argument that Noble Roman's deception claim should be dismissed because Illinois law governed. Instead, it questioned the appropriateness of such a claim where the complaint was bereft of alleged facts to support it.

Finally, the court noted that the parties had glossed over the threshold matter of whether Army Trail was a necessary party to the case. The defendants argued that Army Trail assumed all of B&MP's rights and obligations in 2011 and, therefore, was the only entity that could be responsible for B&MP's debts and obligations. Noble Roman's claimed that Army Trail was simply the business name that B&MP had been using since the parties began their contractual relationship and did not name Army Trail as a defendant or identify it as a d/b/a in the underlying complaint. Noting that the matter may be an appropriate case to pierce the corporate veil between B&MP and Army Trail, the court denied both motions for summary judgment without prejudice to allow the parties to brief the issue of whether Army Trail was a necessary party to the case.

CONTRACT ISSUES

Ford Motor Credit Co. LLC v. Orton-Bruce, Bus. Franchise Guide (CCH) ¶ 15,946, No. 14-CV-5382 (KMK), 2017 WL 1093906 (S.D.N.Y. Mar. 22, 2017)

The U.S. District Court for the Southern District of New York granted in part and denied in part a summary judgment motion filed by plaintiff Ford Motor Credit Co. LLC on its claims for breach of contract and fraudulent transfer, and denied a summary judgment motion filed by defendants Anthony Orton-Bruce, Sr., his ex-wife Victoria Orton-Bruce, and his current wife Renee Orton-Bruce. The court held that Ford was entitled to summary judgment on its breach of contract claim, but that genuine issues of triable fact remained on Ford's fraudulent transfer claim.

Orton-Bruce, Sr. owned Monroe Motors, Inc., a Ford motor vehicle dealership. In September 1990, Monroe and Ford signed a wholesale financing and security agreement pursuant to which Monroe financed the purchase of new and used vehicles through advances and agreed to repay the advances to Ford as vehicles were sold. Orton-Bruce, Sr. signed a continuing guaranty with Ford. The continuing guaranty provided that Orton-Bruce, Sr. jointly, severally, and unconditionally guaranteed to Ford that Monroe would fully, promptly, and faithfully perform, pay, and discharge all of Monroe's present and future obligations to Ford. It also stated that Orton-Bruce, Sr. would pay on demand all sums due and to become due to Ford from Monroe and all of Ford's losses, costs, attorney fees, or expenses. The terms of the continuing guaranty provided that it could only be terminated by notice sent to Ford. Orton-Bruce, Sr.'s then wife, Victoria Orton-Bruce, signed an identical form of continuing guaranty.

In 2006, Orton-Bruce, Sr. sold his interest in Monroe to his son (Orton-Bruce, Jr.) and Orton-Bruce, Jr. signed a continuing guaranty with Ford. Neither Orton-Bruce, Sr. nor Victoria Orton-Bruce sent a notice to Ford terminating the continuing guaranties they previously signed. Subsequently, Ford discovered that Monroe breached the wholesale agreement by selling forty-five vehicles without repaying Ford. Ford requested payment from Orton-Bruce, Jr., but two attempted electronic transfer payments were returned for insufficient funds. When asked by a Ford representative whether he could pay the amount owed by Monroe, Orton-Bruce, Jr. replied that he could not.

Ford subsequently sent notice and demand letters to Orton-Bruce, Jr., Orton-Bruce, Sr., and Victoria Orton-Bruce regarding Monroe's breach of the wholesale agreement, seeking payment in the amount of $889,885.09. Orton-Bruce responded by admitting to Ford that he understood that by virtue of the sale of Monroe to his son, he was not liable for any defaults by Monroe and the continuing guaranty was no longer Orton-Bruce, Sr.'s obligation. Orton-Bruce, Sr. also claimed that he did not discuss Monroe's financial issues with his son after the sale of the dealership. Several months later, Orton-Bruce, Sr. transferred to his new wife, Renee Orton-Bruce, his interest in a home they had purchased together four years earlier for $2.1 million. The transfer price was $1.00.

Ford filed a complaint alleging breach of contract by the defendants and fraudulent transfer by Orton-Bruce, Sr. and Renee Orton-Bruce. Both parties moved for summary judgment. The parties did not dispute the facts that: (1) there was an existing contract between Ford and Monroe; (2) Monroe breached the contract by failing to pay amounts owed to Ford pursuant to the wholesale agreement; and (3) Ford was damaged as a result of the breach. The court had to determine whether the continuing guaranties signed by Orton-Bruce, Sr. and Victoria Orton-Bruce survived the sale of Monroe to Orton-Bruce, Jr. and, if so, whether the defendants breached the continuing guaranties.

The court rejected the defendants' argument that the change in ownership of Monroe terminated the continuing guaranties and found Orton-Bruce, Sr. and Victoria Orton-Bruce liable to Ford for Monroe's default. Citing existing precedent, the court observed that: (1) a guaranty is a separate, independent contract between the guarantor and the creditor; and (2) a guaranty is collateral to the contractual obligation between the creditor and the principal debtor. The court noted that a guaranty is not automatically terminated by a change in the parties' relationship. Where, as here, the continuing guaranty had language of a "continuing obligation," the guaranty was enforceable. The court considered the various circumstances through which changes in the structure or formation of the principal debtor may release the guarantor from his guaranty obligations. Under New York common law, the inquiry is whether the changes in the entity whose debts or responsibilities are guaranteed have the effect of creating a principal with a new identity whose debts the guarantor never intended to guarantee. Factors to consider in determining whether the principal debtor has survived are changes in the business name, form, composition, management, ownership, or involvement of the guarantor in the changes to the business. The court determined that even though Monroe's ownership changed following the sale of the dealership from Orton-Bruce, Sr. to Orton-Bruce, Jr., the business name did not change and Orton-Bruce, Sr. participated in the changes. The court noted an admission by the defendants that Orton-Bruce, Sr. did consulting work for Monroe after the sale and until 2007.

The court found persuasive a 1995 case involving Ford and another guarantor who had signed a guaranty with an identical termination provision. In that case, Ford had obtained a judgment against the guarantor twelve years after the parties executed the original guaranty. Here, the court observed that the defendants could have simply served written termination notice upon Ford pursuant to the terms of the continuing guaranties to extinguish their obligations, but failed to do so. It also rejected the defendants' argument that the divorce decree between Orton-Bruce, Sr. and Victoria Orton-Bruce providing that Victoria was fully divested of any ownership in Monroe could affect the guaranty signed with Ford.

Ford also sought to set aside the transfer of the home between Orton-Bruce, Sr. and Renee Orton-Bruce as a fraudulent transfer. The defendants argued that the transfer was made for estate planning purposes and that it was done before Orton-Bruce, Sr. discovered he may be responsible for Monroe's debt to Ford. Citing precedent under New York law that a court may consider certain "badges of fraud" where direct evidence of fraud is not readily apparent, the court observed that the timing of the transfer of property between Orton-Bruce, Sr. and Renee Orton-Bruce was suspicious. However, because the defendants argued that Orton-Bruce, Sr. always considered the continuing guaranty to be terminated as a result of the sale of Monroe and Ford failed to provide evidence of Orton-Bruce, Sr.'s financial condition before and after the property transfer, there remained genuine issues of material fact to preclude summary judgment on the fraudulent claim.

***Regency Midwest Ventures Ltd. P'ship v. Best W. Int'l, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,942, CIV-16-02491-PHX-MHB, 2017 WL 992357 (D. Ariz. Mar. 13, 2017)**

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

DAMAGES

***Derma Pen, LLC v. 4EverYoung Ltd.*, Bus. Franchise Guide (CCH) ¶ 15,983, Case No. 2:13-cv-00729-DN-EJF, 2017 WL 2258362 (D. Utah May 22, 2017)**

In this case, the U.S. District Court for the District of Utah addressed a series of motions at the conclusion of a long-running and fractious dispute between Derma Pen, LLC and related parties (Derma Pen parties), on the one hand, and 4EverYoung Limited and related parties (4EverYoung parties), on the other hand. The court granted the Derma Pen parties' motions, imposed a sweeping permanent injunction, and awarded approximately $11.9 million in damages and almost $3.7 million in attorney fees and costs to the Derma Pen parties.

Derma Pen was a provider of FDA registered micro-needling and skin treatment products and systems (Derma Pen products). Derma Pen had common law rights to the Derma Pen name and had obtained a federal registration for it and other trademarks (Derma Pen marks). Derma Pen was also the owner of copyrights in certain material displayed on its website (Derma Pen copyrighted content). Derma Pen ultimately failed and the Derma Pen marks and the Derma Pen domain name were sold to one of Derma Pen's creditors.

In 2011, the principals of Derma Pen and 4EverYoung entered into discussions regarding the sale of a micro-needling device and related disposable tips in the United States. During the course of these discussions, defendant Stene Marshall, the then-owner of 4EverYoung, represented that 4EverYoung had the worldwide rights to distribute the micro-needling device and related tips and could grant Derma Pen the right to sell such products in the United States. Marshall also represented that these devices were protected by worldwide patents, although there was only one patent and it was effective only in South Korea. Based on these representations, Derma Pen entered into a distribution agreement with 4EverYoung, pursuant to which Derma Pen had the exclusive right to sell the Derma Pen products and use the Derma Pen marks in the United States and 4EverYoung had the right to use the trademark in the rest of the world. The distribution agreement also provided 4EverYoung with a right of first refusal to purchase Derma Pen's trademark rights in the event the agreement was terminated.

Derma Pen ultimately terminated the agreement and filed suit against the 4EverYoung parties asserting numerous claims, including claims arising under the Lanham Act, the Copyright Act, and common law. 4EverYoung and one of the other 4EverYoung parties filed counterclaims against the Derma Pen parties seeking specific performance of the contractual right to acquire the Derma Pen marks. Prior to the motions that were the subject of this decision, Derma Pen filed a motion for preliminary injunction, which was denied and then appealed to the Tenth Circuit, and 4EverYoung filed a motion for preliminary injunction and several motions for partial summary judgment, which were granted in at least part.

The motions before the court were the Derma Pen parties' motions (1) to strike the 4EverYoung parties' answer, for entry of default, and for a default judgment; (2) for entry of findings of fact and conclusions of law; (3) for terminating sanctions; (4) for an award of damages; and (5) for attorney fees and costs. The court conducted an evidentiary hearing and issued its finding of fact and conclusions of law.

The court found that 4EverYoung and other 4EverYoung parties wrongfully used the Derma Pen marks and domain name in the United States in connection with the sale of micro-needling devices and accessories for at least eighteen months. The court also found that such use was willful and that the defendants intended to improperly benefit from Derma Pen's reputation and goodwill in the Derma Pen marks because the 4EverYoung parties had: (1) falsely asserted that such use was authorized by the distribution agreement; (2) hired former employees of Derma Pen; (3) stolen Derma Pen's confidential customer list and pricing information; (4) used Derma Pen-branded signage and marketing materials at trade shows; and (5) expressed their intent to "white ant" Derma Pen, which is Australian slang for destroying a company from within. The court additionally concluded that the defendants had engaged in false advertising related to their unauthorized use of the Derma Pen marks by stating or implying that their micro-needling products had been approved by the FDA and in other respects. The court further held that the 4EverYoung parties knowingly, willfully, or recklessly used unauthorized reproductions of the Derma Pen copyrighted content or substantially similar content on at least one website.

The court also found that the 4EverYoung parties had willfully or maliciously published false statements about Derma Pen, including that Derma Pen did not have the right to distribute micro-needling products bearing the Derma Pen marks, the Derma Pen products were inferior or unsafe, Derma Pen's principals were not knowledgeable about micro-needling devices and procedures, and Derma Pen would run out of its products and be unable to service its customers.

The court additionally made a series of findings with respect to Marshall's conduct in Australia, which had resulted in the Australia Securities and Investments Commission (ASIC) prohibiting him from managing corporations in Australia. The findings, which were based on a report issued by ASIC, included that Marshall had "extensive involvement" with eight companies that failed and owed significant amounts to creditors, that these companies owed back taxes in excess of $600,000, and that Marshall had engaged in "phoenix" activity by transferring the ongoing business of a failing company to a new company and leaving the failed company with no assets to pay creditors.

The court also addressed the 4EverYoung parties' counterclaims for specific performance of 4EverYoung's purported right to acquire the Derma Pen marks, finding that defendants had failed to prosecute their claims. The court recounted at length the defendants' attorney-client relationships with at least seven separate law firms and their repeated failure to comply with the court's orders that they retain counsel.

Finally, the court issued findings with respect to Derma Pen parties' asserted damages. In particular, the court found that Derma Pen had a recurring revenue business model and low customer attrition rate, but that Derma Pen's customer attrition rate increased, sales dropped, and margins compressed after the defendants commenced their wrongful activities. The court found that such changes were "directly attributable" to the defendants' actions. The court also found that the erosion of Derma Pen's sales, customer base, and margins, coupled with the fees and costs of the litigation, ultimately resulted in Derma Pen's failure.

The court then turned to its conclusions of law. The court struck the defendants' answers to Derma Pen's operative complaint and then deemed the allegations in the complaint admitted and dismissed the 4EverYoung parties' counterclaims. The court also held that the 4EverYoung parties were alter egos of each other.

The court awarded Derma Pen lost profits of approximately $7.3 million based on the 4EverYoung parties' deceptive trade practices, fraudulent representations, disruption of Derma Pen's ongoing and prospective business relationships, defamation, and disparagement. The court chose to award statutory damages on the trademark infringement (counterfeit) claims because the amount of actual damages was uncertain. The court noted that statutory damages serve to both compensate the aggrieved party and punish the infringing party and that, in determining the amount to award, courts typically consider the willfulness of the infringement, the defendants' efforts to mislead and conceal the infringement, the infringing party's "defiance of attempts at deterrence," the scale of the counterfeiting operations, and the amount that would prevent future infringement. Without explanation, the court awarded a total of $4 million in statutory damages—$2 million each for the counterfeiting of the micro-needling devices and the counterfeiting of the related tips. Again without explanation, the court also awarded $600,000 in statutory damages for the defendants' knowing and willful use of the Derma Pen copyrighted content.

The court awarded the Derma Pen parties attorney fees and costs of almost $3.7 million. The award was based on a combination of the attorney fees clause in the distribution agreement, the 4EverYoung parties having "acted in bad faith, vexatiously, wantonly, and for oppressive reasons," the statutory provisions of the Lanham and Copyright Acts, and the court's inherent power.

Finally, the court also issued a broad permanent injunction, which: (1) enjoined the 4EverYoung parties from using the Derma Pen marks and trade name in connection with the sale, advertising, and promotion of any good or service; (2) enjoined the defendants from stating or implying they are affiliated or otherwise associated with Derma Pen or any subsequent owner of the Derma Pen marks, ever had any rights in the Derma Pen marks, and making any false or deceptive statements regarding current or former officers, etc. of the Derma Pen parties; (3) enjoined the defendants from committing any defamation, disparagement, or unfair business practices directed toward obtaining Derma Pen's business, or diminishing the goodwill or reputation of Derma Pen or any subsequent owner of the Derma Pen marks; (4) required the defendants to deliver to Derma Pen or destroy any products or materials bearing the Derma Pen marks or the Derma Pen copyrighted content; (5) required the defendants to deliver to Derma Pen a list and contact information of all parties to whom they had sold or offered to sell products bearing the Derma Pen marks; (6) prohibited the defendants from selling any micro-needling device or tips to any party to whom they had previously sold devices bearing the Derma Pen marks; and (7) required the defendants to deliver to Derma Pen or destroy all materials bearing any false or impliedly false statement regarding the defendants' micro-needling devices, or Derma Pen and its current/former investors, officers, etc. The court also required the defendants to file a report under oath within thirty days of the order setting forth in detail the manner in which they had complied with the injunction.

FRAUD

***Ford Motor Credit Co. LLC v. Orton-Bruce*, Bus. Franchise Guide (CCH) ¶ 15,946, No. 14-CV-5382 (KMK), 2017 WL 1093906 (S.D.N.Y. Mar. 22, 2017)**

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

INJUNCTIVE RELIEF

***Derma Pen, LLC v. 4EverYoung Ltd.*, Bus. Franchise Guide (CCH) ¶ 15,983, Case No. 2:13-cv-00729-DN-EJF, 2017 WL 2258362 (D. Utah May 22, 2017)**

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

***Doctor's Assocs., Inc. v. Repins*, Bus. Franchise Guide (CCH) ¶ 15,962, Civil Action No. 17-CV-323 (JCH), 2017 WL 1745024 (D. Conn. May 4, 2017)**

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

***Fres-Co Systems USA, Inc. v. Hawkins*, Bus. Franchise Guide (CCH) ¶ 15,985, No. 16-3591, 2017 WL 2376568 (3d Cir. June 1, 2017)**

In a dispute between two companies over a sales representative's non-compete agreement, the Third Circuit remanded the matter to the district court to properly analyze all of the four factors required to grant injunctive relief to the former employer.

Fres-co Systems USA, Inc. hired Kevin Hawkins as a sales representative to sell Fres-co flexible packing services, including coffee packaging, for different businesses and products. As a condition of employment with Fres-co, Hawkins signed Fres-co's confidentiality and non-competition agreement, which stated that Hawkins could not compete with Fres-co in any line of business; accept employment with or be employed by a competitor of Fres-co in any line of business; or solicit business from, contract with, be employed by, or otherwise do business with any Fres-co customer during the term of his employment with Fres-co and for one year after the termination of his employment. The non-compete agreement defined a "line of business" as any business involved in the manufacture, development, or sale of flexible packing services, including those companies involved in the sale of coffee, pet food, and agricultural chemicals.

During his tenure with Fres-co, Hawkins serviced the company's West Coast coffee packaging customers and served as Fres-co's primary sales representative for those customers in Washington, California, Hawaii, and Texas. His twelve largest accounts generated over $1 million in annual revenue for Fres-co.

Sixteen years later, Hawkins informed Fres-co that he was leaving the company and had accepted a job with a Fres-co competitor, Transcontinental Ultra Flex, Inc. Hawkins told his sales director that he would likely be servicing Transcontinental's coffee packaging customers. When the sales director reminded Hawkins that he had signed a non-compete agreement, Hawkins declined to confirm he would not solicit Fres-co customers with whom he had worked. Hawkins also did not commit to honoring his other obligations under the non-compete agreement.

Fres-co sued Hawkins for breach of contract, misappropriation of trade secrets under state law and the federal Defend Trade Secrets Act, and interference with existing and prospective contractual relationships. Fres-co subsequently amended its complaint to name Transcontinental as a defendant and to seek injunctive relief and damages. Fres-co later moved for a temporary restraining order and/or preliminary injunction to: (1) require Hawkins to return any Fres-co records in his control or possession; (2) enjoin Hawkins from using or disclosing Fres-co's proprietary business information and/or trade secrets; and (3) prevent Hawkins from communicating with any of the top twelve coffee packaging account customers that Hawkins had serviced at Fres-co. As part of its request for the temporary restraining order, Fres-co attached an affidavit from the sales director. Hawkins and Transcontinental opposed Fres-co's motion and included an affidavit from Hawkins in which he denied being aware of any Fres-co trade secrets. Hawkins also represented in his affidavit that he would not disclose or otherwise use any confidential information he learned while at Fres-co.

The district court granted the preliminary injunction after holding oral arguments on the matter, but not taking any additional evidence. Pursuant to the court's order, Hawkins was not prevented from working at Transcontinental; however, he was required to return any Fres-co materials in his possession; prevented from using or disclosing his former employer's proprietary information and trade secrets; and prohibited from soliciting, contacting, or communicating with the top twelve Fres-co coffee packaging accounts. Hawkins and Transcontinental appealed to the Third Circuit.

Under federal law, a court may issue a preliminary injunction if: (1) the plaintiff shows that it is likely to succeed on the merits; (2) the plaintiff shows that it is likely to suffer irreparable harm without the injunction; (3) the balance of equities do not disfavor granting the injunction; and (4) public interest concerns do not outweigh the interests advanced by the issuing the injunction. The Third Circuit rejected the defendants' challenge of the district court's finding of irreparable harm. It found that the district court did not abuse its discretion in finding irreparable harm because there was evidence of substantial overlap between Hawkins' work for Fres-co and the work he intended to do for Transcontinental given that it was the "same role, same industry, and same geographic region." Accordingly, the Third Circuit found that the district court was within its discretion to conclude that Hawkins would likely use the confidential knowledge he gained at Fres-co in his new role at Transcontinental.

The Third Circuit determined, however, that remand was appropriate because the district court did not mention Fres-co's causes of action or analyze the elements of any of them to determine whether Fres-co was likely to succeed on the merits of its claims. It observed that a finding that Fres-co was likely to succeed on the merits required, among other things, an analysis of the information to which Hawkins had access to determine whether they were trade secrets under statutory law and an analysis of whether the non-compete agreement was reasonably necessary for Fres-co's protection and also reasonably limited in duration and geographic scope. The Third Circuit noted that even if the district court had engaged in this analysis to find that Fres-co was likely to succeed on the merits, remand would still be appropriate because the district court had failed to address the final two preliminary injunction factors. Because the district court did not analyze the last two factors, it could not determine whether the district court reasonably exercised its discretion in granting injunctive relief.

***Stockade Cos., LLC v. Kelly Rest. Grp., LLC*, Bus. Franchise Guide (CCH) ¶ 15,978, 1:17-CV-143-RP, 2017 WL 2375496 (W.D. Tex. May 31, 2017)**

Plaintiff Stockade Companies, LLC owns and licenses the trademarks for Sirloin Stockade, Coyote Canyon, and Montana Mike's restaurants. Stockade entered into fifteen franchise agreements with defendant Kelly Restaurant Group (KRG). KRG failed to make the required royalty payments and Stockade sent a notice of default in January 2017. KRG failed to cure the default and Stockade sent a notice of termination, advising KRG to immediately cease using Stockade's proprietary marks. Nevertheless, KRG continued to operate multiple restaurants using the Sirloin Stockade, Coyote Canyon, and Montana Mike's trademarks. As a result, Stockade filed a lawsuit against KRG in the U.S. District Court for the Western District of Texas, as well as a motion to enjoin KRG from infringing on Stockade's marks, violating the non-compete provisions in the franchise agreements, and using or transferring Stockade's confidential information. The motion was granted in part and denied in part.

The court initially noted that a preliminary injunction is an extraordinary remedy and granting such relief should be the exception rather than the rule. In order to obtain a preliminary injunction, the moving party must establish that it is likely to succeed on the merits, it is likely to suffer irreparable harm in the absence of injunctive relief, the balance of equities tips in its favor, and an injunction is in the public interest.

The court granted an injunction prohibiting KRG from infringing on Stockade's marks. The court held it was clear that KRG was using the marks without Stockade's permission and, when a likelihood of confusion exists, the plaintiff's lack of control over the quality of the defendant's goods or services constitutes an immediate irreparable injury. Although KRG argued that it would suffer significant harm because it would have to close its restaurants, breach its lease agreements and contracts with third-party vendors, attempt to pay rent without any income, and lay off more than 500 employees, the court found that these alleged harms would not result from de-branding, but would instead result from enforcement of the non-compete, which was a separate issue. Finally, the court found that it would be in the public interest to enjoin KRG from using Stockade's marks because trademark law exists to protect the consuming public from confusion.

The non-compete at issue provided: "Franchisee shall not have any interest . . . in . . . any concept which is similar to any franchise concept owned, operated, licensed, or franchised by Franchisor ('similar concepts') . . . within a radius of 50 miles from any franchisor-owned or affiliate-owned restaurant or any franchise concept owned, operated, licensed, or franchised by Franchisor, wherever situated and operated by whomever, then open or under construction or under lease for purchase commitment . . . for a period of three years following the expiration or termination of the agreement." Stockade argued that because KRG continued to operate the franchised restaurants, it was likely to succeed on its claims that KRG was violating the post-termination non-compete provisions. At the hearing, Stockade suggested that KRG might not be able to operate any restaurant in the cities in which its former franchised locations were located. The court held, however, that after KRG de-branded the restaurants, the restaurants would not fall within a 50-mile radius of any other Stockade-owned or affiliate-owned restaurant currently in operation and, therefore, permitted KRG to operate restaurants at the former franchised locations as long as they did not use Stockade's marks.

Stockade also sought to enjoin KRG from using its confidential information, arguing that because KRG was continuing to operate its restaurants under Stockade's marks, it was impermissibly using Stockade's confidential information. The court concluded, however, that because KRG would be enjoined from operating any Stockade-branded restaurant, there was no evidence suggesting KRG would use Stockade's confidential information. Therefore, the court implied that access to confidential information does not presume unlawful use subsequent to termination of a franchise.

JURISDICTION

Pestmaster Franchise Network, Inc. v. Mata, Bus. Franchise Guide (CCH) ¶ 15,965, Case No. 16-cv-07268-EMC, 2017 WL 1956927 (N.D. Cal. May 11, 2017)

The U.S. District Court for the Northern District of California granted defendant AAAC Support Services, LLC's motion to dismiss plaintiff Pestmaster Franchise Network, Inc.'s claims against AAAC for lack of personal jurisdiction and denied Pestmaster's request for jurisdictional discovery.

Pestmaster is a franchisor of pest control businesses. Defendants Jinny and Gabe Mata entered into two franchise agreements with Pestmaster pursuant to which they were granted the right to operate Pestmaster franchises in Texas. The franchise agreements included a California forum selection clause and provided Pestmaster with a right first refusal in the event the Matas sought to sell their franchises.

In 2016, the Matas sold their businesses to defendants Josie and Brian Moss although Pestmaster had advised the Matas that it was interested in exercising its right of first refusal and requested a copy of the written purchase offer. The Mosses formed a new entity, Moss Pest Control, LLC, in connection with the formerly franchised Pestmaster businesses. According to Pestmaster, AAAC is owned by the Mosses and is in the business of franchising pest and animal control businesses.

Pestmaster filed a complaint in federal court asserting numerous claims against the defendants, including breach of contract, conspiracy, fraud, unfair competition, and misuse of trade secrets. In response, AAAC filed a Federal Rule of Civil Procedure Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction. Pestmaster argued that AAAC was subject to both specific and general jurisdiction in California because it has three California-based franchisees and consented to jurisdiction in California because it was bound as a non-signatory to the forum selection clause in the franchise agreements between the Matas and Pestmaster.

The court started by addressing the basic jurisdictional ground rules. First, personal jurisdiction over a non-resident is appropriate only if it is consistent with the state's long-arm statute and fundamental principles of due process. Second, because California long-arm statute is "coextensive" with federal due process, the jurisdictional analyses under both and state and federal law are the same. The court then turned to Pestmaster's jurisdictional arguments.

The court reiterated that general jurisdiction is appropriate only when a defendant's contacts with the forum state are so "continuous and systematic" that the defendant would essentially be "at home" in the state. Citing to the Supreme Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), the court noted that the "paradigm" for general jurisdiction is a corporation's place of incorporation and principal place of business and that only in exceptional cases will there be general jurisdiction elsewhere. Pestmaster argued that AAAC was "at home" in California because it had three franchisees in the state and was actively recruiting new franchisees in California. The court disagreed, finding that AAAC's contacts with California were much less than those that the Supreme Court found to be insufficient in *Daimler* and were "minor" when compared to AAAC's contacts elsewhere. The court also found that there was no indication California was especially significant to AAAC or that AAAC targeted California consumers or solicited prospective franchisees in California. In all events, the court found that exercising general jurisdiction would be contrary to the Supreme Court's guidance in *Daimler* that a "corporation that operates in many places can scarcely be deemed to be at home in all of them."

The court then considered Pestmaster's arguments regarding specific jurisdiction. In the Ninth Circuit, there is a three-prong test for specific personal jurisdiction. First, the defendant must have "purposefully" directed its activities to the forum to such a degree that "it should reasonably anticipate being haled into court there;" second, the claims must arise of out of or relate to the defendant's activities in the forum such that the plaintiff would not have suffered an injury "but for" those activities; and third, exercising jurisdiction must "comport with fair play and substantial justice." The court found that Pestmaster had failed to prove that it would not have suffered harm "but for" AAAC's contacts with California because (1) the Asset Agreement between the Matas and Moss Pest Control was executed in Texas and involved the sale and alleged misuse of assets in Texas, (2) Pestmaster's claimed loss of market share was in Texas, and (3) any harm to Pestmaster's California offices and franchise system was "only remotely and indirectly" related to AAAC's conduct that formed the basis for Pestmaster's claims.

Pestmaster's argument that AAAC consented to personal jurisdiction because it was bound as a non-signatory to the forum selection clause in the franchise agreements between Pestmaster and the Matas fared no better. The court first discussed two Ninth Circuit decisions in which non-signatories to a contract were bound to a forum selection clause—*Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 50 (9th Cir. 1988), and *Holland America Line Inc. v. Wartsila North America, Inc.*, 485 F.3d 450 (9th Cir. 2007). The court held that in those cases the non-signatories had "consented" to the forum selection clause because they "were intimately involved in the ratification or execution of the contract containing the forum selection clause." The court contrasted such circumstances with the facts here in which there was no allegation that AAAC was involved in the formation or execution of the franchise agreements and no evidence of a pre-existing relationship between AAAC and either of the parties to the franchise agreements. The court further distinguished *Manetti-Farrow* and *Holland America* on the basis that in those cases, the non-signatory defendants sought to enforce the forum selection clause against a signatory plaintiff. Thus, unlike AAAC's argument, there was no issue that the defendant was "unfairly" being subjected to jurisdiction without "fair warning" that its activities may result in jurisdiction.

Finally, the court addressed Pestmaster's request to seek jurisdictional discovery. The court noted that such discovery should generally be permitted, but that it is within a court's discretion to deny discovery "when it is clear that further discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction." The court concluded that because there were no jurisdictional facts in dispute, the request for jurisdictional discovery was properly denied.

***TeamLogic, Inc. v. Meredith Grp. IT, LLC*, Bus. Franchise Guide (CCH) ¶ 15,972, Civil Action No. 3:16-CV-2542-BH, 2017 WL 1837114 (N.D. Tex. May 8, 2017)**

TeamLogic Inc., a franchisor of IT services, sued a former franchisee, Meredith Group IT, LLC (MIT), its owner Karen Meredith, her son Matt Meredith, and a former employee of the franchisee, John Miller, for alleged misappropriation of trade secrets, conversion, trademark infringement, conspiracy, interference with business relationships, and breach of contract, and sought injunctive relief as well as damages and attorney fees.

MIT is a Texas limited liability company with its principal place of business in Texas. TeamLogic is a California corporation with its principal place of business in California. In July 2006, TeamLogic entered into a ten-year franchise agreement with MIT. Sometime in 2015, MIT decided not to renew the franchise agreement. Karen's son, Matt Meredith, who handled marketing for MIT, formed Green Bean IT, LLC and registered the domain name www.tlit.com, knowing that "tlit" was an acronym for TeamLogic. TeamLogic claimed that he did so to make it easier to divert MIT's customers to Green Bean upon expiration of the franchise agreement. TeamLogic also claimed that Karen continued to lead the franchisor to believe that she was considering renewal so that TeamLogic would not take steps to transition her customers to another franchisee in accordance with the franchise agreement and the customers could later be diverted to Green Bean. Karen also did not send notices to MIT's customers and suppliers about the transition to another franchisee at the expiration of the franchise agreement, which she was required to do. Additionally, John Miller forwarded customer lists to another former employee of MIT and diverted incoming emails to Green Bean.

Miller and Matt designed Green Bean's website, which had the same color scheme and taxonomy as TeamLogic's branded materials. TeamLogic alleged that Karen simply looked the other way, knowing that MIT's employees Matt and Miller set up Green Bean to do business with MIT's former customers upon expiration of the franchise agreement even though the agreement required that those customers be transitioned to another Texas-based franchisee.

MIT filed a Federal Rule of Civil Procedure 12(b)(1) motion to dismiss TeamLogic's claims for lack of subject matter jurisdiction. The court held that when determining whether to grant a Rule 12(b)(1) motion, the court must presume that the suit lies outside of its limited jurisdiction and the burden of establishing federal jurisdiction rests on the party seeking the federal forum. The court noted that diversity jurisdiction is proper only when complete diversity exists between the parties and the matter in controversy exceeds $75,000, exclusive of interest and costs. The court also noted that a party asserting diversity jurisdiction must affirmatively allege the citizenship of the parties. Although TeamLogic pled that it was a citizen of California because it was incorporated and had its principal place of business there, TeamLogic failed to allege the citizenship of the members of MIT. Additionally, to the extent TeamLogic addressed the location of Miller, Matt, and Karen, it did so only by alleging they were residents of Texas but it did not distinctly and affirmatively allege the citizenship of each individual defendant member of the LLC. The court noted that residency is not at issue when determining whether diversity jurisdiction exists because a citizen of one state may reside in another state of which he is not a citizen. Therefore, the court held that by failing to allege the citizenship of the individual defendants and the citizenship of all members of the LLC, TeamLogic had failed to establish that there was diversity jurisdiction.

This, however, did not end the jurisdictional inquiry because TeamLogic also alleged the existence of federal question jurisdiction. The court noted that federal question jurisdiction exists in all civil actions arising under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331. A federal question is presented when a well-pleaded complaint establishes that federal law creates the cause of action or that the plaintiff's rights to relief depend on a resolution of a substantial question of federal law. To determine whether there is a substantial question of federal law, courts must determine whether: (1) resolving a federal issue is necessary to resolution of the state law claim, (2) the federal issue is actually disputed, (3) the federal issue is substantial, and (4) federal jurisdiction will not disturb the balance of federal and state responsibilities. The court held that because TeamLogic's complaint clearly alleged claims against Matt and Green Bean for trademark infringement under the Lanham Act as the basis for jurisdiction, the court had subject-matter jurisdiction over the trademark infringement claims.

The question then became whether the court had supplemental jurisdiction over the remaining state law claims under 28 U.S.C. § 1367(a). The court noted that courts have supplemental jurisdiction over claims that are so related to claims in the action within its original jurisdiction that they form part of the same case or controversy. Thus, a federal court may hear state law claims if the federal issues are substantial and the state and federal claims derive from a common nucleus of operative facts. The court found that TeamLogic's state and federal claims (1) related to the same franchise agreement and interactions and (2) formed part of the same case or controversy. Therefore, the court held that it would exercise supplemental jurisdiction over the state claims.

MIT also moved to dismiss Team Logic's claims under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. In order to survive a Rule 12(b)(6) motion to dismiss, the pleadings must include well-pleaded facts, not mere conclusory allegations. The court must accept well-pleaded facts as true and view them in the light most favorable to the plaintiff, and such a complaint will survive a motion to dismiss even if the judge believes that the actual proof of facts is improbable and that recovery is remote or unlikely.

With respect to the misappropriation of trade secrets claim, MIT argued that TeamLogic failed to allege any property that actually qualified as a trade secret and that TeamLogic failed to identify any confidential or proprietary information that MIT disclosed or used without consent. Under Texas law, a claim for trade secret misappropriation requires a showing that: (1) a trade secret existed, (2) the trade secret was acquired through breach of a confidential relationship or was obtained by improper means, (3) the defendant used the trade secret without the plaintiff's authorization, and (4) the plaintiff suffered damages as a result. The court noted that the existence of a trade secret is usually a question of fact to be decided by the fact-finder, based on six relevant criteria: (1) the extent to which the information is known outside the business, (2) the extent to which it is known by employees and others involved in the business, (3) the extent of measures taken to safeguard the secrecy of the information, (4) the value of the information to its owner and competitors, (5) the amount of effort or money expended in developing the information, and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. The court held that because so many factors go into determining whether a trade secret exists, and because the factors turn on factual considerations gleaned from discovery, the court denied MIT's motion to dismiss the trade secret misappropriation claims. However, the court noted that customer lists and client information that MIT allegedly used have been recognized as trade secrets.

MIT also moved to dismiss TeamLogic's conspiracy claims against Karen, arguing that TeamLogic failed to allege there had been a meeting of the minds between Karen and the other MIT defendants to intentionally misappropriate TeamLogic's information. Under Texas law, a civil conspiracy is a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. The elements are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result. TeamLogic alleged that Karen, Miller, Matt, and another former MIT employee conspired to misappropriate TeamLogic's property in order to divert it to Green Bean. Specifically, it alleged that Karen agreed to look the other way while MIT's employees provided proprietary information and trade secrets to Green Bean and that she delayed sending a mandatory notice to MIT's customers of her decision not to renew in order to provide time for MIT's employees to transfer information to Green Bean. Based on these allegations, the court held that TeamLogic had sufficiently alleged facts that could entitle it to relief on a conspiracy claim.

MIT additionally sought to dismiss TeamLogic's claim against Karen for tortious interference with a business relationship. To establish tortious interference with a business relationship, a plaintiff must plead: (1) a reasonable probability that the parties would have entered into a contract or relationship; (2) an intentional and malicious act by which the defendant prevented the relationship from occurring, with the purpose of harming the plaintiff; (3) lack of privilege or justification of the defendant to do the act; and (4) actual harm or damage resulting from the defendant's interference. TeamLogic alleged that it developed business relationships through its franchisees and that by unlawfully diverting customers to Green Bean, MIT prevented future relationships between TeamLogic and its franchisees. TeamLogic alleged that MIT did so in order to benefit itself at the expense of TeamLogic. The court agreed that the allegations sufficiently stated a claim for tortious interference with a business relationship.

The court also rejected MIT's motion to dismiss TeamLogic's breach of contract claim. The court held that TeamLogic's allegations that it had complied with the contract, MIT failed to comply with its obligations and that TeamLogic suffered damages as a result was sufficient to state a claim for breach of contract.

MIT also moved to dismiss TeamLogic's claims under Federal Rule of Civil Procedure 12(b)(7), arguing that King, one of MIT's former employees, was an indispensable and necessary party to the litigation because his actions as an employee of MIT and his subsequent employment with Green Bean, as well as his interaction with MIT's former customers, were at the very heart of TeamLogic's claims. Rule 12(b)(7) allows for dismissal of a case for failure to join a party under Federal Rule of Civil Procedure 19, which provides for the joinder of all parties whose presence in a lawsuit is required for the fair and complete resolution of the dispute at issue. The court found that although King may have been relevant to the dispute, he was essentially a joint tortfeasor and joint tortfeasors are not necessary parties under Rule 19. Additionally, the court noted that because TeamLogic could obtain complete relief without joinder of this former employee, he was not an indispensable party under Rule 19.

Finally, MIT asked the court to abstain from exercising jurisdiction and dismiss the case under the Colorado River Doctrine, which requires a court to give regard to conservation of judicial resources by abstaining from a case where a similar action is pending in state court. In order for the Colorado River Doctrine to apply, a court must be satisfied that there is a parallel proceeding pending in state court and that exceptional circumstances warrant abstention. The court held that the burden was on MIT to prove that adequate justification exists for abstention and that the court should abstain only when the clearest of justifications warrant it. King, one of MIT's former employees, who was not currently a party to the case, filed a declaratory judgment action against TeamLogic in state court before TeamLogic filed this lawsuit. None of the MIT defendants in the federal case, however, were parties in the state case. The court held that the absence of the same parties and the same issues resulted in a failure to show that the federal and state cases were parallel proceedings as required by the Colorado River Doctrine to justify abstention.

***Traffic & Parking Control Co., Inc. v. Global Traffic Techs., LLC,* Bus. Franchise Guide (CCH) ¶ 15,936, Case No. 17-CV-117-JPS, 2017 WL 1067774 (E.D. Wis. Mar. 21, 2017)**

Plaintiff Traffic and Parking Control Company, Inc. (TAPCO) filed an action against defendant Global Traffic Technologies, LLC (GTT) in Milwaukee County Circuit Court. The complaint arose from GTT's attempt to terminate the parties' dealership agreement, which TAPCO alleged was a breach of the agreement and the Wisconsin Fair Dealership Law (WFDL). GTT removed the action to the U.S. District Court for the Eastern District of Wisconsin on the basis of diversity jurisdiction under 28 U.S.C. § 1332(a)(1). This case addressed TAPCO's motion to remand the case to state court on the ground that the amount in controversy was less than $75,000 and GTT's motion to dismiss TAPCO's complaint on the ground that TAPCO's complaint failed to state a claim for violations of the WFDL or for breach of contract.

TAPCO alleged that GTT sent it an email on November 3, 2016, stating that the parties' agreement would be canceled effective February 1, 2017. TAPCO claimed the email provided no reason for the proposed cancellation and, therefore, GTT did not have "good cause" to cancel the agreement as required under the WFDL. Additionally, although the agreement gave either party the right to terminate without cause on ninety days' written notice, TAPCO asserted that this provision was unenforceable because it violated the WFDL. TAPCO also asserted a breach of contract on the ground the termination without cause violated GTT's common law duty of good faith and fair dealing. TAPCO further claimed that the November 3 email did not constitute appropriate written notice because the agreement required that any notices be served by personal delivery, registered mail, prepaid post with receipt requested, or facsimile. TAPCO sought declaratory relief that the termination was void and to enjoin the cancellation of the dealership agreement. TAPCO did not seek damages or attorney fees in the lawsuit.

The court first dealt with the jurisdictional question of whether the amount in controversy exceeded $75,000 as required for diversity jurisdiction under 28 U.S.C. § 1332. The court noted that in the Seventh Circuit the inquiry is not confined to an analysis of the claimed damages, but includes more generally "the amount at stake to either party to the suit." As the party seeking federal court jurisdiction, GTT had the burden of showing by a preponderance of the evidence that the amount in controversy requirement had been met. The court noted that although GTT had the burden of proof, it only had to provide a good faith estimate that the amount at stake exceeded the $75,000 threshold. After setting forth a good faith estimate that the $75,000 threshold had been met, a plaintiff can defeat diversity jurisdiction only if it appears to a legal certainty that the amount at stake is really less than $75,000.

GTT submitted an affidavit stating that an injunction prohibiting the termination of the agreement would be worth more than $75,000 because

GTT's sales for 2013 through 2016 were over $500,000 per year and that TAPCO's estimated gross profit margin was 20 percent of GTT's annual sales to TAPCO. Therefore, GTT estimated that TAPCO would make well over $75,000 if the dealership arrangement continued. TAPCO argued that GTT had no way of knowing what TAPCO's profit margins were and, therefore, could not place a reliable dollar figure on the value of the dealership agreement to TAPCO. TAPCO also argued that the amount in controversy was less than $75,000 because the dispute concerned only a ninety-day period since GTT could reissue a second notice complying with the WFDL and the dealership agreement. TAPCO argued that the amount in controversy for this ninety-day period was only $31,000. The court found that GTT's good faith estimate of the amount in controversy was sufficient. First, TAPCO's argument that there was only a ninety-day period at issue in this case was incorrect because it did not account for TAPCO's request that termination be enjoined in the future. Moreover, because TAPCO claimed that there was no good cause for termination, GTT could not simply reissue a notice of termination to be effective within ninety days. Additionally, TAPCO failed to produce any actual evidence that the value of its claims was less than $75,000, which it could have done given its control of its financial records. Thus, the court held that the amount in controversy element was satisfied and the motion to remand was denied.

GTT also moved to dismiss the complaint on the ground that it failed to state a claim for relief. To state a viable claim, a complaint must (1) provide a short and plain statement of the claim establishing that the pleader is entitled to relief and (2) give fair notice of the nature of the claim and the grounds upon which it rests. The allegations must plausibly suggest that the plaintiff has a right to relief, raising the possibility above mere speculation. GTT argued that it properly terminated the agreement, claiming that the November 3, 2016, email was proper notice because, although the agreement required all notices to be made in certain specified forms, the contact information each party provided in that section included their respective email addresses. Therefore, GTT argued that the email complied with the contractual requirements. GTT also asserted that TAPCO claimed no damages from the alleged breach and that TAPCO's theory based on the duty of good faith and fair dealing should be rejected as conclusory.

The court held that TAPCO's claims passed muster at this stage of the proceeding because, on its face, the dealership agreement required notice to be given only in certain specified forms and an email was not sufficient under the notice provision. Although GTT had reasonable arguments that an email did not violate the contract or that GTT substantially complied with the notice requirements, the court held that it was inappropriate to decide whose reading of the agreement was the better one without the benefit of discovery. The court also rejected GTT's argument that TAPCO's lack of damages should result in dismissal because damages are not the only form of harm, and TAPCO was clearly seeking to prevent other forms of harm, including a loss of its investment of time and money in the dealership and that the loss of its dealership arrangement would make TAPCO less competitive in its market.

The court, without explanation, summarily denied the motion to dismiss the other claimed breaches of contract and TAPCO's claims under the WFDL.

LABOR AND EMPLOYMENT

Roman v. Jan-Pro Franchising Int'l, Inc., Bus. Franchise Guide (CCH) ¶ 15,979, No. C 16-05961 WHA, 2017 WL 2265447 (N.D. Cal. May 24, 2017)

The U.S. District for the Northern District of California granted a cleaning franchisor's motion for summary judgment in a wage-and-hour putative class action matter where the plaintiffs alleged they were wrongly classified as independent contractors instead of employees in a three-tiered franchise structure.

Jan-Pro Franchising International, Inc., the franchisor of cleaning and janitorial services businesses, operates a three-tiered franchising structure. As part of that structure, Jan-Pro sells franchise rights to regional master franchisees who obtain the exclusive right to sell unit franchise rights and serve as master franchisees for the Jan-Pro business in their defined geographic territories. The unit franchisees in a regional master franchisee's territory have the right to service certain accounts that the regional master franchisee provides to them. The regional master franchisee provides its unit franchisees with initial training, business development, billing and collection, and revenue disbursement services.

The three plaintiffs, residents of California, were unit franchisees of two Jan-Pro regional master franchisees that were not joined as parties to the case. The plaintiffs had originally sued Jan-Pro in an amended complaint previously filed in the U.S. District Court for the District of Massachusetts. During the summary judgment phase of the Massachusetts case, the court focused on the claims of the Massachusetts plaintiff as a test case. After granting summary judgment to Jan-Pro on most of its claims, the Massachusetts plaintiff dismissed the remaining two claims. The three California plaintiffs successfully moved to sever and transfer the matter to the Northern District of California. The California plaintiffs argued they were employees of Jan-Pro under California law, notwithstanding their contractual relationship with the two regional master franchisees and, as such, were entitled to be paid minimum wage and overtime premiums.

Although both sides agreed that California law applied to the plaintiffs' classification claims, they disagreed over which common law standard applied to the instant case. Jan-Pro claimed that the standard in *Patterson v. Domino's Pizza, LLC*, 333 P.3d 723 (Cal. 2014) applied. In *Patterson*, a case involving a franchisee employee's claims for vicarious liability against Domino's for sexual harassment by a supervisor, the court held that a franchisor could be potentially liable for actions of the franchisee's employees if the franchisor retained or assumed a general right of control over certain facets of the day-to-day operations of the franchised business, such as hiring, supervision, and discipline of the franchisee's employees. The plaintiffs, on the other hand, contended that the standard in *Martinez v. Combs*, 231 P.3d 259 (Cal. 2010), applied. In *Martinez*, the court established three alternative definitions of the phrase "to employ" under California labor law: (1) to exercise control over the wages, hours, or working conditions; (2) to suffer or permit to work; or (3) to engage, consequently creating a common law employment relationship. The plaintiffs claimed that Jan-Pro was their employer under any of the three definitions set forth in *Martinez*.

Finding that no binding decision had addressed the standard applicable to the determination of whether a franchisor is an employer of a franchisee, the court applied the *Martinez* standard "with the gloss" of the *Patterson* standard to the plaintiffs' claims. Using this hybrid approach, the court rejected the plaintiffs' arguments that Jan-Pro exercised control over or had the right to control their wages, hours, or working conditions. The plaintiffs argued that Jan-Pro's master franchise agreements with the regional master franchisees gave Jan-Pro the right to control the business of any regional master franchisee as well as the unit franchisees because Jan-Pro had the right to establish policies and procedures for their businesses. Notably, although the master franchise agreements required the regional master franchisees to include a provision in their unit franchise agreements that Jan-Pro was a third-party beneficiary to the unit franchise agreements, none of the unit franchise agreements at issue contained this language. The court also observed that although the plaintiffs were subject to several measures of control by their regional master franchisees, those provisions conferred no rights upon Jan-Pro and the plaintiffs never entered into any other agreements directly with Jan-Pro. Aside from Jan-Pro's right to modify policies that applied to the regional master franchisees, the court found that the plaintiffs failed to offer any evidence that Jan-Pro satisfied the first factor of either the *Martinez* standard or the *Patterson* standard.

The court also found there was no evidence that Jan-Pro had the authority to stop the unit franchisees from working. Although the master franchise agreements purported to give Jan-Pro that authority, the actual unit franchise agreements did not extend that authority to Jan-Pro. The court also rejected an ostensible agency theory advanced by the plaintiffs alleging that Jan-Pro became their employer because the regional franchisees were the ostensible agents of Jan-Pro. The court determined that these allegations were unfounded because the plaintiffs had no knowledge of Jan-Pro the franchisor until the lawsuit and there was no other evidence that the regional master franchisees acted as agents of any other principal.

NON-COMPETE AGREEMENTS

***Colorado Sec. Consultants, LLC v. Signal 88 Franchise Grp., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,938, 8:16-CV-439, 2017 WL 1047260 (D. Neb. Mar. 17, 2017)**

Colorado Security Consultants, Inc. and others (CSC) filed suit against Signal 88 Franchise Group, Inc. and related LLCs (Signal 88) in the U.S. District Court for the District of Nebraska asserting claims based on Signal 88's alleged breach of the parties' franchise agreement. In response, Signal 88 filed a counterclaim and motion to enforce the covenant not to compete in the franchise agreement. After considering each of the traditional four factors applicable to requests for injunctive relief, the court denied Signal 88's motion.

Signal 88 is in the business of franchising a "unique management and business system for security services." In 2010, CSC executed a franchise agreement to own and operate a Signal 88 franchise for a three-year term in Colorado Springs, Colorado. The franchise agreement was not formally renewed in 2013, but the parties agreed to extend the term of the agreement and entered into an amendment in 2015 to continue the agreement on a month-to-month basis. The amendment provided that it could be terminated on thirty days' notice, although CSC claimed that Signal 88 had promised to "formally renew" the franchise agreement in 2016.

The franchise agreement included a broad covenant not to compete, barring the franchisee from selling the services sold by Signal 88 within seventy-five miles of the franchisee's exclusive territory for a three-year period after the termination of the parties' relationship. The covenant not to compete expressly permits a court to revise its scope to make it enforceable. The franchise agreement also included a right of first refusal pursuant to which CSC had the right to purchase any proposed new franchise within thirty miles of its territory on the same terms being offered to the prospective franchisee.

In early 2016, Signal 88 advised CSC that a prospective franchisee was interested in acquiring a Signal 88 franchise in Colorado Springs. Signal 88, CSC, and the prospective franchisee discussed a variety of potential business arrangements, including CSC selling its territory to the prospective franchisee, reconfiguring CSC's territory, and compensating CSC for potential lost business. After the prospective franchisee acquired a Signal 88 franchise, the parties apparently continued to discuss a potential buy-out or modification of CSC's territory. The discussions ended without an agreement being reached, and Signal 88 demanded that CSC stop servicing customers in the new franchisee's territory, which was within the area to which CSC had a right of first refusal.

In September 2016, Signal 88 advised CSC that Signal 88 would terminate the franchise agreement effective October 31. Since then, CSC has been providing security services under the name "Guardhail," and allegedly contacted Signal 88's customers, undercut Signal 88's prices, and "caused a number of customers to cancel contracts with Signal 88." As a result, Signal 88 sought to enjoin CSC from competing within seventy-five miles of its former Signal 88 territory.

The court started its analysis by noting it did not doubt that Signal 88 faced a threat of harm, but that the relevant inquiry is whether such harm is irreparable or whether it could be remedied "after the fact with a permanent injunction and damages." The court found that Signal 88's evidence was "not particularly compelling." Specifically, the court found that although Signal 88 had identified the purposes of the covenant not to compete—including to maintain customer goodwill and prevent former franchisees from using confidential information to compete with Signal 88—Signal 88 had failed to establish that CSC's actions were actually threatening that goodwill and it was unclear how such harm could occur because CSC was not using Signal 88's trademarks.

The court identified several factors that may support a finding of irreparable harm, including price erosion, loss of goodwill, damage to reputation, and also noted that in some circumstances money damages may not be sufficient to remedy economic harm if such harm "is impossible to measure adequately." But the court also observed that some cases have found that a loss of customers or customer goodwill is not irreparable in that such harm may be addressed through money damages.

The court was unpersuaded by Signal 88's argument that CSC's solicitation of Signal 88's customers established irreparable harm because there was no evidence that Signal 88's "very existence" was threatened or that its goodwill was "being substantially threatened." The court was also unpersuaded by Signal 88's contention that CSC's actions were causing irreparable harm to its contractual relationships and franchise system, finding there was nothing to distinguish the circumstances from any other case in which "the integrity of a contract is at issue."

Having found that Signal 88 had not established that it was likely to sustain irreparable harm absent an injunction, the court unsurprisingly found the balance of harms weighed in CSC's favor. The court concluded that the requested injunction would be "devastating" to CSC and "effectively close" its business, which would moot "several of the parties' claims before they have been addressed on the merits."

Prior to addressing the merits of Signal 88's claims, the court first analyzed whether to apply Nebraska law as urged by Signal 88 or Colorado law as advocated by CSC. Although the franchise agreement included a Nebraska choice-of-law provision, the court essentially found that Colorado had a greater material interest in the agreement because the franchised business was located there. The court further found that there was a fundamental difference in the laws of Nebraska and Colorado. Under Nebraska law, a court will not reform an unreasonable covenant not to compete to make it enforceable, whereas Colorado law permits such reformation. Accordingly, the court held that Colorado law applied.

The court then turned to whether the covenant not to compete was enforceable, noting that non-compete provisions are generally disfavored under Colorado law and are enforced only in limited circumstances, including to the extent necessary to protect trade secrets. The court concluded, however, that although the facts "suggest[ed]" a possibility of success on the merits, Signal 88 had failed to provide sufficient evidence from which the court could determine whether the covenant not to compete was reasonable in scope, geographical reach and duration, and, therefore, enforceable.

Finally, the court held that the public interest did not weigh in favor of granting or denying the requested injunction because whether Signal 88 was likely to prevail on the merits of its claims was unclear, and the general public interest in enforcing contractual obligations was offset to at least some extent by the "strong public interest in encouraging, rather than stifling, competition."

***Elder Care Providers of Ind., Inc. v. Home Instead, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,951, 1:14-cv-01894-SEB-MJD, 2017 WL 1106093 2017 WL 1106093 (S.D. Ind. Mar. 24, 2017)**
This case is discussed under the topic heading "Termination and Non-renewal."

***Fres-Co Systems USA, Inc. v. Hawkins*, Bus. Franchise Guide (CCH) ¶ 15,985, No. 16-3591, 2017 WL 2376568 (3rd Cir. June 1, 2017)**
This case is discussed under the topic heading "Injunctive Relief."

***Stockade Cos., LLC v. Kelly Rest. Grp., LLC*, Bus. Franchise Guide (CCH) ¶ 15,978, 1:17-CV-143-RP, 2017 WL 2375496 (W.D. Tex. May 31, 2017)**
This case is discussed under the topic heading "Injunctive Relief."

STATUTORY CLAIMS

***Marine View Beverage, Inc. v. Pabst Brewing Co., LLC*, Bus. Franchise Guide (CCH) ¶ 15,984, Case No. C17-5151-RBL, 2017 WL 2313490 (W.D. Wash. May 26, 2017)**
The U.S. District Court for the Western District of Washington addressed whether the Washington Wholesale Distributors and Suppliers of Spirits or Malt Beverages Act (Act) provides a single remedy when a supplier terminates a distributor's contract without cause, i.e., "compensation from the successor distributor for the laid-in cost of inventory and for the fair-market value of the terminated distribution rights." Pabst Brewing Company terminated its distribution agreement with Marine View Beverage, Inc. and arranged for another distributor to take over Marine View's former territory. At the time of the termination, the successor distributor had yet to reach an

agreement with Marine View on the fair market value for the lost distribution rights. Marine View sued Pabst to recover its lost profits, business interruption damages, lost investment, reliance damages, and other losses.

Pabst moved to dismiss Marine View's complaint, arguing that the Act limited Marine View's remedies to recovering the fair market value of the distribution rights. Marine View, on the other hand, argued the Act does not authorize termination without cause and does not limit the remedies available to a terminated distributor to compensation for the fair market value of the distribution rights. Marine View asked the court to grant it partial summary judgment and declare that Pabst's interpretation of the Act was incorrect because the Act does not prohibit Marine View from seeking relief under common law. Marine View also asked the court to determine whether the Act authorizes a supplier to terminate a distributor without cause.

Pabst argued that it could terminate the agreement without cause because the Act provides that "[i]f an agreement of distributorship is terminated, canceled, or not renewed for any reason other than for cause . . . the wholesale distributor is entitled to compensation from the successor distributor for the laid-in cost of inventory and for the fair market value of the terminated distribution rights." WASH. REV. CODE § 19.126.040(4). The court disagreed with Pabst, holding that the legislature's acknowledgment of termination without cause was not synonymous with its authorization of termination without cause: "Had the legislature intended to permit suppliers to cancel a distributor's rights without cause, it would not have mandated that in most circumstances a distributor must have an opportunity to cure the cause leading to its potential termination."

Pabst argued further that the Act governs the entire relationship between the distributor and its supplier and, therefore, the distributor's sole remedy was for the successor distributor to make the terminated distributor whole by purchasing its existing inventory and paying the fair market value for the lost distribution rights. Marine View argued that the Act does not provide the exclusive remedy, but merely creates an additional remedy for terminations without cause. The court noted that the statute expressly authorizes payment to a terminated distributor from parties other than a successor distributor. The Act provides, for example:

> When a terminated distributor is entitled to compensation under Subsection (4) of this section, a successor distributor must compensate the terminated distributor for the fair market value of the terminated distributor's rights to distribute the brand, less any amount paid to the terminated distributor by a supplier or other person with respect to the terminated distribution rights for the brand. . . . A terminated distributor may not receive total compensation under this subsection that exceeds the fair market value of the terminated distributor's distribution rights with respect to the affected brand.

Thus, Marine View argued that the Act only limits Marine View's right to seek compensation for the fair market value of its rights for a without-cause termination, but not for other grievances, such as a common law breach of contract.

The court analyzed whether the Act abrogated the common law in order to provide for an exclusive remedy to distributors terminated without cause. The court held that a statute abrogates the common law when its provisions are "so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force." Pabst argued that the Act contains a statement of exclusivity because it limits the terminated distributor's right to recover the fair market value of the distribution rights from the successor distributor. The court disagreed, noting that the Act allows successor distributors and suppliers to negotiate who will pay the terminated distributor for the fair market value of its lost business. The Act, however, does not affect how a distributor is compensated for lost profits, reputational damages, or reliance damages. The court held that the statute only provides a remedy for the loss of the fair market value of the distribution rights, but not remedies for other common law damages such as lost profits or reputational damages. Therefore, the court granted Marine View's motion for partial summary judgment, declaring that the statute did not abrogate Marine View's right to seek common law relief for breach of contract and related damages and that the statute only addresses the damages from the loss of the fair market value of the distribution business.

TERMINATION AND NONRENEWAL

***Elder Care Providers of Ind., Inc. v. Home Instead, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,951, No. 1:14-cv-01894-SEB-MJD, 2017 WL 1106093 (S.D. Ind. Mar. 24, 2017)[1]**

Home Instead, Inc. operates a business that provides non-medical care to senior citizens through a network of more than 1,000 franchises. Home Instead and Elder Care Providers of Indiana, Inc., which was owned by Anthony and Georgette Smith, entered into a franchise agreement pursuant to which Elder Care agreed to operate a Home Instead business in an area of Indianapolis for a ten-year term. Elder Care and other Home Instead franchisees in Indiana are licensed as personal services agencies (PSA), not home health agencies (HHA). A licensed PSA does not require medical staff, and oversight by the Indiana State Department of Health is relatively limited compared to a HHA. A licensed HHA provides skilled nursing and home health aide services authorized by a physician's prescription or order from other medical professionals and supervised by a registered nurse. The skilled nursing services that an HHA may provide include wound care; drawing blood; injecting prescribed medications; and providing

1. Cline Williams Wright Johnson & Oldfather, L.L.P. represented Home Instead, Inc. in *Elder Care Providers of Indiana, Inc. v. Home Instead, Inc.* Editor-in-chief Gary R. Batenhorst, a partner with the firm, edited the entry although he was not directly involved in the case.

medical baths and nursing assessments and diagnoses. HHAs are reimbursed by Medicaid and subject to fairly rigorous oversight. Home Instead franchisees are not authorized to provide HHA medical services.

As a PSA, Elder Care provided non-medical home care and was not allowed to provide any medical care pursuant to both its franchise agreement and Indiana's license requirements. In November 2011, the Smiths formed Home Again Senior Care, Inc., now known as Purpose Home Health, Inc., which was a separately licensed HHA corporation. Home Again and Elder Care frequently referred clients to one another and shared some employees. Home Instead first learned of Home Again's operations in March 2013, giving rise to two concerns: (1) the possible confusion caused by the use of the name Home Again and (2) the possibility that Home Again would provide services in direct competition with Home Instead. The franchise agreement prohibited Elder Care and the Smiths from operating, owning, or engaging in any non-medical companionship and domestic care service business that is of the character and concept similar to the Home Instead senior care business or any unauthorized use of the Home Instead trademark

After learning about Home Again, Home Instead began a twenty-month investigation. Home Instead ultimately concluded that the Smiths' operation of the Home Again business constituted a breach of the franchise agreement's non-compete and infringed on Home Instead's trademark. Accordingly, in November 2014, Home Instead terminated Elder Care's franchise agreement on three grounds: (1) violating the in-term non-compete; (2) diverting business from Elder Care to Home Again and disclosing confidential information contained in the franchise agreement; and (3) using the name Home Again, which was confusingly similar to Home Instead's licensed marks. Pursuant to the notice of termination, the termination was to be effective three days from the date of the notice. Elder Care continued to operate as a Home Instead franchise until January 31, 2015, which allowed time for it to wind its business down.

On May 26, 2015, Elder Care's counsel advised Home Instead that Elder Care was going to sell its client list to a neighboring Home Instead franchisee for $500,000. Home Instead raised various concerns about the legality of the transfer, but did not seek to prohibit the transfer or to unwind the transfer agreement. After the sale of its client list, Elder Care ceased all business operations.

Elder Care filed a complaint in the U.S. District Court for the Southern District of Indiana on November 8, 2014, alleging that Home Instead's termination of the franchise agreement was a breach of contract and a violation of the Indiana Deceptive Franchise Practices Act and seeking declaratory relief and damages. Home Instead subsequently filed counterclaims against Elder Care, the Smiths, and Home Again for breach of contract, civil conspiracy, misappropriation of trade secrets, unfair competition, and trademark infringement. The parties then each filed motions for partial summary judgment.

Elder Care sought a declaratory judgment that Home Instead had failed to provide proper notice of termination as required by the franchise agreement, Elder Care had not violated the non-compete and non-disclosure covenants in the agreement, Home Instead's termination was of no legal effect, and the transfer of the customer list was valid and enforceable. Home Instead argued that the termination was based on Home Again's unfair competition, which justified immediate termination without an opportunity to cure. Home Again claimed that because Home Instead knowingly acquiesced to Home Again's use of the name "Home Again" for twenty months, Home Instead had waived its right to immediately terminate the franchise agreement and that Home Again did not compete with Home Instead; therefore, there was no violation of the non-compete and no unfair competition. In response, Home Instead argued that it had continued to notify Home Again of the need to change its name during its twenty-month investigation and had not acquiesced to the use of the name Home Again.

The court held that Home Instead's failure to take immediate steps to terminate the franchise agreement reasonably led Home Again to believe that Home Instead did not intend to terminate the agreement without notice and an opportunity to cure. In other words, Home Instead could not ignore a supposed material breach for a twenty-month period during which Home Instead mentioned from time-to-time that Home Again would have to change its name and then suddenly terminate the agreement without providing an opportunity to cure. The court found that because Home Instead had lulled Home Again into a false sense of complacency for over twenty months by not immediately demanding that Home Again change its name, Home Instead had wrongfully terminated the franchise agreement by not providing notice and an opportunity to cure.

Home Instead also argued that Home Again violated the non-compete in the franchise agreement by offering the same or similar services as Home Instead franchisees. The court noted that although Home Again provided as a licensed HHA some of the same services that Home Instead franchisees provide as licensed PSAs, Home Again was not of a similar character and concept to a Home Instead franchise and was not a competitor of Home Instead. The non-compete expressly prohibited the Smiths from operating a "non-medical companionship and domestic care service business," but Home Again as an HHA was not doing this and was offering medical services that Home Instead franchisees were not permitted to offer both under their franchise agreements and their state licenses. Therefore, the court held that Home Again had not violated the non-compete restrictions.

Home Instead further argued that because Home Again and Elder Care shared some employees, a reasonable jury could determine that Elder Care disclosed confidential information and trade secrets to Home Again. The court noted, however, that the evidence reflected that persons hired by Home Again were not trained based on Home Instead materials and that Elder Care shared only two documents with Home Again employees, the time-off request form, which Home Instead did not contend was confidential, and an Elder Care handbook that had been revised and changed from Home Instead's template to become Elder Care specific. Therefore, because there was no evidence that any Home Again employee was trained using confidential or proprietary materials belonging to Home Instead, the court granted summary judgment in favor of the Smith parties.

The court ruled against Home Again on its motion for summary judgment on Home Instead's trademark infringement claim. Home Instead alleged that trademark infringement occurred both before and after termination of the franchise agreement. In denying Home Again's motion related to pre-termination infringement, the court rejected Home Again's acquiescence argument, finding that Home Again had not suffered economic prejudice resulting from Home Instead's delay in asserting its trademark rights. The court also rejected Home Again's argument that there was no likelihood of confusion. The court noted that Home Again had focused on whether Home Instead could prove actual confusion, but said that courts in the Seventh Circuit have often said that "likelihood of confusion can exist without any evidence of actual confusion."

In its motion related to post-termination infringement, Home Again argued that any alleged infringement after termination was fair use and that the names in question were not being used in commerce. The court said Home Again did not satisfy the fair use requirements that the use be otherwise than as a mark and be descriptive and used fairly and in good faith to describe the goods or services. The court also rejected Home Again's in commerce argument, noting certain evidence that the marks were used as a trademark after termination, although the court expressed skepticism that Home Instead suffered appreciable damage from these uses.

The court also denied summary judgment to Home Again on Home Instead's trademark counterfeiting claim. In the absence of controlling Seventh Circuit precedent on the issue, each side urged the court to follow certain other precedents supportive of their respective positions. The court found the precedent cited by Home Instead to be consistent with Seventh Circuit precedent and said Home Again "cannot escape liability for the use of counterfeit marks on the basis they are a hold-over franchisee."

Elder Care also sought a declaration that the transfer of its client list to another Home Instead franchisee was valid and did not constitute a misappropriation of trade secrets. Customer lists, however, were clearly identified as trade secrets and confidential information in the franchise agreement. Thus, the court found that a reasonable jury could find that Elder Care's customer list belonged to Home Instead and that Elder Care sold the trade secret without authorization by transferring it to another franchisee.

Home Instead also argued that because payment for the client list was to be made over several years, the Smiths and Elder Care violated the post-term covenant not to compete by owning or having an interest in a non-medical service business that imitates or operates in a manner similar to a Home

Instead business. The court agreed with the Smiths and Elder Care on this point, noting that the post-term non-compete prohibited the Smiths and Elder Care from having an interest in a business that imitates or operates in a manner similar to a Home Instead business, but here, the Smiths and Elder Care had a financial interest in an actual Home Instead business, not a competitor or imitator.

The Indiana Deceptive Franchise Practices Act prevents franchisors from discriminating unfairly among franchisees and the Smiths argued that Home Instead discriminated against them by allowing other franchisees to offer similar services to those provided by Home Instead through secondary businesses, such as a cleaning company and a transportation company. The court noted, however, that one of the three stated reasons for the termination of Elder Care's franchise agreement was the wrongful use of the name Home Again that infringed on Home Instead's trademark. Therefore, even if some franchisees had offered services competitive with the Home Instead system through secondary businesses, they were not similarly situated to the Smiths because the Smiths were terminated at least in part for infringing on Home Instead's trademark. Therefore, the court granted Home Instead's motion for summary judgment on the Smiths' claim for violation of the Indiana Deceptive Franchise Practices Act.

***Regency Midwest Ventures Ltd. P'ship v. Best W. Int'l, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,942, CIV-16-02491-PHX-MHB, 2017 WL 992357 (D. Ariz. Mar. 15, 2017)**

The U.S. District Court for the District of Arizona granted Best Western International, Inc.'s motion to dismiss the plaintiff's complaint asserting claims related to the allegedly improper termination of the parties' membership agreement and seeking a declaratory judgment that the plaintiff did not violate the Lanham Act or other applicable federal law for failing to remove Best Western's trademarks from the terminated hotel in a timely manner.

The plaintiff is the owner of a hotel in Casper, Wyoming. Best Western is a non-profit corporation that operates as a membership association for Best Western branded hotel operators in North America. The plaintiff's membership agreement with Best Western required the plaintiff to adhere to Best Western's bylaws, articles, rules, and regulations. The bylaws provide that a member may be terminated if (1) Best Western's Board of Directors, after a hearing, find grounds to cancel the membership; (2) the Board grants the member an extension to comply with a remedial plan, but the member fails to satisfy the remedial plan; or (3) a member receives two failing quality assurance scores in an eighteen-month period.

In May 2013, Best Western notified the plaintiff that it was considering terminating the parties' membership agreement because the hotel had received two failing quality assurance scores in an eighteen-month period. The plaintiff requested and received a hearing before the Best Western Board of Directors and, although the Board found grounds existed to terminate the membership, the Board granted the plaintiff an extension requiring that certain conditions be met in a timely manner in order for the relationship to continue. The conditions included the requirement that the plaintiff complete a property improvement plan by March 31, 2014, and that if all improvements were not met by that date, the membership agreement would be terminated. On February 4, 2014, the plaintiff requested additional time to complete the improvement plan and Best Western granted an extension to October 1, 2014. In October 2014, Best Western inspected the plaintiff's hotel and determined that portions of the improvement plan had not been completed. Nonetheless, Best Western granted a further extension to February 24, 2015. An inspection in March 2015 confirmed that the plaintiff had not completed all requirements of the plan and, as a result, Best Western terminated the membership agreement.

Shortly after Best Western terminated the membership agreement, the plaintiff began to de-identify the hotel. However, Best Western subsequently discovered that some Best Western marks had not been removed and a highway billboard still indicated that the hotel was affiliated with Best Western. In July 2016, the plaintiff filed a lawsuit against Best Western asserting claims for breach of contract and the covenant of good faith and fair dealing, as well as seeking declaratory relief that the plaintiff had not violated the Lanham Act by failing to remove Best Western's trademarks in a timely manner. In response, Best Western filed a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss.

Because it was a motion to dismiss, the court accepted all allegations of material fact in the plaintiff's complaint as true and construed the complaint in the light most favorable to the plaintiff. Additionally, although courts are generally not permitted to consider documents beyond the pleadings in a Rule 12(b)(6) motion, courts may consider documents that are submitted as part of the complaint or whose contents are alleged in the complaint even if the complaint does not explicitly reference the document at issue.

The court noted that a claim for breach of contract under Arizona law requires a party to establish (1) the existence of a contract between the parties, (2) the defendant's breach of the contract, and (3) the plaintiff's resulting damages. Best Western argued that it terminated the plaintiff's membership agreement in the manner required by the contract. The plaintiff, however, claimed that it had substantially complied with the property improvement plan, arguing that its total investment in the hotel was more than $4.6 million and it had completed 194 of the 197 items in the improvement plan. Under the substantial compliance doctrine, a party's substantial performance entitles it to performance from the other party. The plaintiff also argued that following a material breach, the non-defaulting party must either elect to waive the breach and continue performance or terminate the contract and sue for damages, and that because the membership agreement was terminated in February 2015, but the plaintiff was permitted to operate until April 2015, Best Western had accepted performance by allowing the plaintiff to continue to operate for two months after the property improvement plan deadline and thus waived the right to terminate the agreement. In response, Best Western argued that substantial compliance usually does not apply when the agreement expressly addresses what constitutes a breach and what remedies result from such a breach, and the substantial performance rule does not apply when the parties have agreed that only complete performance will be satisfactory.

The court noted that the circumstances here were unlike a construction dispute where the substantial compliance doctrine often applies because this was not a situation where the plaintiff put up the vast majority of the consideration and the other party avoided paying based on an immaterial breach. Rather, the plaintiff received all of the benefits of the renovations at the hotel that it undertook pursuant to the property improvement plan. Therefore, the court held that the substantial compliance doctrine did not apply, and the contract made it clear that Best Western was entitled to terminate the membership agreement. Accordingly, the court dismissed the plaintiff's breach of contract claim.

The plaintiff also argued that Best Western breached the implied covenant of good faith and fair dealing by imposing unreasonable conditions and a nearly impossible timeline to complete the property improvement plan, and that it reasonably expected to be given additional time to complete the required improvements so long as it was making adequate progress towards complying with the plan. The court, however, agreed with Best Western that the membership agreement expressly provided a right to terminate if the plaintiff failed to meet the property improvement plan in a timely manner, and that the plaintiff was asking the court to look beyond the plainly written terms of the membership agreement and grant greater rights than it bargained for. Therefore, the court also dismissed the breach of the covenant of good faith and fair dealing claim.

With respect to the claim for declaratory relief that it had not violated the Lanham Act, the court noted that the plaintiff was using the Best Western trademark without Best Western's consent and that the plaintiff had received Best Western's express written demand that it cease using Best Western's marks upon termination of the membership agreement. Therefore, the court also dismissed the declaratory relief claim.

***Tim Hortons USA, Inc. v. Singh*, Bus. Franchise Guide (CCH) ¶ 15,949, Case No. 16-23041-CIV-GOODMAN, 2017 WL 1326285 (S.D. Fla. Apr. 5, 2017)**

The U.S. District Court for the Southern District of Florida held that a fast food franchisor was entitled to partial summary judgment on its franchisee's claim for declaratory judgment involving the timing of the franchisor's termination notice to the franchisee. The court found the notice was timely because the franchisee had actual notice of the default, the franchisee failed to cure the default in a timely manner, and the cure period expired before the franchisee offered to cure the default.

Tim Hortons USA, Inc. and Panagg Café Incorporated entered into a franchise agreement granting Panagg the right to operate a Tim Hortons store in Irondequoit, New York. Tim Hortons sent Panagg two notices of default on July 7, 2016, after Panagg failed to make its requisite royalty and other payments due under the franchise agreement. One of the notices provided that the franchise agreement would be terminated if the past due amounts were not paid in full within five days of receipt of the notices. Tim Hortons emailed the notices to Panagg's president, Gurvinder Singh, and also sent them via overnight delivery. Less than an hour after the notices were emailed, Singh presumably opened them and forwarded them to one of his daughters. Singh also telephoned Tim Hortons' Director of Franchise Performance within an hour-and-a-half of receiving the notices.

Panagg did not offer to cure the defaults until July 13, 2016. That same day, Tim Hortons notified Panagg that the franchise agreement was terminated. Panagg challenged the termination on the grounds that the email notices failed to comply with the franchisee agreement's notice provisions, which did not specifically provide for notice via email. Tim Hortons subsequently sued Panagg and the latter counterclaimed, including in its counterclaim a count for declaratory relief. Tim Hortons moved for partial summary judgment on Panagg's claim for declaratory relief arguing that: (1) Panagg received the default notices and consequently had actual knowledge of the pending termination as of July 7, 2016; (2) Panagg's opportunity to cure the financial defaults expired on July 12, 2016; and (3) Panagg's proffer of a cure on July 13, 2016, was too late.

Panagg opposed the motion arguing that: (1) its claim for declaratory judgment was intertwined with other claims in Tim Hortons' complaint and Panagg's counterclaim; (2) Tim Hortons failed to timely provide individual notices to each of Panagg's representatives and guarantors; and (3) a course of performance prevented Tim Hortons from sending the notices.

The court granted in part Tim Hortons' motion for partial summary judgment. As a threshold matter, it noted that Federal Rule of Civil Procedure Rule 56(a) authorizes entry of summary judgment to a part of a claim or defense. Next, it rejected Panagg's arguments regarding the timeliness and legitimacy of the notices. Citing precedent under Florida law, the court observed that strict compliance with a notice provision is unnecessary if the receiving party has actual notice. Here, the fact that Singh opened the email containing the notices, forwarded it to one of his daughters, called Tim Hortons' after the notices were emailed, and failed to dispute receipt of the emailed notices all demonstrated that Panagg had actual notice of the two default letters. It also rejected Panagg's argument that Tim Hortons was required to provide individual notices to each of Panagg's representatives and guarantors. The court noted that the franchise agreement was between Tim Hortons and Panagg and that the notice provision required only that the notices be sent to the respective parties at the addresses set forth on the signature page of the agreement. Here, that meant that the notices only had to be sent to the company and addressed to the attention of all three guarantors. The emailed default notices had been addressed to Panagg and to the attention of the three guarantors. Moreover, because the guarantee provided that the guarantors waived notice of demand for payment or performance, Tim Hortons had no contractual requirement to provide individual notice to the guarantors.

The court denied the portion of Tim Hortons' summary judgment motion that related to Panagg's course of performance challenge. Pursuant to a declaration made by Singh, Panagg had been making weekly payments to Tim Hortons through ACH withdrawals from Panagg's bank account. The day that Tim Hortons emailed the default notices to Singh, an accounts receivable administrator for Tim Hortons' parent company sent Singh a weekly email regarding amounts due. Singh was told the total amount due and was asked what he could pay that week. After Singh stated that he could pay only a portion of the outstanding amount, Tim Hortons took out that portion a few days later. Thus, there was a genuine issue of material fact whether a course of performance prevented Tim Hortons from sending the default notices. The court did not address whether Tim Hortons had adequate grounds to send the default notices and whether the franchise agreement had been properly terminated.

TORTIOUS INTERFERENCE

***Derma Pen, LLC v. 4EverYoung Ltd.*, Bus. Franchise Guide (CCH) ¶ 15,983, Case No. 2:13-cv-00729-DN-EJF, 2017 WL 2258362 (D. Utah May 22, 2017)**

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

TRADEMARK INFRINGEMENT

***Derma Pen, LLC v. 4EverYoung Ltd.*, Bus. Franchise Guide (CCH) ¶ 15,983, Case No. 2:13-cv-00729-DN-EJF, 2017 WL 2258362 (D. Utah May 22, 2017)**

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

***Stockade Cos., LLC v. Kelly Rest. Grp., LLC*, Bus. Franchise Guide (CCH) ¶ 15,978, 1:17-CV-143-RP, 2017 WL 2375496 (W.D. Tex. May 31, 2017)**

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