# *Franchising (& Distribution) Currents*

***Daniel J. Oates, Jason M. Murray, and Maral Kilejian***

Mr. Oates

Mr. Murray

Ms. Kilejian

**ARBITRATION**

***Benihana, Inc., v. Benihana Tokyo, LLC*, Bus. Franchise Guide (CCH) ¶ 15,506, No. 14-841, 784 F.3d 887 (2d Cir. Apr. 28, 2015)**
This case is discussed under the topic heading "Injunctive Relief."

***Machado v. System4 LLC*, Bus. Franchise Guide (CCH) ¶ 15,514, 28 N.E.3d 401 (Mass. 2015)**
System4 LLC entered into a subfranchise agreement with NECCS, Inc., which subsequently entered into franchise agreements with Edson Teles Machado and several additional individuals (collectively, plaintiffs). Although System4 was not a signatory to the franchise agreements, it did provide the plaintiffs with access to its marketing expertise, business practices, training, and trademarks under separate agreement between System4 and NECCS. Under the franchise agreements NECCS offered its franchisees customer accounts to service, which the franchisees were free to either accept or refuse. The franchise agreements authorized plaintiffs to use System4's proprietary information, including its brand and trademarks. The franchise agreements also contained broad arbitration clauses.

Machado filed a complaint in the Massachusetts Superior Court asserting claims against System4 and NECCS (collectively, defendants), seeking rescission of the franchise agreements and damages for misclassification, among other violations of the Massachusetts Wage Act. The defendants, citing the arbitration clauses within

*Daniel J. Oates (dan.oates@millernash.com) is a partner at Miller Nash Graham & Dunn, LLP in Seattle. Jason M. Murray (jmmurray@murraylawpa.com) is the president and chief executive officer of Murray Law, P.A. in Miami. Maral Kilejian (maral.kilejian@haynesboone.com) is counsel at Haynes and Boone, LLP in Richardson, Texas.*

the franchise agreements, filed a motion to stay the superior court proceedings pending arbitration. The superior court initially denied the defendants' motion, but that decision was subsequently overturned by the Massachusetts Supreme Judicial Court. On remand, the plaintiffs filed a motion opposing the defendants' motion to compel arbitration, arguing that: (1) the arbitration clause could not apply to their Wage Act claims because it did not specifically reference the Wage Act, (2) the arbitration clause was unenforceable because it contained multiple unconscionable provisions, and (3) the plaintiffs were not bound to arbitrate their claims against System4 because it was not a signatory to the plaintiffs' respective franchise agreements. The superior court rejected the plaintiffs' Wage Act argument and also held that issues of unconscionability of the arbitration clauses could be decided by an arbitrator. However, the superior court agreed with the plaintiffs that, because System4 was not a signatory to the franchise agreements, they could proceed to litigate their claims against System4 in court.

System4 appealed the superior court's decision regarding the enforceability of the arbitration clause as it applied to System4. Although the plaintiffs did not file a cross appeal of the superior court's decision denying them relief on their other grounds, they did file an application seeking direct appellate review by the supreme court, requesting that the court affirm the superior court's decision.

The supreme court granted direct appellate review and determined that the central question on review was whether System4, a nonsignatory, could compel the franchisee plaintiffs to arbitrate their substantive claims in accordance with the arbitration provisions contained in their franchise agreements with NECCS. The supreme court concluded that System4 could compel arbitration pursuant to the franchise agreements by reason of equitable estoppel. Specifically, equitable estoppel warranted enforcement of the arbitration provisions because the plaintiffs had affirmatively alleged concerted misconduct by the defendants and joint violations of the franchise agreements.

***Morning Star Assocs., Inc. v. Unishippers Global Logistics, LLC,* Bus. Franchise Guide (CCH) ¶ 15,533, CV 115-033, 2015 WL 2408477 (S.D. Ga. May 20, 2015)**

Mornings Star Associates, Inc. (MSA) and several of its principals brought suit against their former franchisor Unishippers Global Logistics, LLC (UGL) alleging multiple claims for breach of the franchise agreement, misrepresentation, bad faith, and misappropriation of trade secrets, as well as a declaration that MSA's principals were not bound by a noncompetition agreement. The dispute arose when MSA failed to cure its noncompliance with several provisions of the franchise agreements. Instead of outright termination for cause, UGL initially offered to terminate the franchise agreements between the parties with UGL agreeing to waive certain rights (such as requiring MSA to return customer lists). When MSA failed to agree to UGL's proposal, UGL went ahead with unilateral termination of the franchise agreements and demanded that MSA return all customer lists, cease servicing customers, and perform other post-termination obligations that it had previously offered to waive.

The termination prompted MSA to file the lawsuit, but UGL responded by moving to dismiss the case and compel arbitration pursuant to the arbitration provisions in both the franchise agreements and the noncompetition agreement with MSA's principals. MSA argued that the court could not compel arbitration because (1) MSA and its principals were exempt from the Federal Arbitration Act because they were "transportation workers," (2) the noncompetition agreement was either waived or illegal under state law, (3) the arbitration agreements were no longer valid because UGL had already terminated the franchise agreement and noncompetition agreement, and (4) the claims fell outside the scope of the arbitration provision.

With respect to the first argument, the U.S. District Court for the Southern District of Georgia held that the exemption for transportation workers must be construed narrowly to effectuate the congressional intent to encourage enforcement of arbitration provisions. The court went on to hold that neither the franchise agreement nor the noncompetition agreement between MSA and UGL and its principals created an employment relationship between the parties, and as such, the plaintiffs did not meet the narrow definition of a transportation "worker." MSA was at most an independent contractor. Moreover, the court went on to note that as a factual matter, MSA's logistics business did not fall within the narrow scope of a "transportation" worker because it did not involve actual transportation, but rather coordination of transportation services.

The court also rejected MSA's other three arguments, noting that the arbitration agreements each had a delegation clause that granted authority to the arbitrator to decide issues relating to the enforceability of the arbitration clause in the parties' agreements. Accordingly, MSA's claims about waiver, illegality, the validity of the agreements, and whether the claims fell within the scope of the parties' arbitration agreement were all issues that should be addressed by the arbitrator in the first instance. Accordingly, the court granted UGL's motion and compelled the parties to arbitrate their dispute.

## ATTORNEY FEES

### ***Yumilicious Franchise, LLC v. Barrie*, Bus. Franchise Guide (CCH) ¶ 15,509, Civil Action No. 3:13-CV-4841-L, 2015 WL 1856729 (N.D. Tex. Apr. 23, 2015)**

Yumilicious Franchise, LLC (franchisor) entered into two franchise agreements with Why Not, LLC (franchisee) that granted the franchisee the right to operate two self-serve frozen yogurt stores in South Carolina in exchange for royalty fees. The franchise agreements were guaranteed by Matt Barrie, Kelly Glynn, and Brian Glynn (collectively with franchisee, defendants). After franchisee fell behind on payments due and closed one location without the franchisor's consent, the franchisor filed a lawsuit in the U.S. District Court for the Northern District of Texas alleging that the defendants failed to comply with their contractual obligations. The franchisor sought recovery of damages for unpaid invoices, as well attorney fees, costs, and prejudgment and post-judgment interest. The defendants counterclaimed and alleged numerous breaches of the franchise agreements by the franchisor. In addition, the defendants alleged that franchisor fraudulently induced them into entering into the franchise agreements by making false statements regarding franchise costs and product suppliers. The defendants alleged that they lost their investment in the franchises and other personal assets because of their inability to obtain franchisor's proprietary products at a fair market price. The defendants further alleged that the franchise agreements and franchise disclosure documents contained misrepresentations and omissions upon which they relied to their detriment.

The franchisor moved for summary judgment on its claims for breach of contract and attorney fees and partial summary judgment on the defendants' counterclaims for fraud, negligent misrepresentation, fraudulent inducement, consequential and punitive damages, and attorney fees. The defendants did not contest franchisor's motion for summary judgment for breach of contract and corresponding attorney fees. The court granted franchisor summary judgment on its breach of contract and attorney fees claims after it found that franchisor had established beyond peradventure that franchisee breached the franchise agreements and that guarantors were liable for these breaches and attorney fees pursuant to the guaranty agreements.

The court also granted franchisor's motion for partial summary judgment on the defendants' fraud and negligent misrepresentation claims. The court found that the defendants' fraud and negligent misrepresentation claims were tied directly to the franchise agreements, arising solely from the contractual relationship between the parties. The defendants did not show that they suffered any loss independent of the franchise agreements. Accordingly, the claims were barred by the economic loss rule. In fact, the court found that the defendants simply recast their previously dismissed breach of contract claim as a claim for fraud and negligent misrepresentation.

The court next considered the defendants' counterclaims for consequential and punitive damages. The franchisor sought summary judgment on these claims based upon its affirmative defense of waiver, arguing that the franchisee waived its right to consequential and punitive damages by agreeing to a damages waiver provision in the franchise agreements. In response, the defendants argued that the damages waiver provision did not apply to them because the damages waiver provision was not conspicuous and because guarantors were not parties to the franchise agreements. Upon review of the plain language of the franchise agreements, the court concluded that the franchisor was entitled to summary judgment on its affirmative defense that the franchisee waived the right to recover consequential and punitive damages and that the guarantors were bound by that waiver.

Finally, the court held that the franchisor was entitled to summary judgment on the defendants' request for attorney fees because the defendants failed to provide any statutory or contractual bases for an award of attorney fees.

**CHOICE OF FORUM**

***Untitled 3, LLC v. Apex Energy Grp., LLC*, Bus. Franchise Guide (CCH) ¶ 15,527, No. 15-cv-164, 2015 WL 2169770 (W.D.Pa. May 8, 2015)**
Defendant Apex Energy Group, LLC sought to transfer the venue of a case pending before the U.S. District Court for the Western District of Pennsylvania pursuant to the terms of its license agreement with plaintiff Untitled 3, LLC. Untitled initiated the lawsuit against Apex arguing that the "license agreement" was in fact a franchise agreement and that Apex had sold a franchise in violation of both Indiana and Pennsylvania laws requiring registration and disclosure. Untitled's complaint sought rescission of the license agreement, damages for breach of contract and fraud, and a declaratory judgment holding that the contract was in fact a franchise.

Apex argued that the case should have been brought in the U.S. District Court for the District of Southern Indiana, as required by the forum selection clause in the license agreement. Untitled argued that the forum selection clause was invalid because Apex fraudulently induced Untitled to enter into the license agreement.

In determining whether to transfer a case, the court applied the balancing test required by the Third Circuit, analyzing both the private and public factors. Untitled argued that all of the private factors weighed against transfer, but the court held that under the U.S. Supreme Court's decision in *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas*, 134 S. Ct. 568 (2013), the district court must construe all of the private interest elements in favor of the moving party where the claims arise out of a contract with a valid forum selection clause. The court rejected Untitled's argument that the license agreement was invalid because Untitled's own complaint sought damages for breach of contract, and more importantly, sought a declaratory judgment on aspects of the contract, both of which presupposed the existence of a valid contractual agreement.

Having concluded that all of the private factors must be construed in favor of transfer, the court analyzed the following public factors (1) the enforceability of the judgment; (2) practical considerations that could make the trial easy, expeditious, or inexpensive; (3) the relative administrative difficulty in the two fora resulting from court congestion; (4) the local interest in deciding controversies at home; (5) the public policies of the fora; and (6) the familiarity of the trial judge with the applicable state law in diversity cases. The only issues raised were number (4) and (6), and the court held that both factors were neutral because the complaint raised claims under both Pennsylvania and Indiana law; and as such, both fora would have an interest in adjudicating the dispute. Accordingly, with the private factors weighing strongly in favor of transfer under the *Atlantic Marine* case and the public factors coming out neutral on balance, the court ordered the case transferred to the federal court for the Southern District of Indiana.

**CHOICE OF LAW**

***Martin v. Bimbo Foods Bakeries Distrib., LLC*, Bus. Franchise Guide (CCH) ¶ 15,508, No. 5:15-CV-96-BR, 2015 WL 1884994 (E.D.N.C. Apr. 24, 2015)**
This case is discussed under the topic heading "Contract Issues."

**CONTRACT ISSUES**

***Fabbro v. Drx Urgent Care, LLC*, Bus. Franchise Guide (CCH) ¶ 15,486, D.C. Civil No. 3-13-cv-03558, 2015 WL 1453537 (3d Cir. Apr. 1, 2015)**
This case is discussed under the topic heading "Fraud."

***Grout Doctor Global Franchise Corp. v. Groutman, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,530, No. 7:14-CV-105-BO, 2015 WL 2353698 (E.D.N.C. May 14, 2015)**
This case is discussed under the topic heading "Damages."

***Martin v. Bimbo Foods Bakeries Distribution, LLC*, Bus. Franchise Guide (CCH) ¶ 15,508, No. 5:15-CV-96-BR, 2015 WL 1884994 (E.D.N.C. Apr. 24, 2015)**
Beginning in 2006, plaintiff John Martin operated a franchised baked goods business under an agreement with franchisor Bimbo Foods Bakeries Distribution, LLC. Pursuant to the agreement, Martin made an upfront payment of $108,000 for the exclusive distribution rights for Bimbo's baked goods in a predetermined territory. Martin also agreed to pay Bimbo a small percentage of his sales of Bimbo's baked goods in his territory. During the course of the parties' relationship, Martin claimed that he earned approximately $7,000 per month in profits from the operation of the business.

In December 2013, Bimbo issued a written notice of termination of the franchise agreement, contending that Martin had created false sales and buyback invoices to fabricate nonexistent deliveries. Bimbo then seized Martin's distribution route and operated the business for eight months before selling the route to a third party for $135,581. During the course of Bimbo's operation of the route, it incurred losses of $26,918, which were billed to Martin.

Martin filed suit, alleging that Bimbo had breached the franchise agreement by failing to operate the route at a profit and to sell the distribution rights for the best price. Martin also alleged that Bimbo's operation of the route at a loss gave rise to claims for fraud, negligence, breach of fiduciary duty, and violations of North Carolina's Unfair and Deceptive Trade

Practices Act (UDTPA). Bimbo moved to dismiss the complaint, arguing that the breach of contract claims were not supported by any factual allegations and that the common law tort and statutory claims were barred by the economic loss rule. Bimbo also argued that Pennsylvania law applied to the parties' dispute to preclude Martin's claims under North Carolina's UDTPA.

The U.S. District Court for the Eastern District of North Carolina refused to dismiss the breach of contract claims. The court noted that Martin had alleged facts to support the claim, specifically including how he would have made profits of $7,000 per month had he operated the business, and as a result, Bimbo's operation of the business resulting in a net loss of $26,918 stated a claim for breach of contract. The court also noted that the contract specifically required that Bimbo obtain the "best price which can be obtained" rather than merely a "fair" or "reasonable" price. As such, given that the complaint alleged that the distribution route was worth "in excess of $140,000," the court concluded that the complaint contained sufficient facts to state a claim for breach of contract when the distribution rights were sold for less than that amount.

Conversely, the court granted the motion as to the common law tort claims for negligence and breach of fiduciary duty, noting the claims were barred by the economic loss rule. The court held that the complaint sought exclusively economic damages, and further, that the claims overlapped entirely with the breach of contract claims. The fraud claims were also dismissed because the complaint contained no allegations suggesting Martin had been in any way deceived by allegedly false statements about Bimbo's operation of the route.

Lastly, the court declined to dismiss the UDTPA claim under the economic loss rule, noting that state court decisions had not conclusively determined whether the rule applied to statutory claims. The court also refused to apply Pennsylvania law to require dismissal of the claim, noting that dismissal on choice of law grounds is only required where the difference in law between the two jurisdictions would change the outcome. Because the outcome would be the same under the laws of both jurisdictions, the court applied North Carolina's statute and refused to dismiss the case.

***MS & BP, LLC v. Big Apple Petroleum, LLC*, Bus. Franchise Guide (CCH) ¶ 15,526, No. 14-CV-5675 (RRM) (RER), 2015 WL 2185038 (E.D.N.Y. May 7, 2015)**

This case is discussed under the topic heading "Petroleum Marketing Practices Act."

***New York Metro Peterbilt, Inc. v. Peterbilt Motors Co.*, Bus. Franchise Guide (CCH) ¶ 15,488, No. 13-CV-843 (DRH) (GRB), 2015 WL 1469212 (E.D.N.Y. Mar. 30, 2015)**

Peterbilt Motors Company manufactures medium and heavy duty trucks for retail sale through a network of independently owned and authorized dealers. In October 2009, Peterbilt and New York Metro Peterbilt, Inc. entered into a dealer sales and service agreement through which Peterbilt granted NY Metro a nonexclusive right to buy Peterbilt products and identify itself as an authorized Peterbilt dealer. On March 2, 2011, NY Metro's principal Barclay Ehrler notified Peterbilt in writing that it no longer made sense for him to continue to operate at NY Metro's Flushing location and proposed consolidating operations with NY Metro's other dealership located in Hauppauge. Thereafter, Ehrler began negotiations with Mauricio Leal regarding the potential sale and transfer of Ehrler's interests in NY Metro and the Hauppauge dealership to Leal and his company Peterbilt of New York City, LLC. According to Leal, he met Ehrler on November 29, 2011, and executed a purchase/sale agreement for the sale of NY Metro. Leal paid Ehrler $40,000 upon execution of the purchase agreement.

While NY Metro believed that the purchase agreement contained all of the essential material terms necessary to bind the parties to a sale, Leal believed that this document was simply a letter of intent. Over the next two months, Ehrler and Leal exchanged contracts but found each other's proposals to be insufficient for various reasons. On January 31, 2012, Leal met with Ehrler at the Hauppauge location. Leal claimed he informed Ehrler that there was no deal to close because Ehrler did not have the consideration required to close, i.e., permits and licenses, but Ehrler claimed that NY Metro was ready and willing to close on that date. Both parties agreed that no deal occurred on that date and Ehrler refunded Leal $38,000, keeping $2,000 for legal fees.

Following the failure of the deal, NY Metro and Ehrler (collectively, plaintiffs) commenced an action against Peterbilt, Peterbilt of NYC, and Leal (collectively defendants) asserting state claims of breach of contract, misrepresentation, and fraud in the Suffolk County Supreme Court. On February 14, 2013, the action was removed to the U.S. District Court for the Eastern District of New York. After removal, Peterbilt filed a motion for summary judgment seeking dismissal of the plaintiffs' breach of contract and fraud claims. Similarly, Peterbilt of NYC and Leal (collectively, the Leal defendants) filed a motion for summary judgment seeking dismissal of each of the plaintiffs' claims against them. Finally, the plaintiffs moved for summary judgment on the Leal defendants' counterclaims for franchise infringement, fraudulent misrepresentation, and bad faith.

The district court first addressed the Leal defendants' motion for summary judgment that sought dismissal of the plaintiffs' breach of contract and fraud claims against the Leal defendants. The plaintiffs claimed that the Leal defendants breached the purchase agreement by failing to pay the plaintiffs the sums outlined in the agreement. The Leal defendants argued that the plaintiffs' claim for breach of contract must fail because no contract existed between the parties. The Leal defendants characterized the purchase agreement as a non-binding preliminary agreement. The district court found that while the purchase agreement did not contain any language indicating that it was merely a proposal, the fact that it purported to *outline* the terms of the agreement and lacked detail regarding certain terms indicated that the parties did not intend to be bound. Therefore, the district court held that because intent could not readily be determined by examining the purchase agreement, summary judgment was not appropriate.

Additionally, the plaintiffs also claimed that the Leal defendants committed fraud because they agreed to purchase the plaintiffs' business without the intent of consummating the transaction. The Leal defendants argued that this claim must be dismissed because it was duplicative of the plaintiff's breach of contract claim. The district court agreed that simply dressing up a breach of contract claim is insufficient to state an independent tort claim. However, the district court also found that to the extent the plaintiffs contended that the fraud claim arose not from the purchase agreement, but from misrepresentations extraneous to the contract, they failed to specifically identify any of those statements or point to any evidence suggesting that they relied on these statements to their detriment. Accordingly, the district court granted the Leal defendants' motion for summary judgment as to the plaintiffs' fraud claim.

The district court next addressed Peterbilt's motion for summary judgment that sought dismissal of the plaintiffs' breach of contract, misrepresentation, and price discrimination claims. The plaintiffs claimed that, although Peterbilt was not a party to the purchase agreement, because Peterbilt controlled every aspect of the transaction it was liable for Leal's failure to pay the consideration provided for in the purchase agreement under agency theory. The district court found that although the evidence in the record did not directly reference Peterbilt's grant of authority to Leal to engage in the dealership transaction on its behalf, a reasonable trier of fact could find that certain correspondence involving Michael Conroy, a Peterbilt representative, raised a question as to whether Leal acted with apparent authority. The court also noted that a reasonable fact finder might conclude that Conroy's discussion of his intent to meet with Leal regarding the transaction, as well as his use of the words *we* and *our*, gave rise to the appearance that Peterbilt had authorized Leal to act on its behalf. Accordingly, the court refused to dismiss the plaintiffs' breach of contract claim against Peterbilt.

The plaintiffs' complaint also alleged that Peterbilt had made fraudulent misrepresentations to the plaintiffs regarding the sale of NY Metro. Specifically, the plaintiffs alleged that they agreed to the extension of the dealership agreement and refrained from marketing the business to third parties, based upon Peterbilt's representations that it would purchase the plaintiffs' dealership and rent the plaintiffs' premises for a fair and reasonable price. Peterbilt argued that the plaintiffs failed to provide any evidence that Peterbilt made any material false statements. The district court agreed and dismissed the plaintiffs' misrepresentation claim against Peterbilt because they failed to raise a genuine dispute as to whether Peterbilt made any material false representations.

Count III of the plaintiffs' complaint alleged price discrimination arising out of Peterbilt's alleged refusal to sell trucks and parts inventory to the plaintiffs at a price equal to the price which Peterbilt sold its trucks and parts to other dealerships. The plaintiffs alleged that Peterbilt specifically engaged in discrimination in order to make it impossible for the plaintiffs to sell Peterbilt's products at a price that was competitive with the prices which competing dealerships could offer potential product purchasers. Peterbilt argued that there was no language in the dealer agreement requiring such sales and that even if there were, the plaintiffs had not presented any evidence of a breach. Given Peterbilt's arguments, in addition to the fact that Ehrler testified at his deposition that he was not aware what other dealers paid for trucks from Peterbilt and that he did not have any evidence that Peterbilt was selling trucks to other dealers at lower prices, the district court dismissed the plaintiffs' price discrimination claim.

Finally, the district court addressed the plaintiffs' motion for summary judgment that sought dismissal of the Leal defendants' counterclaims for breach of the dealership agreement, fraudulent misrepresentation, and bad faith. The Leal defendants claimed that the plaintiffs knowingly and wrongfully continued to hold themselves out as a Peterbilt dealer after cancellation of their franchise by continuing to perform Peterbilt warranty work and selling and servicing Peterbilt trucks. According to the Leal defendants, these actions were in breach of the plaintiffs' cancellation/termination policy contained in the dealership agreement with Peterbilt and resulted in damages to the Leal defendants as third party beneficiaries of that agreement. The plaintiffs argued that the Leal defendants had no basis to assert any breach of the dealership agreement because the Leal defendants were not parties to the agreement, nor have they been assigned any rights under that agreement. The district court found that the Leal defendants neither raised any genuine issue of fact as to their claim that they were third party beneficiaries of the dealership agreement, nor explained how they sustained damages as a result of the alleged breach. As a result, the district court dismissed this counterclaim.

The Leal defendants also alleged that the plaintiffs made various misrepresentations regarding business licenses, certificates of occupancy, and environmental hazards with the intent to deceive and defraud Leal. But the Leal defendants failed to cite any evidence to support this cause of action. Accordingly, the district court found that the Leal defendants had failed to raise a genuine question of fact regarding the plaintiffs' alleged misrepresentations and dismissed their fraudulent misrepresentation claim against the plaintiffs. Citing a similar lack of evidence, the district court similarly dismissed the Leal defendants' final claim that the plaintiffs acted in bad faith during the purchase and sale negotiations.

***Noble Roman's Inc. v. Hattenhauer Distrib. Co.*, Bus. Franchise Guide (CCH) ¶ 15,484, No. 1:14-cv-1734-WTL-DML, 2015 WL 1526074 (S.D. Ind. Apr. 3, 2015)**

Plaintiff Noble Roman's, Inc. was a franchisor of a pizza and sandwich restaurant that sold franchises to defendant Hattenhauer Distributing Co. in 2005 and 2006. In 2014, Noble exercised its right to perform an audit of the franchisee's sales to determine whether Hattenhauer had properly paid royalties on gross sales as required by the franchise agreements. Specifically, Noble compared the total amount of products purchased by Hattenhauer with the reported gross sales and noted that there was a discrepancy. Concluding that the disparity represented Hattenhauer's underreported sales, Noble demanded payment of royalties on the underreported sales figures. When Hattenhauer refused to pay, Noble filed suit against Hattenhauer seeking damages for the underreported sales.

Hattenhauer moved to dismiss the lawsuit, arguing that the franchise agreement only permitted Noble to recover royalties on gross sales and argued that the complaint should be dismissed because it did not allege that Hattenhauer had failed to pay royalties on specific product sales. The U.S. District Court for the Southern District of Indiana rejected Hattenhauer's argument, noting that concealment of product sales gave rise to the breach of contract claims, and as a result, the complaint contained adequate factual allegations to survive dismissal.

Hattenhauer also argued that the court should dismiss the claims to the extent barred by the Uniform Commercial Code's (UCC) four-year statute of limitations. Noble argued that the longer ten-year limitations period applicable to breach of contracts claims applied. The court held that the predominant thrust of the franchise agreements was the sale of a franchise, not the sale of products, and therefore the four-year limitations period under the UCC did not apply.

***Noble Roman's Inc. v. Sahara Sam's Indoor Water Park, LLC*, Bus. Franchise Guide (CCH) ¶ 15,487, No. 1:14-cv-00500-SEB-MJD, 2015 WL 1505647 (S.D. Ind. Mar. 31, 2015)**

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

***One Hour Air Conditioning Franchising, LLC v. Jerry's Comfort Experts, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,522, No. 8:14-CV-994-T-EAK-TGW, 2015 WL 2095199 (M.D. Fla. May 5, 2015)**

One Hour Air Conditioning Franchising, LLC and Jerry's Comfort Experts, Inc. (JCE) entered into a One Hour Air Conditioning franchise agreement in September 2008. JCE's owners, Brent Rackham and Jason Rackham, personally guaranteed JCE's obligations under the franchise and related agreements, including its obligations under a promissory note for $51,385.34. In September 2013, the plaintiff sent JCE and its guarantors a notice of default under the franchise agreement and a subsequent notice of termination in

October 2013 arising out of JCE's failure to cure the defaults. After termination, JCE continued to use the plaintiff's trademarks, competed with the plaintiff in JCE's former territory, and failed to make payments to the plaintiff under the promissory note. The plaintiff filed suit against JCE and guarantors and sought an order of summary judgment on its claims against the guarantors. The guarantors did not respond to the motion.

In reviewing the motion, the U.S. District Court for the Middle District of Florida applied the well-established standard that a motion for summary judgment should be granted only where the party moving for the judgment "has sustained its burden of showing the absence of a genuine issue as to any material fact when all evidence is viewed in the light most favorable to the non-moving party." The non-moving party is required to go beyond the pleadings and rely on affidavits, deposition testimony, interrogatories, and any other discovery to show the court that a genuine issue for trial does exist and cannot simply rest on the denials in its pleadings. As guarantors did not respond to the motion for summary judgment and did not provide any evidence to show a genuine issue of material fact, the court granted the plaintiff's motion for summary judgment. The court then proceeded to grant damages to the plaintiff, which request was unopposed by guarantors, for lost continuing franchise fees and marketing fund contributions under the terms of the franchise agreement, the unlicensed use of the One Hour Air Conditioning trademarks, and unpaid principal and interest on the promissory note. The court also granted the plaintiff leave to file a motion to recover attorney fees and costs.

***Super 8 Worldwide, Inc., v. Anu, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,504, Civil Action No. 13-4852, 2015 WL 1969138 (D.N.J. Apr. 29, 2015)**

On October 20, 1997, Super 8 Worldwide, Inc. entered into a franchise agreement with Anu, Inc. that permitted Anu to operate a fifty-seven room Super 8 guest lodging facility. Anu supplemented the agreement with personal guaranties from its owners, Pravin Patel and Kailashben Zaver (collectively defendants), providing that upon default by Anu and notice from Super 8, the guarantors would immediately make payment and perform, or cause Anu to perform, each unpaid or unperformed obligation under the agreement. On March 3, 2010, Super 8 sent Anu a notice of termination due to abandonment of the franchise. Super 8 demanded payment for liquidated damages, recurring fees, and attorney fees. Three years later, Super 8 filed suit against the defendants alleging various breach of contract claims and arguing that the defendants owed Super 8 damages because Anu unilaterally terminated the agreement through its abandonment of the hotel. On January 20, 2015, the court granted Super 8 a default judgment against Anu and awarded the plaintiff $317,591.65 in damages. Super 8 then filed a motion for summary judgment against Patel.

When Patel did not oppose the motion, the court granted summary judgment in favor of Super 8, awarding liquidated damages and recurring fees.

The court found that the agreement and its corresponding guaranties were valid and binding contracts and that Patel breached the agreement when he ceased operation of the hotel.

***Texas Ujoints, LLC v. Dana Holding Corp., LLC*, Bus. Franchise Guide (CCH) ¶ 15,537, Case No. 13-CV-1008, 2015 WL 3454431 (E.D. Wis. May 30, 2015)**
This case is discussed under the topic heading "Termination and Nonrenewal."

***Untitled 3, LLC v. Apex Energy Grp., LLC*, Bus. Franchise Guide (CCH) ¶ 15,527, No. 15-cv-164, 2015 WL 2169770 (W.D. Penn. May 8, 2015)**
This case is discussed under the topic heading "Choice of Forum."

***Yumilicious Franchise, LLC v. Barrie*, Bus. Franchise Guide (CCH) ¶ 15,509, Civil Action No. 3:13-CV-4841-L, 2015 WL 1856729 (N.D. Tex. Apr. 23, 2015)**
This case is discussed under the topic heading "Attorney Fees."

## DAMAGES

***Grout Doctor Global Franchise Corp. v. Groutman, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,530, No. 7:14-CV-105-BO, 2015 WL 2353698 (E.D.N.C. May 14, 2015)**
Plaintiff Grout Doctor Global Franchise Corp. filed suit against a former franchisee, Groutman, Inc., and an affiliated business and the former franchisee's owner (collectively, Groutman) seeking a permanent injunction preventing Groutman from continuing to use Grout Doctor's trademark and trade secrets following termination of the franchise relationship, as well as damages for breach of contract, trade secret infringement, trademark infringement, and violations of North Carolina's Unfair and Deceptive Trade Practices Act. The lawsuit arose out of Groutman's decision to voluntarily cease operation of the business as a franchise, but continue doing business independent from Grout Doctor. When the defendants failed to answer the complaint, the U.S. District Court for the Eastern District of North Carolina entered a default judgment in favor of Grout Doctor on all claims.

The court required Grout Doctor to prove its entitlement to damages. Grout Doctor submitted evidence demonstrating the average amount of royalties paid by Groutman during the course of the franchise relationship and projected those amounts into the future to estimate the amount of its damages. Concluding that Grout Doctor's submissions were sufficiently concrete and calculable, the court awarded Grout Doctor damages for breach of contract that included lost profits for the remaining unexpired term of the franchise relationship. The court held that Groutman's voluntary abandonment of the franchise entitled Grout Doctor to any profits it would have otherwise derived from the remaining unexpired term of the franchise relationship.

The court also awarded Grout Doctor damages for Groutman's misappropriation of trade secrets and treble damages for violations of North Carolina's Unfair and Deceptive Trade Practices Act. These damages arouse out of Groutman's sale of copies of the franchise policy manuals to consumers over the Internet after it abandoned the franchise relationship. The court also directed the U.S. Patent and Trademark Office to cancel the trademark registration applications that Groutman had filed in an effort to gain control over Grout Doctor's federally registered trademarks. The court awarded Grout Doctor prejudgment and post-judgment interest on the contract damages and post-judgment interest on the damages arising out of Groutman's statutory violations.

Finally, the court issued a permanent injunction preventing Groutman from continuing to use Grout Doctor's trademarks in its business and misappropriating Grout Doctor's proprietary trade secrets, both through use in its business sales to consumers.

***Super 8 Worldwide, Inc., v. Anu, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,504, Civil Action No. 13-4852, 2015 WL 1969138 (D.N.J. Apr. 29, 2015)**
This case is discussed under the topic heading "Contract Issues."

## DEFINITION OF FRANCHISE

***Cycle City, Ltd. v. Harley-Davidson Motor Co.*, Bus. Franchise Guide (CCH) ¶ 15,536, CV. No. 14-00148 HG-RLP, 2015 WL 3407825 (D. Haw. May 26, 2015)**
Harley-Davidson Motor Co. is a manufacturer of high end motorcycles. In the State of Hawaii, all Harley motorcycles had been exclusively distributed by Cycle City, Ltd. (CC) since 1966 under a licensing agreement with Harley. Pursuant to the parties' distribution and licensing agreements, CC had a right to sell motorcycles and other products bearing Harley's trademark to dealers in its network and independent third party retailers. The parties' agreement renewed automatically at the conclusion of each term. On July 13, 2013, the distribution agreement expired, and Harley did not renew the term.

Following nonrenewal of the distribution agreement, CC filed suit against Harley alleging, among other things, violations of Hawaii's Franchise Investment Law (HFIL). Harley filed a motion to dismiss limited to CC's claims under the HFIL. Specifically, Harley alleged that the HFIL did not apply because the parties' relationship did not constitute a franchise under the statute.

Under the HFIL, an agreement constitutes a franchise if (1) there is an agreement granting the right to use the manufacturer's trademark;

(2) there is a community of interest between the putative franchisee and franchisor; and (3) the putative franchisee pays a fee, directly or indirectly. Harley argued that CC had failed to allege sufficient facts to establish the community of interest and fee elements of the franchise test.

CC argued that it had sufficiently alleged the existence of a franchise fee, noting that the parties' agreement, which was incorporated into the complaint by reference, provided for CC to pay royalties based on a percentage of its net sales of products. Although Harley argued that these amounts did not constitute a franchisee fee because they fit within a statutory exemption for sales of products at a bona fide wholesale price, the U.S. District Court for the District of Hawaii held otherwise. Specifically, the court noted that the parties' agreement was not merely an agreement for sale of products at wholesale prices, but rather contained expansive provisions regarding use of the Harley-Davidson trademark on motorcycles and on other products. The court also noted that whether the price was a bona fide wholesale price was a factual question that could not be resolved at the motion to dismiss stage.

Harley also argued that there was no community interest between the parties' two respective businesses. Under the HFIL, a community interest is defined broadly as a continuing financial interest between the franchisor and franchisee in the operation of the franchise business. Due to an apparent dearth of Hawaiian law interpreting this provision, the court looked to case law interpreting similar language under the Wisconsin Fair Dealership Law. Under Wisconsin case law, courts apply a non-exhaustive ten factor list to determine whether there is a community interest between the two businesses. Noting that the balancing test requires a fact intensive review of the parties' relationship, the court concluded that it would be inappropriate to address the community interest question at the motion to dismiss stage. However, the court did note that many of the factors supporting a community interest were affirmatively alleged in CC's complaint.

Having concluded that factual issues precluded dismissal at the early stage of the case, the court denied Harley's motion to dismiss.

### DISCRIMINATION

### *Andy Mohr Truck Ctr., Inc. v. Volvo Trucks N. Am.*, Bus. Franchise Guide (CCH) ¶ 15,523, No. 1:12-cv-448-WTL-DKL, 2015 WL 2124994 (S.D. Ind. May 6, 2015)

Andy Mohr Truck Center, Inc. entered into a dealer agreement with Volvo Trucks North America, a division of Volvo Group North America, LLC after Volvo allegedly promised that once Andy Mohr entered into an agreement to be a Volvo Trucks dealer, Volvo would grant it a Mack Trucks dealership. Relying on this promise, Andy Mohr signed a Volvo Trucks dealer agreement and later approached Volvo for the promised Mack Truck franchise. It became clear that Andy Mohr, however, would not be awarded the dealership and soon afterward Volvo sold the Mack Truck business to another party. Andy Mohr informed Volvo that it considered Volvo's actions to be a breach of their agreement. Thereafter, according to Andy Mohr, Volvo began treating Andy Mohr unfairly and differently than other Volvo Trucks dealers. Among other things, Andy Mohr contended that Volvo granted other dealers better price concessions, even when competing for the same fleet purchase customer, and further, that Volvo allowed these other Volvo Trucks dealers to offer lower prices to the customer and underbid Andy Mohr for sales. Volvo sued Andy Mohr in May 2012 and Andy Mohr countersued in June 2012. The cases were consolidated and all claims, except for one, were resolved on the pleadings. Volvo then moved for summary judgment on Andy Mohr's sole remaining claim for price discrimination under the Indiana Unfair Practices Act (IUPA) and Indiana Deceptive Franchise Practices Act.

Volvo first argued that the claim was barred under the limitation of remedies clause in the dealer agreement. The enforceability of the limitations of remedies clause, however, had a previous procedural history under this case. Specifically, Volvo had filed a motion for summary judgment under which it claimed that the limitation of remedies clause in the parties' agreement barred Andy Mohr's claim for breach of contract. The U.S. District Court for the Southern District of Indiana granted the motion and dismissed the claim. Andy Mohr then filed a motion for reconsideration where the court concluded that the IDFPA would have rendered the clause unenforceable had it not been for the two-year statute of limitations applicable to the claim under the statute. Ultimately, the clause was enforced by the court to bar the breach of contract claim. Relying on this earlier finding, Volvo asked the court to dismiss Andy Mohr's price discrimination claim. Andy Mohr, however, argued that Volvo's wanton and willful discrimination of Andy Mohr was conduct which, as a matter of public policy, should not be limited by a generally phrased limitations clause. The court agreed and denied Volvo's motion as to this issue.

Volvo also argued that Andy Mohr could not meet its prima facie case for price discrimination. In order to prevail as to its claim, Andy Mohr had to show that Volvo engaged in arbitrary and disparate treatment between Andy Mohr and other similarly situation dealers. While Andy Mohr identified similarities between itself and the dealers to which it claimed Volvo provided favorable treatment, Volvo argued that Andy Mohr provided no evidence to show that the "competitive circumstances" between the dealers were the same and, in fact, the dealers were quite different and warranted differing treatment. The court, however, agreed with Andy Mohr and held that differences in the dealers' respective "competitive circumstances" were factual questions that must be decided by a jury.

Volvo next argued that Andy Mohr could not prove that Volvo's treatment was arbitrary and disparate. To support its argument, Volvo submitted data contradicting earlier information provided by Andy Mohr that evaluated Volvo's price concessions as to similar deals across a much larger sample than used by Andy Mohr. The court, however, found that Andy Mohr's evaluation of the different concessions granted by Volvo to similar deals during the two-week period before and two-week period after each specific deal for which disparate treatment was claimed was sufficient to create a genuine issue of fact to be determined by the jury. To this end, the court denied Volvo's motion for summary judgment as to Andy Mohr's failure to meets its prima facie case.

Lastly, Volvo claimed that Andy Mohr did not show sufficient evidence of damages. The court denied Volvo's final argument for summary judgment, noting that Andy Mohr's expert report need not evaluate all of the transactions for which Andy Mohr was claiming discriminating treatment. Instead, Andy Mohr could bring in additional witnesses to testify as to damages based on their personal knowledge of Andy Mohr's business.

***McClain v. Avis Rent a Car System, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,502, Civ. No. 12-5151 (WHW) (CLW), 2015 WL 1344645 (D.N.J. Mar. 23, 2015)**

Lakeisha McClain and Leonard McClain were a married African American couple. Mrs. McClain was the president and sole shareholder of L&M Agency, a company that entered into an independent operator agreement (IOA) with Avis Rent a Car System, Inc. in 2003, pursuant to which L&M would operate the Avis car rental location on South Henderson Road in King of Prussia, Pennsylvania. The McClains began working at the location that year. In 2005, Mrs. McClain ceased operating the location full-time, and Mr. McClain assumed primary responsibility. The McClains operated L&M's Avis car rental location until Avis terminated the IOA in 2012.

Following the termination in 2012, the McClains brought suit against Avis under 42 U.S.C. § 1981 and the New Jersey Law Against Discrimination, alleging race discrimination and retaliation after termination of a business agreement. The U.S. District Court for the District of New Jersey dismissed the McClains' claims under § 1981 because the individuals were not parties to L&M's contract with Avis. The McClains' New Jersey state law claims were also dismissed because the case lacked necessary contacts with New Jersey. Shortly thereafter, Avis moved for summary judgment on the sole remaining claim under § 1981. The court determined that because L&M's argument was based upon a theory that Avis's stated reasons for termination were a pretext for race discrimination, L&M's § 1981 discrimination claim must be analyzed under the *McDonnell Douglas* burden-shifting framework.

Under *McDonnell Douglas*, a plaintiff must first establish a prima facie case of discrimination. Next, if the plaintiff succeeds in establishing a prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Finally, should the defendant carry this burden, the plaintiff has an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons but were a pretext for discrimination. Applying this framework, the court found that L&M easily presented a prima facie case of race discrimination, given that the McClains were members of a protected class, qualified to operate under the IOA, and suffered an adverse employment action under circumstances that could give rise to an inference of intentional discrimination.

The court also found that Avis carried its burden to articulate legitimate, nondiscriminatory reasons for terminating the IOA when it alleged that the termination was due to uncleanliness at the location, missed financial goals, and personality conflict. The court determined that Avis's argument was not so weak, incoherent, implausible, or inconsistent an explanation that a reasonable fact finder could not find it worthy of credence. However, upon review of the final step of the *McDonnell Douglas* framework, the court did not find that L&M demonstrated by a preponderance of the evidence that the legitimate reasons offered by Avis for termination of the IOA were not its true reasons but instead pretext for discrimination. In support of this finding, the court stated that based upon the record, no reasonable fact finder would disbelieve Avis's articulated legitimate reasons for termination or believe Avis was more likely than not to have been motivated by invidious discriminatory animus.

The court also rejected L&M's retaliation claim as a matter of law, holding that neither of the comments made by Mr. McClain that were offered in support of this claim constituted protected activity under § 1981. Additionally, the court rejected L&M's argument that the McClains' 2007 letter to Avis complaining of racial discrimination qualified as protected activity under § 1981, finding it impossible to make any reasonable inference of causation between the letter and termination.

## EARNINGS CLAIMS

### ***Legacy Academy, Inc. v. Mamilove, LLC,* Bus. Franchise Guide (CCH) ¶ 15,513, 771 S.E.2d 868 (2015)**

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

## ETHICS

### ***Patel v. 7–Eleven, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,492, No. CV 14-00519 PSG (DTBx) (C.D. Cal. Apr. 14, 2015)**

Defendant 7–Eleven, Inc. brought a motion to disqualify the plaintiffs' counsel, Gerard Marks and Marks & Klein, LLP, in a case brought by 7–Eleven's former franchisee for unlawful termination. The motion alleged that the plaintiffs' witness, a former employee of 7–Eleven, was unlawfully paid for his factual testimony. The plaintiffs argued, however, that the witness was compensated as an expert on interview and asset protection standards or, in the alternative, compensated for preparation time and as a litigation consultant and that payment was not contingent on the content of his testimony.

The witness, Kurt McCord, contacted Marks by e-mail stating that he could provide evidence of 7–Eleven's misconduct that would assist the plaintiffs in their claims against 7–Eleven. Marks hired McCord at $300 an hour, with a $2,500 minimum, to provide testimony as to "whether the interview techniques and circumstances [relative to plaintiffs] were proper as to both 7–Eleven interview directives, as well as to professionally accepted loss prevention interview ethics and practices." McCord's experience with 7–Eleven totaled only nine months, and his work history in the loss prevention field dated back only six years.

7–Eleven argued that McCord was not an expert and, therefore, paying him for his services constituted a violation of California Rule of Professional Conduct (CRPC) 5-310. The U.S. District Court for the Central District of California concluded that McCord's credentials did not qualify him as an expert and that while certain portions of his testimony could be construed to fall within the scope of expert testimony, the remainder was factual and pertained specifically to the plaintiffs' circumstance. The court went on to state that even if McCord was an expert in the purported areas, Marks hired McCord because of the factual testimony McCord told Marks he could provide, particularly as it pertained to the inner workings of 7–Eleven's franchisee investigations. Marks argued, however, that even if the testimony was factual, the payment to McCord did not violate the CRPC because such monies were to compensate McCord for preparation time and in exchange for acting as a litigation consultant. The court, once again, revisited the timeline of McCord's communications to Marks that included the type of factual testimony he could provide and what the associated fee was for such testimony. Marks hired McCord only after such communications so the court viewed this as "'quid pro quo' payment for testimony." The court next analyzed whether the payment could be construed as having been provided for preparation time and found it could not. Specifically, payments to witnesses for preparation time included preparation time for depositions, hearings, or trial, none of which applied in this instance. Also, McCord never provided Marks with an invoice for services or provided an accounting for time spent on the case. The court also concluded that McCord could not be found to be a litigation consultant as the determination had already been made that he was not an acceptable expert in any relevant field and that payment had been made in direct exchange for his factual testimony.

The court further found that Marks had violated CRPC 5-310. The court noted that disqualifying counsel is typically strongly disfavored, and instead, the preference is that "substantial justice" be accomplished another way. Nonetheless, as McCord's testimony was essentially discredited and likely of no further use to the plaintiffs, the court found that the proper remedy was to disqualify counsel as a result of their ethical violation. Accordingly, the court granted 7–Eleven's motion to disqualify counsel.

**FRAUD**

***Creative Am. Educ., LLC v. The Learning Experience Sys., LLC*, Bus. Franchise Guide (CCH) ¶ 15,524, No. 9:14-CV-80900, 2015 WL 2218847 (S.D. Fla. May 11, 2015)**

Plaintiff Creative American Education, LLC (CAE) purchased two "The Learning Experience" child care franchises from the defendant, Learning Systems Experience, LLC (LSE). CAE's owners were residents and citizens of Singapore who were using the purchase of the franchise as the basis to obtain EB-5 investor visas in order to immigrate to the United States. They were unable, however, to obtain their visas before the build-out of the child care center so, in the interim, CAE and LSE entered into a management agreement and power of attorney that granted LSE the right to operate the business and enter into agreements on CAE's behalf. The management agreement provided for a transition of the management of the child care center from LSE to CAE. Thereafter, CAE's owners arrived to the United States, trained with LSE, and assumed at least some managerial roles. But the centers were having operational problems, including staffing and licensing issues. CAE wrote to LSE requesting authorization to close one of the centers so that it could focus efforts on the second. LSE refused the request and notified CAE that it would be resuming management of the centers, which it later did. LSE requested funds from CAE during the operation of the centers, but CAE did not provide any money and instead filed a lawsuit in the U.S. District Court for the Southern District of Florida alleging fraudulent and negligent misrepresentation, rescission, violations of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), securities fraud, power of attorney claim, and breach of contract. LSE filed a motion for summary judgment seeking dismissal of those claims.

In order to prevail on its fraudulent or negligent misrepresentation claim, CAE had to show: (1) there was a misrepresentation of a material fact; (2) the representation was made knowingly, without knowledge as to its truth or falsity, or made when the maker ought to have known it was false; (3) the maker of the representation intended that the representation induce another party to act on it; and (4) injury must result to the party acting in justifiable reliance on the misrepresentation. In its motion, LSE argued that CAE had no evidence suggesting that it had justifiably relied on the pre-contractual representations CAE claimed were made by LSE because the franchise agreement contained an integration clause and a disclaimer of representations clause. The court held that the disclaimer in the franchise agreement resembled the one in the analogous case of *Garcia v. Santa Maria Resort, Inc.*, where the court held that the disclaimer precluded any showing of justifiable reliance. Accordingly, the court granted

LSE's motion for summary judgment and dismissed CAE's fraudulent and negligent misrepresentation claims.

The court similarly dismissed CAE's FDUTPA claims that were based on representations outside of the agreements, noting that justifiable reliance was an essential element of the cause of action, to the extent it was based on alleged misrepresentations. Nonetheless, CAE had also alleged deceptive acts committed during the management of the centers and supported the allegation in its pleadings. To this end, the court did not grant summary judgment on post-execution deceptive acts for which CAE brought FDUTPA claims.

With respect to CAE's rescission claim, the court articulated the following six elements necessary to prevail on that cause of action: (1) the character or relationship of the parties; (2) the making of a contract; (3) the existence of fraud, mutual mistake, false representation, impossibility of performance, or other grounds for rescission or cancellation; (4) that the party seeking rescission has rescinded the contract and notified the other party of the same; (5) that if the moving party has received benefits from the contract it should allege an offer to restore the benefits to the party furnishing them, if restoration is possible; and (6) the moving party has no adequate remedy at law.

The court found that with respect to the third, fourth, and six elements, there remained genuine issues of material fact. As to the third, LSE's seizure of the management of the two centers, CAE's cessation in acting as the franchisee, and the passing of a full year since the seizure raised at least the question for the court of whether the franchise agreement had become impossible for CAE to perform under. As to the fourth element, the court found that the filing of a suit and the service of the same to LSE was sufficient to serve as notice of the demand for rescission. Finally, as to the sixth element, the court found that the complaint included both rescission and damages and that LSE failed to convince the court that no adequate remedy exists. Accordingly, the court denied summary judgment on CAE's rescission claim.

To establish its securities' claim, CAE had to show: (1) there was an investment of money, (2) in a common enterprise, and (3) with an expectation of profits that was to come solely from the efforts of others. The record was clear, however, that there was no common enterprise because the franchise agreement and management agreement were not contemplated at the same time as a single venture. To the contrary, the management agreement came about only after CAE's owners realized that they would be unable to immigrate to the United States before the build-out of the centers. Moreover, the original intent was, from the very beginning, for CAE to operate the centers. In addition, the court also held that the parties did not expect that profits in the business would come solely through the management efforts of LSE because the management agreement was terminable by CAE per its terms. And in any event, LSE's management would also cease once the co-management period was over. For these reasons, the court found there was no investment created that would give rise to a securities claim and granted summary judgment in favor of LSE.

CAE's power of attorney claim was based on LSE's purported breach of the fiduciary duties of such appointment, including the duty to act in good faith and the duty not to act contrary to a principal's reasonable expectations. While certain actions LSE took may have been consistent with the powers granted to it by the management agreement, the power of attorney was potentially broad enough to impose other duties. In light of this, and LSE's failure to state why, as a matter of law, the court should find that no fiduciary duty existed here, CAE's claim as to the power of attorney survived and the motion for summary judgment was denied as to this claim.

The court then turned briefly to the remaining breach of contract claim and, citing previous decisions on factual issues in the case, denied summary judgment.

***Fabbro v. Drx Urgent Care, LLC,* Bus. Franchise Guide (CCH) ¶ 15,486, D.C. Civil No. 3-13-cv-03558, 2015 WL 1453537 (3d Cir. Apr. 1, 2015)**
Plaintiff Laura Fabbro brought suit against defendant franchisor Drx Urgent Care, LLC (DRX) alleging that DRX was liable for fraud, misrepresentation, breach of contract, and breach of the duty of good faith and fair dealing in connection with alleged misrepresentations contained in DRX's franchise disclosure document (FDD). Specifically, Fabbro alleged that the FDD substantially underestimated the total build-out cost of a new franchise. In addition, Fabbro alleged that DRX had made significant changes to the business model after Fabbro executed the franchise agreement—changes that made the business unprofitable and resulted in a constructive termination of the franchise agreement.

DRX moved to dismiss Fabbro's claims, arguing: (1) the statements in the FDD were not actionable statements of existing fact as they related to estimates or opinions; (2) Fabbro had failed to identify any provisions of the contract that had been purportedly breached by DRX; (3) the duty of good faith and fair dealing was not independently actionable under Maryland or New Jersey law; and (4) the U.S. Supreme Court's decision in *Mac's Shell Service Inc. v. Shell Oil Products Company* holding that a plaintiff cannot bring a claim under the Petroleum Marketing Practices Act (PMPA) for constructive termination applied to preclude a claim for constructive termination under the New Jersey Franchise Practices Act. The trial court agreed and entered a judgment in favor of DRX.

On appeal, the Third Circuit affirmed, agreeing that the expressly denominated "estimated" cost to build out the franchise unit set forth in the FDD could not give rise to an actionable claim for fraud. The court held that if it were to conclude otherwise, corporate annual reports and advertisements would give rise to a claim for fraud. The court also agreed that the breach of contract claim and duty of good faith claims were properly dismissed. The Third Circuit did note that, unlike in Maryland, it is possible in New Jersey to bring an independent claim for breach of the duty of good faith, but only where the defendant has acted with an improper motive or intention. As the complaint contained no allegation of DRX's bad motivation, the court affirmed the dismissal.

On the constructive termination claim, the Third Circuit rejected DRX's contention that the *Mac's Shell* case applied to preclude a claim for constructive termination under the New Jersey Franchise Practices Act. Consequently, the court affirmed the dismissal of the claim, noting that Fabbro had not alleged any improper intentions by DRX to terminate the agreement. The court rejected Fabbro's argument that significant changes to the business model that DRX applied to all franchisees in a nondiscriminatory way could constitute grounds for constructive termination of the franchise.

Finally, the court held that any claim under the Maryland Franchise Registration and Disclosure Law was barred by the three-year statute of limitations.

***Legacy Academy, Inc. v. Mamilove, LLC*, Bus. Franchise Guide (CCH) ¶ 15,513, 297 Ga. 15, 771 S.E.2d 868 (Apr. 20, 2015)**

Plaintiffs Mamilove, LLC and its officers Michele and Lorraine Reymond (collectively, Mamilove), brought suit against Legacy Academy, Inc. as franchisor and its officers Frank and Melissa Turner (collectively, defendants), seeking rescission of the franchise agreement the parties had entered into ten years earlier as well as damages based on claims for fraud, negligent misrepresentation, and violation of GA. CODE ANN. § 51-1-6 and the Georgia Racketeer Influenced and Corrupt Organizations Act (GRICO). The plaintiffs' claims arose primarily out of conduct occurring before execution of the franchise agreement. Specifically, the plaintiffs contended that the defendants made unlawful presale earnings claims during the parties' negotiations. Thereafter, the plaintiffs returned and met with the defendants once again and received an offering circular. But they alleged that the defendants coerced them into signing a franchise agreement that same day before they had an opportunity to review the offering circular by telling them that another franchisee would be permitted to take their desired location if they did not sign immediately.

In a jury trial, after the trial court's denied the defendants' motion for directed verdict, the jury awarded the plaintiffs a general verdict for $750,000 in compensatory damages, $375,000 in additional GRICO damages, and $30,000 for the cost of litigation. On appeal, the Georgia Court of Appeals affirmed the jury award. The Supreme Court of Georgia thereafter granted certiorari to determine whether the trial court's denial of the defendants' motion for directed verdict was in error and, as a result, whether certain claims should not have been submitted to the jury for consideration.

First, the court determined that where a party has the capacity and opportunity to read a contract, "they cannot afterwards set up fraud in procurement of his signature to the instrument based on [extracontractual] representations that differ from the terms of the contract." This includes extracontractual representations as to earnings. The court went on to state that "the only type of fraud that can relieve a party of his obligation to read a written contract and be bound by the terms is a fraud that prevents the party from reading the contract." While the defendants did put pressure on the plaintiffs by alerting them to the possibility of another franchisee acquiring their desired location for the franchise, they were not prevented from reading the contract; therefore, there was no fraud or misleading artifice. There was no evidence that excused the plaintiffs from reading the franchise agreement; absent such evidence, the court found in favor of the defendant's request for a directed verdict as to the plaintiffs' rescission claim.

The court next analyzed the effect of the franchise agreement's merger clause on the plaintiffs' claims, all of which depended on precontractual representations. The franchise agreement did include representations and acknowledgments by the plaintiffs that no earnings representations were made. Where a comprehensive merger clause exists in a contract stating that the written agreement is the whole agreement and understanding of the parties and that no prior representations will modify the agreement, the merger clause will stand and bar any claims for fraud based on precontractual representations. Therefore, the court found that the plaintiffs' claims of fraud, negligent misrepresentation, and violations of the GRICO statute were barred by the merger clause included in the franchise agreement.

Finally, the plaintiffs argued that even if the fraud, negligent misrepresentation, and GRICO claims should have been granted a directed verdict, they were still entitled to the jury award of $750,000 in compensatory damages because their § 51-1-6 claim survived. The court, however, determined that the award was unclear as to the claim for which the $750,000 in compensatory damages was awarded; therefore, it must then be reversed and remanded on the grounds that it could have included amounts awarded for claims that should not have been submitted to the jury.

***Martin v. Bimbo Foods Bakeries Distribution, LLC*, Bus. Franchise Guide (CCH) ¶ 15,508, No. 5:15-CV-96-BR, 2015 WL 1884994 (E.D.N.C. Apr. 24, 2015)**

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

***Noble Roman's Inc. v. Sahara Sam's Indoor Water Park, LLC*, Bus. Franchise Guide (CCH) ¶ 15,487, No. 1:14-cv-00500-SEB-MJD, 2015 WL 1505647 (S.D. Ind. Mar. 31, 2015)**

Plaintiff Noble Roman's Inc. brought an action against former franchisee Sahara Sam's Indoor Water Park, LLC alleging, among other things, fraud and breach of contract. Specifically, Noble Roman alleged that Sahara had fraudulently underreported sales of products under the franchise agreement, resulting in substantial reductions in monthly royalty payments. Noble Roman also argued that it was entitled to an injunction prohibiting Sahara from continuing to operate a business selling pizza and sandwich products in violation of a post-term noncompetition covenant contained in the agreement.

Sahara moved to dismiss, arguing: (1) the complaint did not allege all of the necessary elements of fraud with sufficient particularity, as required by Federal Rule of Civil Procedure 9(b); and (2) that the terms of the franchise agreement permitted Sahara to continue operating an "existing pizza or sandwich concept" after termination. The U.S. District Court for the Southern District of Indiana agreed in part. In particular, although Noble Roman had alleged most of the elements of fraud with sufficient particularity, the court noted that it had failed to allege when Sahara had allegedly misrepresented its sales during the course of the parties' nine-year business relationship and further had failed to allege facts showing how Noble Roman had relied upon the misrepresented sales figures. Accordingly, the court dismissed the fraud claim without prejudice and allowed Noble Roman to seek to re-plead its claims to cure the deficiencies in its pleadings.

With respect to the breach of contract claim, the court held that the complaint contained sufficient factual allegations to preclude dismissal. Although the contract expressly allowed Sahara to operate an "existing pizza or sandwich concept" post-termination, that right was limited by other language in the contract that precluded Sahara from operating such a business using any knowledge gained from Noble Roman during the operation of the franchise. Because Noble Roman alleged that Sahara was utilizing information obtained during the course of the parties' relationship, it had alleged sufficient facts for the court to deny the motion to dismiss and to allow Noble Roman to proceed with its attempt to enjoin Sahara's ongoing violations of the parties' post-termination noncompetition agreement.

## FTC FRANCHISING RULE

### *Yumilicious Franchise, LLC v. Barrie*, Bus. Franchise Guide (CCH) ¶ 15,532, Civil Action No. 3:13-CV-4841-L, 2015 WL 2359504 (N.D. Tex. May 18, 2015)

Plaintiff Yumilicious Franchise, LLC entered into two franchise agreements with Why Not, LLC that granted Why Not the right to operate two self-serve frozen yogurt stores in South Carolina in exchange for royalty fees. The franchise agreements were guaranteed by Matt Barrie, Kelly Glynn, and Brian Glynn (collectively, with Why Not, the defendants).

After Why Not fell behind on payments due and closed one location without the franchisor's consent, Yumilicious filed a lawsuit in the U.S. District Court for the Northern District of Texas alleging that the defendants failed to comply with their contractual obligations. The defendants filed various counterclaims, including claims pursuant to the Federal Trade Commission Act (Franchise Rule), Texas Deceptive Trade Practices Act (DTPA), and the Business Opportunity Acts of Texas (TBOA) and South Carolina (SCBOA). Yumilicious filed a motion for summary judgment on its affirmative claims for breach of contract and attorney fees and for partial summary judgment on the defendants' counterclaims for fraud, negligent misrepresentation, fraudulent inducement, consequential and punitive damages, and attorney fees.

On April 23, 2015, the court (1) granted Yumilicious' motion for summary judgment on its affirmative claims as well as reasonable attorney fees and (2) granted Yumilicious' motion for partial summary judgment on the defendants' counterclaims and dismissed these claims with prejudice. In its decision, noting that Yumilicious had failed to move for summary judgment on the defendants' counterclaim arising from alleged violations of the Franchise Rule, the court sua sponte raised the issue and directed the parties to brief whether any remaining counterclaim stemming from alleged violations of the Franchise Rule should be dismissed, given the case law holding that there is no private right of action under the FTCA.

The defendants conceded the point that the Franchise Rule does not create a private right of action for violation of its requirements; however, the defendants argued that their counterclaim alleging violations of the Franchise Rule should not be dismissed because the TBOA provides a right of action for violations of the Franchise Rule. The defendants further argued that a violation of the TBOA is a violation of the DTPA, which provides for private and public rights of action. In opposition, Yumilicious reminded the court that it had addressed the viability of a claim for violation of the Franchise Rule under the DTPA. Specifically, in a previous order, the court dismissed the defendants DTPA claim for failure to state a claim. Thus, absent a DTPA counterclaim, the defendants lacked a basis to bring a separate counterclaim for violations of the Franchise Rule. Accordingly, the court dismissed the defendants' counterclaim alleging violations of the Franchise Rule with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6) for lack of a private right of action under the FTCA.

## GOOD FAITH AND FAIR DEALING

***Fabbro v. Drx Urgent Care, LLC,* Bus. Franchise Guide (CCH) ¶ 15,486, D.C. Civil No. 3-13-cv-03558, 2015 WL 1453537 (3d Cir. Apr. 1, 2015)**

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

***Lukoil N. Am. LLC v. Turnersville Petroleum Inc.*, Bus. Franchise Guide (CCH) ¶ 15,516, Civil No. 14-3810 (RMB/AMD), 2015 WL 1735369 (D.N.J. Apr. 16, 2015)**

This case is discussed under the heading "Petroleum Marketing Practices Act."

## INJUNCTIVE RELIEF

**7–*Eleven, Inc. v. Sodhi*, Bus. Franchise Guide (CCH) ¶ 15,490, Civil Action No. 13-3715 (MAS) (JS), 2015 WL 1469859 (D.N.J. Mar. 30, 2015)**

7–Eleven, Inc. brought suit against several franchisees (collectively, Sodhi) in the U.S. District Court for the District of New Jersey alleging violations of the Racketeer Influenced and Corrupt Organizations Act. Specifically, 7–Eleven alleged that Sodhi engaged in a scheme to underreport gross sales and therefore deprive 7–Eleven of its share of the proceeds of the franchised business. During the course of discovery, Sodhi attempted to retain a former 7–Eleven employee to act as an expert witness in the case. 7–Eleven responded by filing suit in a Texas state court against the proposed expert witness, arguing that he had violated the terms of a confidentiality agreement with 7–Eleven by agreeing to testify in the federal case.

Sodhi filed a motion in the federal lawsuit requesting that the court enjoin 7–Eleven's prosecution of the Texas state court action and further enjoin the state court from enforcing any preliminary restraints obtained in that action. In addressing the motion, the court held that the federal Anti-Injunction Act applied. Under the Act, a federal court may stay ongoing state court litigation only in several limited and discrete circumstances. Sodhi argued that one such exception existed, specifically, the exception for instances where an injunction is necessary to aid the court's jurisdiction. The court noted that the jurisdictional exception applied only in extremely narrow circumstances where the absence of an injunction would seriously impair the federal court's flexibility and authority to decide the case. The court held that Sodhi's ability to use a specific expert witness did not seriously impair the court's ability or authority to decide the case and therefore denied the requested injunction of the ongoing state court proceedings.

The court rejected Sodhi's contention that 7–Eleven's actions constituted witness tampering or contempt of court. The court noted that such allegations presented affirmative claims for relief or criminal offenses and as such did not support a request for an injunction in a civil proceeding.

Finally, the court refused Sodhi's request that 7–Eleven return confidential material and information that it had obtained from the expert witness on the grounds that Sodhi had failed to object to the disclosures during the Texas state court proceedings and therefore had waived any objections to the disclosures.

***Benihana, Inc., v. Benihana Tokyo, LLC*, Bus. Franchise Guide (CCH) ¶ 15,506, No. 14-841, 784 F.3d 887 (2d Cir. Apr. 28, 2015)**

This case arises from a dispute resulting from the 1994 corporate division of the Benihana restaurant chain. Under the terms of the agreement dividing up the company, Benihana, Inc. (Benihana America) received the right to operate Benihana restaurants and use Benihana trademarks in the United States, Latin America, and the Caribbean, while Benihana Tokyo, LLC (Benihana Tokyo) received those rights for all other territories. The one exception to this division was Hawaii. On May 15, 1995, the parties entered into a license agreement granting Benihana Tokyo a license and franchise to operate Benihana restaurants in Hawaii, subject to the terms of the agreement. Most relevant here, the license agreement restricted Benihana Tokyo's menu selection and use of Benihana trademarks. The license agreement set forth procedures governing termination and also contained broad arbitration provisions for resolving disputes.

In May 2013, Benihana America sent a letter to Benihana Tokyo noting that hamburgers were not an authorized menu item and demanded that they be removed from the menu. When no remedial action was forthcoming, Benihana America sent a second letter notifying Benihana Tokyo that it was in breach of the license agreement and had thirty days to cure. After receiving two extensions of the cure period from Benihana America, Benihana Tokyo brought suit in the New York Supreme Court seeking an injunction to stay the running of the cure period pending arbitration of whether selling hamburgers violated the license agreement. Benihana America removed the suit to U.S. District Court for the Southern District of New York. The district court denied Benihana Tokyo's motion to stay the cure period. On December 13, 2013, Benihana America sent another notice of breach based on deficiencies in the submitted financial documentation and violations of the license agreement's advertising restrictions.

On January 13, 2014, the day on which the second cure period was set to expire, Benihana Tokyo filed an arbitration demand with the American Arbitration Association seeking a declaratory judgment that the claimed defaults did not exist. In the alternative, Benihana Tokyo sought a ruling allowing additional time to cure the alleged defaults.

Despite its assurances to the contrary, Benihana Tokyo continued to sell hamburgers at its Honolulu location. An onsite inspection by Benihana America on January 21, 2014, allegedly revealed that Benihana Tokyo was serving a "Tokyo Burger" as well as a "Beni Panda" children's meal consisting of two mini-burgers served with rice and arranged to resemble a panda face. These menu offerings were advertised using the Benihana name and other trademarks in a manner allegedly not authorized by the license agreement. That discovery prompted Benihana America to send Benihana Tokyo a notice of termination of the license agreement effective February 15, 2014. The notice asserted that good cause for termination existed under the license agreement for failure to cure within thirty days and the existence of three notices of default within twelve months. Benihana America concurrently filed a counterclaim in the arbitration seeking confirmation of its termination.

Thereafter, Benihana America filed a petition in the district court for injunctive relief in aid of arbitration pursuant to Rule 65 of the Federal Rules of Civil Procedure, seeking to enjoin Benihana Tokyo from (1) selling hamburgers or other unauthorized food items pursuant to the license agreement; (2) using or publishing advertisements, publicity, signs, decorations, furnishings, equipment, or other matter employing in any way whatsoever the words *Benihana*, *Benihana of Tokyo*, or the *flower symbol* that have not been approved in accordance with the license agreement; and (3) arguing to the arbitration panel that it be permitted to cure any defaults if the arbitrators rule that Benihana Tokyo breached the license agreement. The district court granted Benihana America's petition for an injunction on all three points. Benihana Tokyo promptly appealed.

The Second Circuit acknowledged that where the parties have agreed to arbitrate a dispute, a district court has jurisdiction to issue a preliminary injunction to preserve the status quo pending arbitration. After analyzing the district court's ruling under an abuse of discretion standard of review, the Second Circuit affirmed the order in part and denied the order in part. The Second Circuit affirmed the district court's order enjoining Benihana Tokyo's sale of unauthorized food items and unauthorized use of the Benihana name and symbols during the pendency of the arbitration because it found that the menu item and advertising restrictions of the license agreement were clear and that Benihana Tokyo was clearly violating those provisions. However, the Second Circuit reversed the district court's order insofar as it enjoined Benihana Tokyo from making arguments before the arbitration panel during the arbitration. The Second Circuit stated that once arbitrators have jurisdiction over a matter, any subsequent construction of the contract or the parties' rights and obligations under it are for the arbitrators to decide. Accordingly, the Second Circuit held that because the parties agreed to submit their dispute to arbitration, the district court could not enjoin any party from seeking a particular remedy or making specific arguments in arbitration, even where, in the district court's opinion, that remedy or argument would have no legal basis under the license agreement.

***Brunner v. Liautaud*, Bus. Franchise Guide (CCH) ¶ 15,482, 14-c-5509, 2015 WL 1598106 (N.D. Ill. Apr. 8, 2015)**

This case is discussed under the topic heading "Labor & Employment."

***Dunkin' Donuts Franchising, LLC v. 14th St. Eatery, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,521, Civil Action No. 15-cv-519 (TSC), 2015 WL 2090491 (D.D.C. May 5, 2015)**

Plaintiff Dunkin' Donuts Franchising, LLC filed a motion for preliminary injunction against a former District of Columbia franchisee, 14th Street Eatery, Inc., and related individuals (collectively, defendants) for trademark infringement and breach of their covenant not to compete. Dunkin' and the defendants entered into a franchise agreement in 2011. In early 2015, the defendants failed to make payments due to Dunkin' under the franchise agreement. Dunkin' sent two separate notices of default and terminated the agreement when it received no response and no action was taken by the defendants. The defendants, however, continued to operate a store under the Dunkin' Donuts trademarks. When Dunkin' filed a lawsuit, the defendants did not respond, and they did not respond to the preliminary injunction motion.

In order to grant a motion for preliminary injunction, the party seeking the injunction must show that "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."

The U.S. District Court for the District of Columbia reviewed the unopposed facts and determined that Dunkin' had showed that it would likely succeed on the merits of its claims. The franchise agreement was terminated in accordance with its terms. In addition, in a claim for trademark infringement Dunkin' must show

> (1) that it possesses a mark; (2) that the defendant used the mark; (3) that the defendant's use of the mark occurred "in commerce"; (4) that the defendant used the mark "in connection with the same, offering for sale, distribution, or advertising" of goods and services; and (5) that the defendant used the mark in a manner likely to confuse customers.

The court found the elements to be self-evident and that the unauthorized use of the Dunkin' Donuts marks was likely to confuse consumers who would have no idea that the defendants were no longer a Dunkin' franchisee. The court also found that Dunkin' was likely to succeed as to its claim for breach of the covenant not to compete. The court found the restriction on operating a doughnut business for a two-year time period within a five-mile radius to be reasonable in scope, time, and geographic limitation and, therefore, enforceable under Massachusetts law.

Because trademark infringement raises a presumption of irreparable harm in the Federal Circuit, the court found this second requirement for the granting of a preliminary injunction was also met. Specifically, courts have found that infringement may lead to the dilution of a mark as well as the loss of control over the quality of the products and services offered under the infringing mark. Consumer confusion would also lead to irreparable harm to Dunkin'. As to the covenant not to compete, the court found that Dunkin' showed that it would likely suffer irreparable harm not only for the same reasons as those mentioned under trademark infringement, but also because if the relief was not granted, other franchisees may well follow suit and breach their franchise agreements with no fear of reprisal.

The court held that the equities balanced in favor of entering the injunction because any harm to the defendants in granting injunction was outweighed by the harm to Dunkin'. Finally, the court also found that the public interest would be served by the granting of the injunction because, if not granted, the public would not only be confused over whether the location was an authorized Dunkin' Donuts but also because "the quality and integrity of the product may suffer without the supervision of the franchisor." Therefore, the court granted Dunkin's motion for preliminary injunction and ordered that the defendants cease using the Dunkin' Donuts marks, stop competing with Dunkin' Donuts in violation of their covenant not to compete, and file within thirty days of the service of the injunction a report with the court detailing how they had complied with the injunction.

***Executive Home Care Franchising LLC v. Marshall Health Corp.*, Bus. Franchise Guide (CCH) ¶ 15,489, Civil Action No.: 15-760 (JLL), 2015 WL 1422133 (D.N.J. Mar. 26, 2015)**

In 2013, Executive Home Care Franchising LLC entered into a franchise agreement with Marshall Health Corporation under which Marshall agreed to operate an in-home care business. Two years later, Marshall notified Executive that it was abandoning the business because it was unable to obtain sufficient business to continue operations. Marshall also informed Executive that it had formed a different home-care business that operated at a different location but provided the same services to Marshall's former Executive customers.

Executive filed suit against Marshall, seeking a preliminary injunction that prevented Marshall from continuing to use Executive's good will and trademarks in the operation of the competing business, in violation of the franchise agreement's post-termination noncompetition agreement.

The U.S. District Court for the District of New Jersey denied Executive's request for injunctive relief, noting that Executive needed to show: (1) a likelihood of success on the merits; (2) irreparable harm if the injunction is denied; (3) balancing of the hardships; and (4) sufficient public interest to warrant issuance of an injunction. The court addressed only the second element, irreparable harm, rejecting Executive's claim that the parties could establish irreparable harm by agreement, as provided by the terms of the franchise agreement. The court also noted that Marshall had submitted evidence that it had returned thirteen boxes of Executive's proprietary material, worked with Executive to transfer the business telephone number, ceased using the franchised business location, and notified its customers that it was no longer affiliated with Executive. Notwithstanding the public policy favoring enforcement of noncompetition agreements, the court concluded that the evidence demonstrated that Marshall was no longer using Executive's proprietary information to operate its business, and further, that there was little likelihood of confusion by customers because Marshall had informed them of the disassociation. The court also noted that the loss of customer business was probably a figure that could be monetized with some degree of particularity, such that the harm was not irreparable in nature, and instead could be compensated with money. Accordingly, having failed to establish an essential element for injunctive relief, the court refused Executive's request for a preliminary injunctive.

***Grout Doctor Global Franchise Corp. v. Groutman, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,530, No. 7:14-CV-105-BO, 2015 WL 2353698 (E.D.N.C. May 14, 2015)**

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

***MS & BP, LLC v. Big Apple Petroleum, LLC*, Bus. Franchise Guide (CCH) ¶ 15,526, No. 14-CV-5675 (RRM) (RER), 2015 WL 2185038 (E.D.N.Y. May 7, 2015)**

This case is discussed under the topic heading "Petroleum Marketing Practices Act."

***Noble Roman's Inc. v. Sahara Sam's Indoor Water Park, LLC*, Bus. Franchise Guide (CCH) ¶ 15,487, No. 1:14-cv-00500-SEB-MJD, 2015 WL 1505647 (S.D. Ind. Mar. 31, 2015)**

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

***TGI Friday's Inc. v. Stripes Rests., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,529, No. 1:15-cv-00592-AWI-SAB, 2015 WL 2341991 (E.D. Cal. May 13, 2015)***

TGI Fridays' Inc. sued one of its former franchisees, Stripes Restaurants, Inc. for trademark infringement under the Lanham Act when the franchisee continued to operate its business after TGI terminated the franchise agreement. Shortly after filing suit, TGI filed a motion asking the U.S. District Court for the Eastern District of California to issue a preliminary injunction preventing Stripes from continuing to infringe on TGI's trademark. Stripes filed a motion seeking expedited discovery from TGI, including eighteen different categories of documents and depositions of several of TGI's key employees.

In evaluating Stripes' motion, the court noted that expedited discovery is typically warranted only in connection with a motion for preliminary injunction when the discovery is being sought by the moving party because the moving party bears the burden of proof. Accordingly, the court denied Stripes' motion for expedited discovery, noting that it had access to all of the proof relied upon by TGI in support of its motion. The court further noted that Stripes failed to articulate any clear defenses to the motion for preliminary injunction, much less why the discovery it was seeking related to those defenses and was therefore needed to adequately prepare a response to the pending preliminary injunction motion. Instead, the court held that the overbroad discovery requests were sent out on the speculative hope that they might uncover something that might be relevant to the motion for preliminary injunction.

## JURISDICTION

***Benihana of Tokyo, LLC, v. Angelo, Gordon & Co.*, Bus. Franchise Guide (CCH) ¶ 15,538, Civil No. 15-00028 ACK-RLP, 2015 WL 3463502 (D. Haw. June 1, 2015)**

On December 22, 2014, Benihana of Tokyo filed its first amended complaint against Angelo, Gordon & Co. (AGC) and others (collectively, de-

*Ms. Kilejian's firm represented the plaintiff in this case.

fendants) in the Circuit Court of the First Circuit of Hawaii. The amended complaint asserted five claims against the defendants: common law unfair competition, statutory unfair competition, breach of contract, deceptive trade practices, and false advertising. The defendants removed this action to the U.S. District Court for the District of Hawaii on January 26, 2015. On March 3, 2015, Benihana filed a motion to remand before the district court, arguing that remand to state court was appropriate because the district court lacked subject matter jurisdiction. Specifically, Benihana asserted that complete diversity did not exist among the parties because Benihana and the defendant were both citizens of New York. The defendants countered that jurisdiction was proper in federal court because AGC was fraudulently joined as a sham defendant for the sole purpose of defeating jurisdiction.

On April 17, 2015, the magistrate judge issued his findings and recommendation, holding that AGC was not fraudulently joined and thus, in light of the lack of complete diversity among the parties, the district court lacked diversity jurisdiction over the instant matter. The defendants filed their objections to the findings and recommendation, and Benihana subsequently filed its response. Upon de novo review, the district court determined the defendants had failed to show by clear and convincing evidence that there was no possibility that Benihana could state a cause of action against AGC for at least one potentially valid claim. Accordingly, the district court held that the defendants improperly removed the action to federal court and that remand to the Circuit Court of the First Circuit of Hawaii was proper.

## LABOR AND EMPLOYMENT

### *Brunner v. Liautaud*, Bus. Franchise Guide (CCH) ¶ 15,482, 14-c-5509, 2015 WL 1598106 (N.D. Ill. Apr. 8, 2015)

This suit was brought by one current and one former assistant store manager and employee of two different Jimmy John's franchisees, Emily Brunner and Caitlin Turowski, against multiple defendants, including the franchise location owners; the Jimmy John's franchisor entity; the franchisor's CEO, James Liautaud personally; and other associated entities. The complaint alleged, among other things, (1) a violation of the Fair Labor Standards Act (FLSA) against Jimmy John's, Liautaud, and both franchise owners; (2) a violation of the Illinois Minimum Wage Law (IMWL) on behalf of the plaintiffs, individually, as well as on behalf of a putative nationwide class, against Jimmy John's and Liautaud and on behalf of Brunner against the franchise owner; and (3) a claim for declaratory judgment and injunctive relief with respect to the confidentiality and noncompetition agreements signed by both plaintiffs individually and on behalf of a putative nationwide class. The defendants filed a motion for summary judgment, each as to different claims and on different grounds, but as a whole based on Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim and 12(b)(1) for dismissal due to lack of subject matter jurisdiction.

In the FLSA claim against Liautaud, the plaintiffs alleged that they were misclassified as exempt employees and not paid for overtime work as legally required. FLSA defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee." The court looked at several different factors in determining whether Liautaud could be considered as a joint-employer with the franchise owners in this context, including whether he had the power to hire and fire employees, supervise and control employee work schedules or payment, and maintain employment records. The plaintiffs alleged that Liautaud set operational policies that dictated selection of employees; that he had the ability to terminate a franchisee's employees, even if indirectly; and that he exerted control over the employment condition of Jimmy John's franchisee employees through control over a franchisee's business operations. The U.S. District Court for the Northern District of Illinois did not agree and found that the CEO's "hands-on approach emphasizing uniformity and compliance does not support a determination that Liautaud is a joint-employer under the FLSA" and Liautaud's motion to dismiss was granted as to the FLSA claim.

The FLSA claims against the franchise owners for misclassification as "exempt" employees, however, survived the franchise owners' motion to dismiss. The court found that the plaintiffs' second amended complaint sufficiently pleaded that they regularly worked at least fifty hours every week (where forty hours was the maximum under the statue without overtime compensation); the plaintiffs were compensated more than the minimum required amount under the statute; and that the work outlined in the complaint was neither "bona fide executive, administrative, or professional" in nature because the plaintiffs spent a majority of their time making sandwiches, stockpiling supplies and shelves, and cleaning. To this end, the defendant franchise owners did not establish that the plaintiffs fell under the executive or administrative employee exemptions under the FLSA.

Under the IMWL, the plaintiffs, on their own behalf and on behalf of a putative nationwide class, alleged that Jimmy John's and Liautaud again improperly classified them as exempt employees. The court granted Jimmy John's' motion to strike the claim as to the nationwide class because the IMWL applied to "places of employment in the State of Illinois"; since the statute was silent on the issue of whether it applied to workers outside of the state, the court relied on *Graham v. General U.S. Grant Post No. 2665* in deciding that when a state statute is silent on the issue, there is a presumption that it does not. As to Liautaud, the court used the same analysis that it did under the FLSA when it found he was not a joint-employer and dismissed the plaintiffs' claims as to violations of the IMWL.

The defendants also asked the court to dismiss the plaintiffs' claims for declaratory and injunctive relief with respect to the enforceability and validity of the confidentiality and noncompetition agreement that each plaintiff signed before beginning her employment. Under the Declaratory Judgment Act, 28 U.S.C. § 2201(a), a federal court "may declare the rights and other legal relations of any interested party seeking such declaration" when there is an "actual controversy." In addition, the controversy must be ripe for judicial determination. Although the court did not find precedent as to whether declaratory relief would be applicable to confidentiality and noncompetition agreements, the court did rely on two applicable principles from *International Harvester Company v. Deere & Company*, a patent infringement case. First, the plaintiffs must have a "reasonable apprehension" that the defendants are going to file a lawsuit against them for violating the terms of their confidentiality and noncompetition agreement. Second, the plaintiffs must allege that they had or were preparing to compete with the defendants in violation of the agreement. As to Brunner, who was still employed at the Jimmy John's store owned by one of the franchise owner defendants, neither the mere apprehension that she may violate the terms of the confidentiality and noncompetition agreement by disclosing certain information nor her confusion regarding where she could apply for future employment, was sufficient grounds for the court to find a controversy ripe for determination.

Turowski, who had begun work at a barbeque restaurant within the restrictive three-mile radius provided for under the confidentiality and noncompetition agreement, had subsequently left her new job and therefore did not have a reasonable fear of impending litigation from defendants. Moreover, the defendants made it plain to the court, through signed affidavits, that they had no intention of enforcing the confidentiality and noncompetition agreement against the plaintiffs "in the future." The court found this sufficient to pass the standard set by the U.S. Supreme Court ruling in *United States v. Concentrated Phosphate Export Association*, which held that a case may be moot "if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Because there was no past or reasonably anticipated future injury, the court granted the defendants motion for summary judgment as to the declaratory and injunctive relief sought with respect to the confidentiality and noncompetition agreements.

***Machado v. System4 LLC*, Bus. Franchise Guide (CCH) ¶ 15,514, 471 Mass. 204, 28 N.E.3d 401 (Mass. Apr. 13, 2015)**
This case is discussed under the topic heading "Arbitration."

## NONCOMPETE AGREEMENTS

***AKB Wireless, Inc. v. Wireless Toyz Franchise, LLC*, Bus. Franchise Guide (CCH) ¶ 15,519, 2015 LEXIS 48005 (E.D. Mich. Apr. 13, 2015)**
Third-party plaintiff Alan Bahnam entered into a franchise agreement with Wireless Toys Franchise, LLC for the establishment and operation of a Wireless Toyz franchise in Florida. Bahnam assigned his rights under the

franchise agreement to plaintiff AKB Wireless, Inc. and personally guaranteed AKB's obligations under the franchise agreement. Bahnam and AKB filed suit against Wireless Toyz alleging breach of contract and other claims. Wireless Toyz, in turn, filed two counter-claims against Bahnam and AKB, one for a declaratory judgment, and a second for breach of contract, including breach of noncompetition and confidentiality covenants.

Bahnam and AKB each filed a motion to dismiss both of Wireless's claims against them under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. As to the claim seeking a declaratory judgment, Bahnam and AKB argued that Wireless Toyz failed to state a claim because it already had an adequate remedy at law. However, the court pointed out that AKB and Bahnam based their argument on a single unpublished opinion from the Western District of Michigan, *Cromer v. Braman*, and instead should have relied on Federal Rule of Civil Procedure 57, which states explicitly that "the existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate." The court went on to note that while there may be a point in the proceeding when it might determine that an alternative remedy would be more appropriate in a breach of contract instance than a declaratory judgment finding, such alternative available remedy did not constitute grounds for dismissing Wireless's declaratory judgment claim. As to Wireless's second claim for breach of contract, AKB and Bahnam argued that the formation of the entities "Express Mobile, Inc." and "Wireless Xpress, Inc." and their subsequent operation of a competing wireless store did not constitute a breach of the franchise agreement because the franchise agreement was not yet terminated and the covenant did not apply. The court did point, however, to the in-term covenant included in the franchise agreement (and attached to the complaint as an exhibit), concluding that Wireless Toyz had sufficiently stated a claim in its allegation for breach of contract. Accordingly, the court denied, without prejudice, both Bahnam and AKB's motions to dismiss as to both counts.

***Executive Home Care Franchising LLC, v. Marshall Health Corp.*, Bus. Franchise Guide (CCH) ¶ 15,489, Civil Action No.: 15-760 (JLL), 2015 WL 1422133 (D.N.J. Mar. 26, 2015)**

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

***Mister Sparky Franchising, LLC v. On Time Electricians, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,512, No. 8:15-cv-164-T-33TGW, 2015 WL 1811082 (M.D. Fla. Apr. 21, 2015)**

On February 8, 2013, Mister Sparky Franchising, LLC entered into a franchise agreement with On Time Electricians, Inc. (OTE). Thereafter, OTE's owner, George Donaldson, accepted employment at American Residential Services, LLC (ARS). Mister Sparky filed suit against OTE in the U.S. District Court for the Middle District of Florida (Florida suit), seeking a declaratory judgment that Donaldson's employment with ARS violated the provisions of the franchise agreement, which prohibited him from entering into any business relationship with Mister Sparky's competitors, such as ARS. Mister Sparky further sought a declaration that this uncured violation of the franchise agreement constituted grounds for immediate termination under the terms of the franchise agreement. OTE filed a motion to dismiss or, in the alternative, a motion to stay this case as there was a similar case with related parties already pending in the U.S. District Court for the Central District of California (California suit).

On the motion to dismiss, OTE contended that the first-to-file rule should apply and the Florida suit should be dismissed because Mister Sparky's parent company and OTE's affiliates were already engaged in litigation in the California suit with respect to nearly identical franchise agreements. While the first-to-file rule favors the initial suit filed, it is ultimately up to the discretion of the court (and not a mandatory determination) as to whether the subsequent lawsuit should be dismissed. As the parties in the two suits were not identical and the suits also involved different issues, the court denied OTE's motion to dismiss. Although the court did recognize OTE's concern for potential inconsistent judgments, the court concluded it would have ample time to review the California suit's documents and rulings because that case had already been pending for nearly one year and was set for trial well before the Florida suit's scheduled trial date. For the same reasons, the court denied OTE's alternative motion to stay, stating again that the cases involved different parties and issues, as well as distinct franchise agreements, and that the court would review the California court's findings before making a ruling.

***Noble Roman's Inc. v. Sahara Sam's Indoor Water Park, LLC*, Bus. Franchise Guide (CCH) ¶ 15,487, No. 1:14-cv-00500-SEB-MJD, 2015 WL 1505647 (S.D. Ind. Mar. 31, 2015)**

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

**ORAL AGREEMENTS**

***Texas Ujoints, LLC v. Dana Holding Corp., LLC*, Bus. Franchise Guide (CCH) ¶ 15,537, Case No. 13-CV-1008, 2015 WL 3454431 (E.D. Wis. May 30, 2015)**

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

**PETROLEUM MARKETING PRACTICES ACT**

***Fabbro v. Drx Urgent Care, LLC*, Bus. Franchise Guide (CCH) ¶ 15,486, D.C. Civil No. 3-13-cv-03558, 2015 WL 1453537 (3d Cir. Apr. 1, 2015)**

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

***Lukoil N. Am. LLC v. Turnersville Petroleum Inc.*, Bus. Franchise Guide (CCH) ¶ 15,516, Civil No. 14-3810 (RMB/AMD), 2015 WL 1735369 (D.N.J. Apr. 16, 2015)**

In 2005 Lukoil North America, LLC and Turnersville Petroleum, Inc. entered into a franchise agreement granting Turnersville the exclusive right to license and use the Lukoil trademark throughout the United States. In 2013, Lukoil terminated the franchise agreement and brought suit against Turnersville for failing to use its best efforts to maximize sales, failing to purchase adequate motor fuel, and failing to pay Lukoil in a timely manner. Turnersville, in its response, filed four counterclaims including breach of contract, violation of the Uniform Commercial Code (UCC), breach of the duty of good faith and fair dealing, and violations of the New Jersey Franchise Practices Act (NJFPA). Lukoil moved to dismiss all counterclaims, arguing that they were preempted by the Petroleum Marketing Practices Act (PMPA) or, in the alternative, that the court should dismiss all claims, except the fourth under the NJFPA, for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

Addressing the preemption argument first, the U.S. District Court for the District of New Jersey noted that the PMPA addresses the issue within its text, providing that

> no State . . . may adopt, enforce, or continue in effect any provision of any law or regulation . . . with respect to termination (or the furnishing of notification with respect thereto) of any such franchise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this title.

On reviewing the interpretation of this statute by prior courts, the court concluded that PMPA provides only a narrow scope for preemption and only with respect to the procedures for, or notification requirements as to, termination or nonrenewal. The preemption can, however, reach claims that are "inextricably intertwined" with the termination or nonrenewal of the franchise. In this instance, however, Turnersville was seeking damages based on Lukoil's alleged breach of contract, violation of the UCC, breach of the duty of good faith and fair dealing, and violation of the NJFPA based on events that took place prior to termination. Therefore, the PMPA did not preempt Turnersville's claims.

The court next turned to Lukoil's alternative basis for dismissal, Turnersville's alleged failure to state a claim. On its breach of contract claim, Turnersville had alleged sufficient facts to satisfy the first three elements of a valid claim, which included showing the existence of a contract between the parties, failure of Lukoil to perform its obligations under the contract, and a causal relationship between the breach and Turnersville's alleged damages. Turnersville, however, failed to plead the fourth element, i.e., "that the party asserting the claim for breach of contract allege that it was performing its obligations under the contract." As a result, the court granted Lukoil's motion for summary judgment but, without prejudice to Turnersville's amendment of its counterclaims. The court granted Turnersville twenty-one days to amend its deficient pleading.

Turnersville's UCC claim was predicated on § 2-305, which provides that where the contract calls for the seller to set the price of the product being sold, the seller must set the price in good faith. Specifically, Turnersville alleged that Lukoil set the price of fuel at or even above the competition. The court held that this allegation was sufficient to support a potential UCC violation. Nonetheless, Lukoil also argued that Turnersville had failed to satisfy notice requirements under the UCC, which provides that where a tender has been accepted "the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from remedy." Lukoil argued that Turnersville had not alleged that it provided proper notice of prices set in bad faith. Relying on prior court decisions, the court found that general complaints and conveyance of financial struggles did not serve as adequate notice. Accordingly, the court also dismissed Turnersville's good faith claim, but granted Turnersville leave to amend.

Finally, with respect to the covenant of good faith and fair dealing—which is implied in all contracts in New Jersey—Turnersville had a duty to allege facts demonstrating that Lukoil acted in bad faith and that its conduct denied Turnersville the benefit of the bargain originally intended by the parties. Relying on relevant case law, the court found that, although Turnersville did not use the words "bad faith" or "bad motive," the allegation that Lukoil set fuel prices "close to, equal to, or even above the price being charged at retail by [Turnersville's] competitors" was a sufficient factual allegation to show that Lukoil arbitrarily deprived Turnersville of the benefit of the bargain intended. The court denied the motion to dismiss as to the claim for breach of the implied covenant of good faith and fair dealing.

### *MS & BP, LLC v. Big Apple Petroleum, LLC*, Bus. Franchise Guide (CCH) ¶ 15,526, No. 14-CV-5675 (RRM) (RER), 2015 WL 2185038 (E.D.N.Y. May 7, 2015)

This case involved a dispute between a petroleum products retailer, MS & BP, LLC, and its wholesale distributor Big Apple Petroleum, LLC. MS & BP had operated an Exxon/Mobil branded retail gasoline station under a supply and lease agreement with Big Apple for approximately ten years. During the course of the parties' relationship, MS & BP typically paid for gasoline deliveries and monthly rent through electronic funds transfers (EFTs) initiated by Big Apple. Pursuant to the terms of the supply agreement, MS & BP had an obligation to establish a dedicated commercial account that was debited by Big Apple to cover the cost of gasoline deliveries and rent. MS & BP had a duty to maintain sufficient funds in the commercial account to cover any EFT transaction. In the event MS & BP bounced a payment because it failed to maintain sufficient funds, Big Apple had the right to collect a service charge. At any time, Big Apple could require MS & BP to provide additional security, pay for fuel at the time of delivery, or prepay for fuel deliveries.

Beginning in September 2013, MS & BP bounced multiple EFT payments. As a result, in an effort to bring MS & BP into compliance with the supply agreement, Big Apple required MS & BP to pay for gasoline at the time of delivery. MS & BP returned to EFT payment in January 2014 and again began bouncing EFT payments. Big Apple sent MS & BP a notice of default, citing MS & BP's duty to maintain sufficient funds in its commercial account to cover any EFT payment initiated by Big Apple. Big Apple also demanded that MS & BP provide $30,000 as additional security for future payments and required that MS & BP prepay for gasoline deliveries. Big Apple continued to withdraw rent payments by EFT, however, and in April and May 2014, MS & BP bounced its rent payments. After several additional bounced EFT payments, on June 17, 2014, Big Apple sent MS & BP a notice of termination, indicating that it would terminate the fuel supply agreement and franchise relationship, effective September 15, 2014. The notice of termination identified MS & BP's consistent failure to maintain sufficient funds in its commercial account to cover EFT transactions as the grounds for termination of the franchise relationship.

In response, MS & BP filed a lawsuit against Big Apple and sought to enjoin Big Apple from terminating the supply and lease agreements. MS & BP argued that (1) Big Apple had failed to provide proper notice as required by the Petroleum Marketing Practices Act (PMPA) for termination of the franchise relationship; (2) MS & BP had not breached the supply agreement because Big Apple never clarified when MS & BP was required to maintain funds in the commercial account; (3) MS & BP had satisfied its obligations to maintain sufficient funds by providing the $30,000 security deposit; and (4) Big Apple had waived its right to terminate by accepting payments for gasoline and rent. The U.S. District Court for the Eastern District of New York rejected all of MS & BP's arguments and denied its request for a preliminary injunction.

First, the court held that Big Apple had complied with the PMPA's notice of termination requirements. Under the PMPA, a supplier seeking to terminate a supply agreement must have actual or constructive notice of the events giving rise to termination within 120 days of the date of the notice of termination. This time requirement is intended to preclude suppliers from terminating a franchise relationship based on stale (and presumably pretextual) grounds. The court concluded that although MS & BP began bouncing EFT payments in late 2013, the notice of termination issued on June 17, 2014, was validly based on MS & BP's multiple bounced EFT payments in 2014, within 120 days of the notice.

The PMPA also requires suppliers to issue a notice of termination at least ninety days in advance of a termination, if the termination is based upon the dealer's failure to pay the supplier in a timely manner amounts due and owing to the supplier. The court held that Big Apple's notice to MS & BP was timely because it was by its terms not effective until September 15, 2014.

The court rejected MS & BP's argument that the supply agreement did not specify when a payment would be considered "late" because the contract unambiguously required MS & BP to maintain sufficient funds in its commercial account at all times to cover any EFT debit. The court also held that the supply agreement did not contain any provision that required Big Apple to apply the security deposit to offset any bounced EFT, noting that the purpose of security is to provide for a loss, not to cover ongoing expenses. Finally, the court rejected MS & BP's contention that Big Apple had waived its right to terminate by accepting late payments, noting that the supply agreement expressly provided that the acceptance of a late payment would not constitute a waiver of any of Big Apple's rights under the terms of the supply agreement.

### STATUTE OF LIMITATIONS

***Fabbro v. Drx Urgent Care, LLC,* Bus. Franchise Guide (CCH) ¶ 15,486, D.C. Civil No. 3-13-cv-03558, 2015 WL 1453537 (3d Cir. Apr. 1, 2015)**
This case is discussed under the topic heading "Fraud."

***Noble Roman's Inc. v. Hattenhauer Distrib. Co.*, Bus. Franchise Guide (CCH) ¶ 15,484, No. 1:14-cv-1734-WTL-DML, 2015 WL 1526074 (S.D. Ind. Apr. 3, 2015)**
This case is discussed under the topic heading "Contract Issues."

***Window World of Chicagoland, LLC v. Window World, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,525, Case No. 13 C 4624, 2015 WL 2193752 (N.D. Ill. May 7, 2015)**
Two sets of plaintiffs, (1) Window World of Chicagoland, LLC and David Hampton (Hampton plaintiffs) and (2) Kenneth Dillingham, Debbie Dillingham, and their company Suntec, Inc. (Dillingham plaintiffs) jointly sued Window World, Inc. and four of its employees (collectively, Window World) for fraud, breach of contract, and violation of the Illinois Franchise Disclosure Act (IFDA).

The case arose out of the parties' business dealings between 2005 and 2011. Between 2005 and 2009, Hampton entered into various license agreements with Window World. On October 28, 2011, Window World sent the Hampton plaintiffs a notice of rescission granting them the right to become a franchisee in thirty-five days or rescind the license agreements. On November 29, 2011, Window World entered into a final judgment and consent decree with the attorney general of Illinois that found that Window World had entered into fourteen license agreements which were, in fact, franchises, in violation of the IFDA. On January 26, 2012, the Hampton plaintiffs filed a lawsuit against Window World and associated parties for fraud, breach of contract, and violation of the IFDA. Window World filed its own suit against the Hampton plaintiffs, which was consolidated with the first suit brought by the Hampton plaintiffs. On June 25, 2012, the Hampton plaintiffs voluntarily dismissed their claims without prejudice. Window World, however, proceeded to pursue its claims and when more than sixty days passed without the Hampton plaintiffs filing an answer, Window World requested and received a default judgment. The Hampton plaintiffs, however, never received a copy of any of the motions related to the default judgment. As a result, the default judgment was set aside but the Hampton plaintiffs were ordered to pay Window World's fees and costs associated with the default judgment proceedings. On August 4, 2014, when the Hampton plaintiffs failed to pay the ordered amount, the December 4, 2012, default judgment was reinstated in the first lawsuit.

The Dillinghams entered into two license agreements with Window World; the first in 2003 and the second in 2007. After entering into the 2003 license agreement, the Dillinghams attended meetings where Window World made earnings representations and promises as to exclusivity and territorial protection. During their time as franchisees, the Dillinghams experienced encroachment from competition and existing Window World licensees. They also lost four staffers who jointly left the company to form a competitive business. In March 2010, a Window World representative called the Dillinghams and notified them that they were in breach of their license agreement because they had not met certain performance requirements and that Window World would terminate their license agreements in ninety days. However, Window World did not actually terminate their license agreements.

On June 24, 2013, the Hampton plaintiffs and Dillingham plaintiffs filed a second lawsuit. Window World filed a motion to dismiss all counts, which the U.S. District Court for the Northern District of Illinois granted with prejudice as to all claims, except for two counts brought by the Dillingham plaintiffs, which were dismissed without prejudice.

On the claims brought by the Hampton plaintiffs, the defendants argued that all claims were barred by the doctrine of res judicata because the default judgment under the earlier case had been reinstated. The Hampton plaintiffs, however, argued that the case at hand was consolidated with the earlier case before August 4, 2014, the date the default judgment was reinstated and, therefore, was not a final disposition of the claims, but rather an earlier judgment that could be revisited. The court disagreed, however, and found that the cases had been consolidated with respect to discovery only and, as such, the default judgment was indeed a final judgment on the merits; the court dismissed with prejudice all of the Hampton plaintiffs' claims.

On the fraudulent inducement, breach of contract, and violations of the IFDA claims brought by the Dillingham plaintiffs, the court analyzed each separately. As to the IFDA claims, the defendants argued that such claims were time barred under the applicable statute of limitations. According to the IFDA, the limitations period elapses three years "after the act or transaction constituting the violation upon which it is based." The court rejected the Dillingham plaintiffs' argument that the statute began to run once they learned of the facts that gave rise to the claim because the time limitation under the IFDA's statute of repose did not depend on the discovery of the facts giving rise to the claim. Therefore, the statute of limitations under the IFDA barred the Dillingham plaintiffs' claims.

Window World's motion to dismiss the Dillingham plaintiffs' fraud claim was based upon the fact that the claims had not been pleaded with particularity. Accordingly, the court dismissed only the fraud claim without prejudice, giving the Dillingham plaintiffs leave to amend.

Finally, as to the Dillingham plaintiffs' breach of contract claim, although the court determined that the three-year statute of limitations applicable to the claim under North Carolina law was likely to apply, the Dillingham plaintiffs had not been provided an opportunity to brief the issue. Accordingly, in light of the fact that plaintiffs are not obligated to anticipate and defeat affirmative defenses, such as the applicability of a statute of limitations, and that they may yet be able to plead additional facts that would affect the ultimate outcome of the case, the court dismissed only the Dillingham plaintiffs' breach of contract claims without prejudice.

***Yumilicious Franchise, LLC v. Barrie*, Bus. Franchise Guide (CCH) ¶ 15,511, Civil Action No. 3:13-CV-4841-L, 2015 WL 1822877 (N.D. Tex. Apr. 22, 2015)**

Franchisor Yumilicious Franchise, LLC entered into two franchise agreements with Why Not, LLC that granted Why Not the right to operate two self-serve frozen yogurt stores in South Carolina in exchange for royalty fees. The franchise agreements were guaranteed by Matt Barrie, Kelly Glynn, and Brian Glynn (collectively with Why Not, defendants). After Why Not fell behind on payments due and closed one location without the franchisor's consent, the franchisor filed a lawsuit in the U.S. District Court for the Northern District of Texas alleging that the defendants failed to comply with their contractual obligations. The franchisor sought recovery of damages for unpaid invoices, as well as attorney fees, costs, and prejudgment and post-judgment interest.

The defendants filed various counterclaims, including claims pursuant to the Federal Trade Commission Act (FTCA), Texas Deceptive Trade Practices Act (DTPA), and the Business Opportunity Acts of Texas (TBOA) and South Carolina (SCBOA). The defendants' statutory claims were based on allegations that franchisor fraudulently induced them into entering into the franchise agreements by making false statements regarding franchise costs and product suppliers. The defendants also alleged that they lost their investment in the franchises and other personal assets because of their inability to obtain franchisor's proprietary products at a fair market price.

The court construed the defendants' counterclaim for alleged violations of the DTPA, FTCA, TBOA, and SCBOA as a single claim under DTPA

§ 17.46. The court dismissed the defendants' DTPA counterclaim with prejudice because it was time barred and because the defendants failed to plead a basis for tolling of the statute of limitations. The defendants requested that the court reconsider its order of dismissal, arguing that the court erred in dismissing its statutory claims because they pleaded the discovery rule and because Texas Civil Practice and Remedies Code § 16.069 applied to their counterclaims.

On reconsideration, the court held that the defendants had not adequately pleaded the discovery rule because their affirmative defenses did not reference the discovery rule at all. Further, the court found that even assuming the defendants' pleadings were sufficient to satisfy the requirement that the discovery rule must be affirmatively pleaded, the court concluded that their pleadings were devoid of any facts to support their conclusory assertion that the alleged misrepresentations by franchisor continued for two years until the failure of their franchise stores. Nevertheless, the court agreed with the defendants that § 16.069 shielded the defendants' DTPA claim from being prohibited by the statute of limitations. Pursuant to § 16.069, the defendants were able to pursue an otherwise time barred complaint against the franchisor in the form of a counterclaim because the counterclaim was filed within thirty days of the due date of the defendants' answer to the complaint and because it arose out of the same transaction or occurrence that formed the basis of franchisor's claims.

However, the court went on to hold that although its dismissal of the defendants' counterclaim under the DTPA was not appropriate on statute of limitations grounds, the defendants nevertheless failed to state a proper DTPA cause of action upon which relief could be granted. The defendants' counterclaim failed to show intentional misrepresentations by the franchisor and their reliance on those misrepresentations to their detriment. The defendants did not allege that the franchisor intentionally made assurances and omissions to vendors and distributors or that the defendants detrimentally relied on them or were induced into entering into the franchise agreements based on those representations. The defendants acknowledged they were aware of certain product supply issues before entering into the agreements and entered into those agreements despite this knowledge. Furthermore, the defendants' allegations that the franchisor failed to provide certain financial performance disclosures was a technical violation of the FTC Franchise Rule that was insufficient on its own to state a claim under the DTPA based on representations or omissions.

## STATUTORY CLAIMS

### *Beck Chevrolet Co. v. General Motors LLC*, Bus. Franchise Guide (CCH) ¶ 15,531, Nos. 13-4066, 13-4310, 787 F.3d 663 (2d Cir. 2015)

Beck Chevrolet Co. was a licensed dealer of Chevrolet branded vehicles under a dealership agreement with General Motors LLC (GM), the successor-in-interest to General Motors Corporation (GMC). Beck had originally been a dealer of GMC prior to that company's bankruptcy case, which resulted in the agreed termination and winding down of Beck's Chevrolet dealership. After GM acquired GMC's assets, however, Beck entered into the new Chevrolet dealership agreement with GM.

Pursuant to its agreement with GM, Beck was obligated to sell a certain number of Chevrolet-branded motor vehicles from its dealership located in Yonkers, New York. GM monitored Beck's sales in its predetermined geographic market and compared those sales figures with a minimum sales benchmark (RSI) that GM set based upon a complicated formula that took into consideration the average number of vehicle sales in the State of New York with adjustments for GM's market share as well as some local considerations for sales in each market segment (such as sedans and light trucks) in each dealer's specific geographic market. GM's local adjustments to the RSI benchmarks did not take into consideration brand popularity.

For several years, Beck failed to meet GM's RSI sales targets for its geographic market. When GM sought to unilaterally amend Beck's geographic market in a way that would have required it to sell even more vehicles to comply with GM's RSI benchmarks, Beck filed a lawsuit against GM in state court alleging violations of New York's Franchised Motor Dealer Act and New York's Vehicle and Traffic Law. Specifically, Beck alleged that GM's RSI benchmarks constituted an "unreasonable, arbitrary or unfair" standard under the dealer act, and GM's unilateral modification of Beck's geographic region violated the vehicle law's prohibition on unfair contractual modifications by motor vehicle franchisors. GM removed the case to federal court; after prevailing at the trial court level, Beck appealed the case.

The Second Circuit concluded the statutory language prohibiting GM from implementing "unreasonable" standards was ambiguous. In reviewing jurisprudence from other jurisdictions, the court noted that there was a split of authority on the question of whether a motor vehicle franchisor could set a benchmark using state-wide numbers and apply that benchmark to a local franchisee without taking local factors such as brand popularity into consideration. The court also noted that the legislative history of the dealer act did not shed any light on the issue, and further, that on the day of oral arguments in Beck's case on appeal, an administrative law judge had held that GM's RSI benchmarks were an unreasonable standard because it did not take local considerations into account. Because there were no state court decisions interpreting the ambiguous language, the Second Circuit decided to certify the question of the reasonableness of the RSI benchmarks to the New York Court of Appeals.

The court also certified the question of GM's right to unilaterally modify Beck's geographic region. Although the court noted that generally a party has the right to exercise a discretionary right granted to it in a contract, the language of the vehicle law was potentially broad enough to preclude vehicle franchisors from including such provisions. As the issue had never been interpreted by a New York appellate court, the Second Circuit determined that certification was appropriate.

In addition to the certified questions, Beck also argued that GM had violated the dealer act by refusing to deliver vehicles. The Second Circuit affirmed the trial court's dismissal of this claim, noting that Beck had repeatedly refused GM's offer to deliver vehicles. The court also noted that GM's vehicle allocation system was properly based on past vehicle sales and that GM took appropriate steps to modify its vehicle allocation system when necessary to make additional vehicles available to dealers.

**Braatz, LLC v. Red Mango FC, LLC, Bus. Franchise Guide (CCH) ¶ 15,507, Civil Action No. 3:14-CV-4516-G, 2015 WL 1893194 (N.D. Tex. Apr. 27, 2015)**

On November 4, 2011, plaintiff Braatz, LLC received defendant Red Mango FC, LLC's franchise disclosure document (FDD), which included a sample franchise agreement that itself contained a mandatory franchisee questionnaire. The plaintiff later received the official franchise agreement, which again included the questionnaire. The plaintiff returned an executed version of the franchise agreement and a check to Red Mango on January 5, 2012. Upon receipt of the agreement, the defendant signed the document and cashed the plaintiff's check. Subsequently, the defendant allegedly mailed a blank copy of the questionnaire to the plaintiff and indicated that it should change its answers to certain questions to reflect that the defendant did not make any statements regarding earnings, probability of success, or franchise investment costs that were not contained within the FDD.

The plaintiff alleged that when it confronted the defendant regarding the blank questionnaire, the defendant stated that it could not open a Red Mango franchise store without changing its answers. The plaintiff complied and changed its answers to state that franchisor did not make any financial or costs representations that conflicted with the FDD. Once the parties finalized the agreement, the plaintiff began operating a Red Mango franchise. Financial struggles led to the franchise's closing on March 2, 2014, and to the plaintiff's declaration of bankruptcy.

The franchise and its owners later filed suit in the U.S. District Court for the Northern District of Texas against Red Mango, seeking rescission of the franchise agreement pursuant to the Wisconsin Franchise Investment Law (WFIL). The defendant moved to dismiss the amended complaint arguing that the court lacked jurisdiction because the plaintiff lacked standing under Article III of the U.S. Constitution. Specifically, the defendant claimed that the plaintiff lacked an injury-in-fact and failed to demonstrate that the alleged violation caused its injuries. Moreover, the defendant argued that even if the court possessed jurisdiction franchisee had not pleaded a material violation of the WFIL sufficient to survive a motion to dismiss.

The court determined that the plaintiff had standing to bring its claim because the WFIL creates a legal right that when violated can establish an injury-in-fact sufficient for Article III standing. However, the court then determined that the plaintiff did not plausibly plead a material violation of the WFIL because it willingly changed its answers to the questionnaire regarding whether the defendant made improper statements regarding earnings claims, probability of success, or franchise costs. Moreover, the plaintiff sent a check to franchisor subsequent to changing its answers to the questionnaire and promptly opened and operated its franchise. Accordingly, the court granted defendant's motion and dismissed the amended complaint, finding that the plaintiff's actions clearly supported the fact that it did not find the defendant's request to edit the questionnaire or the timing of the defendant's redelivery of the franchise agreement with the questionnaire to be material to its decision to buy and operate its Red Mango franchise.

***Grout Doctor Global Franchise Corp. v. Groutman, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,530, No. 7:14-CV-105-BO, 2015 WL 2353698 (E.D.N.C. May 14, 2015)**
This case is discussed under the topic heading "Damages."

***Texas Ujoints, LLC v. Dana Holding Corp., LLC*, Bus. Franchise Guide (CCH) ¶ 15,537, Case No. 13-CV-1008, 2015 WL 3454431 (E.D. Wis. May 30, 2015)**
This case is discussed under the topic heading "Termination and Nonrenewal."

***Yumilicious Franchise, LLC v. Barrie*, Bus. Franchise Guide (CCH) ¶ 15,511, Civil Action No. 3:13-CV-4841-L, 2015 WL 1822877 (N.D. Tex. Apr. 22, 2015)**
This case is discussed under the topic heading "Statute of Limitations."

## TERMINATION AND NONRENEWAL

***Cycle City, Ltd. v. Harley-Davidson Motor Co.*, Bus. Franchise Guide (CCH) ¶ 15,536, CV. No. 14-00148 HG-RLP, 2015 WL 3407825 (D. Haw. May 26, 2015)**
This case is discussed under the topic heading "Definition of Franchise."

***Fabbro v. Drx Urgent Care, LLC*, Bus. Franchise Guide (CCH) ¶ 15,486, D.C. Civil No. 3-13-cv-03558, 2015 WL 1453537 (3d Cir. Apr. 1, 2015)**
This case is discussed under the topic heading "Fraud."

***HLT Existing Franchise Holding LLC v. Worcester Hospitality Grp., LLC*, Bus. Franchise Guide (CCH) ¶ 15,481, No. 14-593-CV, 2015 WL 1566858 (2d Cir. Apr. 9, 2015)**
Worcester Hospitality Group, LLC (WHG) was a Hampton Inn franchisee of HLT Existing Franchise Holding, a subsidiary of Hilton Worldwide, Inc.

HLT terminated WHG's franchise agreement because WHS failed several evaluations due to poor scores on guest surveys. After termination, HLT filed suit against WHG for past due fees and liquidated damages. After the U.S. District Court for the Southern District of New York rendered a decision in favor of HLT, WHG appealed, arguing that the district court erred in

> (1) considering results from guest satisfaction surveys when deciding whether HLT properly terminated the franchise agreement; (2) finding that HLT acted properly in terminating the franchise agreement because it did not act arbitrarily, irrationally, or in violation of its duties of good faith and fair dealing; and (3) permitting HLT to recover liquidated damages under the franchise agreement.

On the first issue, WHS argued that the district court improperly considered the results from the guest satisfaction surveys because the surveys were inadmissible hearsay statements that were not properly authenticated. The Second Circuit found, however, that the reports were properly considered as records of a regularly conducted activity that a third-party vendor regularly compiled and transmitted guest satisfaction surveys to HLT; WHS provided no evidence to dispute the authenticity or transmission of the surveys.

Second, the court held that the question of whether HLT acted in an arbitrary or irrational manner in conducting onsite inspections in violation of its duty to act in good faith and deal fairly was moot because there was another independent basis for the termination of the franchise agreement. Specifically, the court noted that WHG failed its two evaluations due to the subpar guest survey scores and not because of failing onsite inspection scores. Therefore, even if WHG had acted irrationally in conducting on-site inspections, the decision to terminate was based on the contractually permitted, rational, and non-arbitrary result of guest survey scores.

Finally, WHG argued that the district court erred as a matter of law when it awarded HLT three years of liquidated damages because the district court failed to consider the affidavit of Sunil Nayak, who had more than twenty years of experience in the hotel industry. Nayak's affidavit noted that a Hampton Inn prototype could be constructed in less than a year, and as such, a three-year liquidated damages provision was excessive and unenforceable. The Second Circuit found that the district court did not err in disregarding the affidavit because the question central to awarding the liquidated damages amount was how long the parties reasonably anticipated it would take to find a replacement franchisee and reopen a Hampton Inn hotel; the affidavit discussed only the length of time related to the hotel's construction. Accordingly, the Second Circuit affirmed the entirety of the district court's judgment.

***Mister Sparky Franchising, LLC v. On Time Electricians, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,512, No. 8:15-cv-164-T-33TGW, 2015 WL 1811082 (M.D. Fla. Apr. 21, 2015)**

This case is discussed under the heading "Noncompete Agreements."

***McClain v. Avis Rent a Car System, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,502, Civ. No. 12-5151 (WHW) (CLW), 2015 WL 1344645 (D.N.J. Mar. 23, 2015)**

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

***MS & BP, LLC v. Big Apple Petroleum, LLC*, Bus. Franchise Guide (CCH) ¶ 15,526, No. 14-CV-5675 (RRM) (RER), 2015 WL 2185038 (E.D.N.Y. May 7, 2015)**

This case is discussed under the topic heading "Petroleum Marketing Practices Act."

***Robinson v. Charter Practices Int'l LLC*, Bus. Franchise Guide (CCH) ¶ 15,515, No. 3:14-CV-1736-PK, 2015 WL 1799833 (D. Or. Apr. 16, 2015)**

James Robinson entered into two franchise agreements with Charter Practices International LLC (CPI) for the establishment and operation of two Banfield Pet Hospitals in Tennessee. When Robinson applied for the first franchise in 2002, he notified CPI that he owned and operated the Robinson Animal Hospital and that he intended to continue doing so even if he was awarded the franchise. In 2003, when he executed the first franchise agreement, a side letter agreement amended the franchise agreement to allow Robinson to continue to operate the Robinson Animal Hospital while he remained a Banfield franchise owner. In 2004, when Robinson entered into his second franchise agreement with CPI, the parties failed to execute a similar letter or amendment, although CPI did not enforce its noncompetition rights against Robinson during the term of the agreement.

In 2012, CPI notified Robinson that it had elected to terminate its franchise program in the area and therefore would not be renewing the 2003 franchise agreement—a right it had reserved under the terms of the agreement. In 2013, Robinson notified CPI that he would like to renew his second franchise agreement. CPI responded by stating that they would not agree to renew the franchise agreement if Robinson still owned a competing business. Robinson attempted to sell the franchised business, but the sale was not approved by CPI. In November 2014, CPI took over the operation of Robinson's remaining franchised location.

Robinson thereafter brought suit against CPI alleging claims for breach of contract, promissory estoppel, breach of implied covenant of good faith and fair dealing, and intentional interference with economic relations. Robinson also sought a declaratory judgment that the noncompetition covenant in the franchise agreement was unenforceable as a matter of law. The defendants, in turn, filed a motion to dismiss on all counts for failure to state a claim pursuant to the Federal Rule of Civil Procedure 12(b)(6) or, in the alternative, a motion to strike.

On its first claim for breach of contract, Robinson alleged that CPI had breached the renewal provisions of the 2004 franchise agreement by failing to apply the concession made during the term of the 2004 franchise agreement—as to the ownership of a competing business—to the renewal term. The U.S. District Court for the District of Oregon examined whether CPI's waiver of the noncompetition provision during the term of the 2004 franchise agreement necessarily required CPI to offer a renewal term to Robinson on the same terms. The renewal language in the 2004 franchise agreement, however, was clear in that Robinson would be required to sign CPI's "then current form of franchise agreement" and that a new form of agreement may differ in many material respects from the terms of the preceding franchise agreement. In the face of this language, the court concluded that Robinson could not state a claim for breach of contract for CPI's failure to offer a renewal franchise agreement on the same terms as the 2004 franchise agreement. Robinson's further claim for breach of contract was based on the allegation that CPI's waiver of the noncompetition provision during the term of the 2004 franchise agreement was irrevocable. The court noted, however, that under Oregon law, a party that has waived strict compliance may demand future compliance as long as it provides advanced notice. Here, CPI provided eighteen months' notice of its intent to require that Robinson divest himself of his competing veterinary hospital before it would agree to renew the 2004 franchise agreement. To this end, the court found that CPI's waiver was not irrevocable and Robinson's breach of contract claim was dismissed with prejudice.

The court next examined whether CPI could be estopped from failing to renew the 2004 franchise agreement by seeking to enforce the noncompetition provision it had previously waived. The theory of promissory estoppel, however, works to take a promise and create a contract from it; it does not apply to circumstances where an enforceable contract already exists. Reviewing the facts, CPI did not make any express promise not to enforce the noncompetition provision during the term of the 2004 franchise agreement. Instead, it simply refrained from enforcing the provision. For the same reason that CPI's waiver was not considered to be irrevocable, the court found that this waiver could not reasonably be expected by Robinson to govern future agreements and the defendants' motion to dismiss was granted as to Robinson's claim for promissory estoppel.

On the theory of equitable estoppel,

> under Oregon law: (1) there must be a false representation, (2) it must be made with knowledge of the facts, (3) the other party must have been ignorant of the truth, (4) it must have been made with the intention that it should be acted upon by the other party, and (5) the other party must have been induced to act upon it.

The court found previously, however, that the "representation" made by CPI was not only not "false" but that it could not reasonably bind CPI to waive the noncompetition provision during any renewal term. To this end, the court also granted the defendants' motion to dismiss as to Robinson's claim for breach on the theory of equitable estoppel.

Robinson also claimed that the noncompetition provision under the 2004 franchise agreement was unenforceable as a matter of law. During the term of an agreement, Oregon law imposes a "rule of reasonableness" as to noncompetition covenants where the restriction must be partial with respect to time or place, must be in exchange for "good consideration," and must be reasonable in affording a fair protection to the interested party and not so large that it interferes with the interest of the public. The 2014 renewal agreement would have restricted the time of the noncompetition provision to the term; it was in exchange for good consideration, i.e., renewal of the franchise agreement; and it was reasonable in that it was aimed at requiring Robinson to focus his efforts towards the Knoxville Banfield Pet Hospital and not his own private competing enterprise. The court therefore found that the noncompetition provision was enforceable as a matter of law and granted the defendants' motion to dismiss as to this count as well.

The court further granted defendants' motion to dismiss Robinson's claim of breach of the implied covenant of good faith and fair dealing because, while there is such an implied covenant under Oregon law, "it is only the objectively reasonable expectations of the parties that will be examined in determining whether the obligation of good faith has been met." As stated before, the court found that, under the renewal terms of the 2004 franchise agreement as well as under Oregon law, Robinson had no reasonable expectation that he would be permitted to renew the 2004 franchise agreement for an additional five years during which he could continue to operate his competing business.

Robinson also alleged that the defendants intentionally interfered with his economic relations with customers and clients of the Knoxville Banfield Pet Hospital. In order to prevail, however, under the third element of the cause of action, Robinson had to show that the injury resulted from the defendants' "improper purpose or motive" or "improper means." If a party's actions are in pursuit of its own interest, it does not automatically follow that its actions were improperly motivated. Nor will a party be held liable for intentional interference if its actions reflect the exercise of its rights under an enforceable agreement. Here, the court found that Robinson premised the intentional interference solely on the alleged wrongful conduct, that is, the non-renewal of the 2004 franchise agreement, the assumption of the ownership of the location, and the formation of relationships with existing customers of the Knoxville Banfield Pet Hospital. Because Robinson and the defendants were competitors, Robinson contended that such actions were aimed at increasing the defendants' profits at Robinson's expense. The court found, however, that the elimination of the franchise program was expressly permitted under the terms of the 2004 franchise agreement, and that even if the defendants' actions were motivated by profit, such "profit-seeking [is] a proper purpose as a matter of law among business competitors." As previously discussed, Robinson's theory of "improper means" by way of CPI's refusing to renew the 2004 franchise agreement was, in fact, permitted under its terms.

Without "improper means" or "improper purpose," the court dismissed Robinson's claim for intentional interference with prejudice.

The defendants' motion to dismiss was granted in its entirety and Robinson's claims were dismissed with prejudice.

***Texas Ujoints, LLC v. Dana Holding Corp., LLC*, Bus. Franchise Guide (CCH) ¶ 15,537, Case No. 13-CV-1008, 2015 WL 3454431 (E.D. Wis. May 30, 2015)**

Dana Holding Corporation was the successor in interest to GWB, a German company that sold heavy duty industrial drive lines and universal joints used in marine, scrap, fracking, and oil drilling industries. Since the early 1960s, GWB had distributed its products through Automotive Industrial Supply Company (AISCO), a Texas corporation. Over the ensuing decades and following GWB's acquisition by Dana, AISCO's distribution of Dana products steadily declined. In 2012, the predecessor-in-interest to Texas Ujoints, LLC approached AISCO and offered to purchase its business assets expressly for the purpose of acquiring the distribution rights for Dana products. Nonetheless, the final acquisition agreement did not expressly convey AISCO's distribution rights, and Texas Ujoints did not approach Dana about the distribution rights until after closing its purchase of AISCO.

For the next several months, Dana continued to sell its products to Texas Ujoints, purportedly on a trial basis. When Texas Ujoints failed to prepare a detailed marketing plan, Dana terminated its right to purchase products and directed it to purchase products in the future from one of its other authorized distributors.

Following termination, Texas Ujoints filed a state court action alleging that the termination violated the Texas Fair Practices of Equipment Manufacturers, Distributors, Wholesalers, and Dealers Act (FPA). The FPA applies to all written and oral dealer agreements and prohibits the termination of dealer agreements unless the supplier gives written notice of default and an opportunity to cure. The termination notice sent by Dana gave no advance notice or opportunity to cure. Dana removed the action to the U.S. District Court for the Eastern District of Wisconsin.

The parties filed cross-motions for summary judgment. Dana raised several arguments in defense of liability. First, Dana argued that there was no contract between the parties and therefore no "dealer agreement" that had been terminated because Texas Ujoints had only been operating on a trial basis. The court rejected that argument, noting that although there were no cases interpreting the definition of a "dealer agreement," the statute had previously applied only to "dealer contracts" and had subsequently been amended to extend to "agreements." The court construed the term "agreement" more broadly than "contract," noting that Dana's continued sale of products to Texas Ujoints after it learned of the asset transfer from AISCO to Texas Ujoints was sufficient evidence of an "agreement" under the scope of the statute.

Second, Dana argued that the asset purchase agreement between AISCO and Texas Ujoints did not transfer the distribution agreement and therefore Texas Ujoints had not properly taken assignment of those rights. The court rejected this argument, noting that Dana was not a third party beneficiary of the asset purchase agreement and therefore had no right to dispute what was and was not assigned by virtue of that contract. Because Texas Ujoints and AISCO had agreed that the distribution rights had been assigned, their agreement controlled. The court also rejected Dana's argument that the transfer was somehow improper because it was effectuated without Dana's consent. There was no evidence that Dana had retained any contractual right to approve a transfer of assets; in any case, Dana waived any right it had to object to the transfer by not terminating the distribution agreement when it learned of the transfer.

Finally, the court dismissed Dana's argument that the distribution agreement was an invalid oral agreement under Texas' statute of frauds. The court held that the written agreement requirement set forth in the statute of frauds did not apply to claims under the FPA because the FPA expressly applied to written or oral agreements.

Having rejected all of Dana's defenses to liability, the court granted summary judgment in favor of Texas Ujoints. It was undisputed that Dana did not provide the requisite notice and opportunity to cure, and as such, Texas Ujoints was entitled to judgment as a matter of law on the question of liability under the FPA.

***Yumilicious Franchise, LLC v. Barrie*, Bus. Franchise Guide (CCH) ¶ 15,509, Civil Action No. 3:13-CV-4841-L, 2015 WL 1856729 (N.D. Tex. Apr. 23, 2015)**

This case is discussed under the topic heading "Attorney Fees."

**TORTIOUS INTERFERENCE**

***Robinson v. Charter Practices Int'l LLC*, Bus. Franchise Guide (CCH) ¶ 15,515, No. 3:14-CV-1736-PK, 2015 WL 1799833 (D. Or. Apr. 16, 2015)**

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

**TRADEMARK INFRINGEMENT**

***7–Eleven, Inc., v. Maia Inv. Co.*, Bus. Franchise Guide (CCH) ¶ 15,503, Civil Action No. 14-8006 (JBS/JS), 2015 WL 1802512 (D.N.J. Apr. 17, 2015)**

Franchisee Sam Younes entered into franchise agreements with 7–Eleven, Inc. (7–Eleven) for the ownership and operation of three 7–Eleven stores. His wife and son, Nashwa Younes and Mohammad Younes, were the president and vice-president, respectively, of defendant Maia Investment Co., Inc. Maia owned a competing convenience store, 24–7 Foodmart, which was located approximately one mile from two of the franchisee's 7–Eleven stores. 7–Eleven originally filed a one-count complaint against Maia and Nashwa Younes for trademark infringement, resulting in a consent order granting 7–Eleven a permanent injunction against the defendants after they admitted to selling certain 7–Eleven merchandise. However, 7–Eleven subsequently filed an amended complaint alleging that the defendants jointly conspired to sell 7–Eleven's proprietary products at Maia's 24–7 Foodmart and that the franchisee committed fraud and breach of contract in the process. The defendants moved to dismiss 7–Eleven's amended complaint.

The defendants argued that 7–Eleven's fraud claim was barred by the economic loss doctrine and that the civil conspiracy claim failed because it was premised upon an inadequate fraud claim and because 7–Eleven pleaded only conclusory allegations as to each defendant's role in the conspiracy. The defendants also argued that the trademark infringement claims failed under the "first sale" doctrine because the allegedly infringing goods were genuine and there could be no consumer confusion. The defendants also argued that 7–Eleven lacked standing to assert a claim for trademark infringement because it had not identified any injury as a result of the alleged infringement. Assuming dismissal of 7–Eleven's other claims, the defendants requested that the U.S. District Court for the District of New Jersey decline to exercise supplemental jurisdiction over 7–Eleven's breach of contract claim.

The court determined that 7–Eleven's fraud claim was based on the franchisee's fraud in its performance under the franchise agreement and not fraud in the inducement. Thus, 7–Eleven's fraud claim was indeed barred by the economic loss doctrine. Consequently, the court determined that 7–Eleven's conspiracy claims failed because they were predicated solely upon the defendants' role in aiding and abetting the alleged fraud committed by the franchisee, claims that the court previously rejected.

The court next analyzed 7–Eleven's trademark infringement claim. 7–Eleven argued that the defendants' resale of 7–Eleven branded products by itself was sufficient to allege a likelihood of confusion. 7–Eleven reasoned that because the products in question were exclusively sold at 7–Eleven stores, the defendants' unauthorized sale of such products inherently suggests an affiliation with or sponsorship by 7–Eleven that is likely to confuse consumers. The court rejected 7–Eleven's argument, stating that absent authority supporting the contention that resale of certain products is inherently likely to confuse consumers, the court was bound by well-settled law that mere display and resale of a genuine product does not violate the Lanham Act. Further, the court found that 7–Eleven's amended complaint referred only in conclusory fashion to the defendants' use of 7–Eleven's marks and logos, alleging almost nothing beyond the mere resale of 7–Eleven's products. Accordingly, the court held that the facts alleged in the amended complaint fell short of those necessary to support a claim for trademark infringement based upon sponsorship confusion. Finally, the court determined that 7–Eleven adequately pleaded diversity jurisdiction for its breach of contract claim against franchisee and thus denied the defendants' motion to dismiss due to lack of subject matter jurisdiction.

***Donut Joe's, Inc. v. Interveston Food Servs., LLC*, Bus. Franchise Guide (CCH) ¶ 15,510, Case No. 2:13-CV-1578-VEH, 2015 WL 1840431 (N.D. Ala. Apr. 22, 2015)**

Donut Joe's, Inc. opened a Donut Joe's in Pelham, Alabama, in 2009. At the end of 2010, representatives from Interveston Food Services, LLC approached Donut Joe's regarding the possibility of opening Donut Joe's franchises throughout the state. In February 2011, the parties entered into a letter of understanding with respect to Interveston's development of Donut Joe's shops in Alabama. Around May 2011, Interveston secured lease space in and obtained a building permit from the City of Calera. Interveston also obtained financing and purchased equipment for the Calera location. The build-out of the Calera store began in early June 2011 and around June 14, 2011, the parties met at the Calera location to discuss the build-out and other business issues. The parties could not agree on the final terms of a license arrangement, and their business relationship terminated at the end of June 2011. Because Interveston had already made investments into the project, it proceeded to open an independent donut shop in the Calera location under the trade name *The Donut Chef*. Interveston registered *The Donut Chef* trademark with the Alabama Secretary of State. The mark consisted of a personified doughnut character wearing a chef's hat along with the words *THE DONUT CHEF*.

Following Interveston's opening of the competing location, Donut Joe's filed an action against Interveston for trademark infringement. Donut Joe's had two marks that it alleged were infringed. The first was the word mark *Donut Joe's*. The second was its logo, which contained the words "DONUT JOE'S Fresh Coffee & Donuts To Go," along with a circular, anthropomorphized donut character smiling and wearing a chef's hat. To establish a prima facie claim for trademark infringement, Donut Joe's had to demonstrate that (1) it enjoyed enforceable rights in its marks, and (2) the alleged infringer adopted a mark that is the same or confusingly similar. When Interveston moved for summary judgment, the U.S. District Court for the Northern District of Alabama determined that Donut Joe's did not meet either of these thresholds.

Regarding the enforceability of the marks, the court found that Donut Joe's marks and logo were descriptive and not inherently distinctive. Thus, Donut Joe's marks were not protectable unless it could demonstrate that its marks had achieved secondary meaning. However, Donut Joe's explicitly declined to offer argument that its marks acquired secondary meaning. Donut Joe's asserted that the mere fact of trademark registration prevented a summary judgment that its marks were not protectable and automatically created a question of fact for trial. The court rejected this argument, citing several other circuits and at least one district court within the Eleventh Circuit that also rejected the argument that registration automatically created a triable issue of fact. The court agreed with this weight of persuasive authority, holding that the presumption of validity was rebutted by the lack of evidence that Donut Joe's marks had acquired secondary meaning. Accordingly, the court held that Donut Joe's could not protect its marks from Interveston's alleged infringement because Donut Joe's marks were merely descriptive and did not achieve secondary meaning. Further, even if Donut Joe's marks were protectable, the court would have granted Interveston's motion for summary judgment because Donut Joe's failed to demonstrate that Interveston's mark was likely to cause consumer confusion.

***Executive Home Care Franchising LLC, v. Marshall Health Corp.*, Bus. Franchise Guide (CCH) ¶ 15,489, Civil Action No.: 15-760 (JLL), 2015 WL 1422133 (D.N.J. Mar. 26, 2015)**
This case is discussed under the topic heading "Injunctive Relief."

***Grout Doctor Global Franchise Corp. v. Groutman, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,530, No. 7:14-CV-105-BO, 2015 WL 2353698 (E.D.N.C. May 14, 2015)**
This case is discussed under the topic heading "Damages."

**TRADE SECRETS**

***Grout Doctor Global Franchise Corp. v. Groutman, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,530, No. 7:14-CV-105-BO, 2015 WL 2353698 (E.D.N.C. May 14, 2015)**
This case is discussed under the topic heading "Damages."

**TRANSFERS**

***New York Metro Peterbilt, Inc. v. Peterbilt Motors Co.*, Bus. Franchise Guide (CCH) ¶ 15,488, No. 13-CV-843 (DRH) (GRB), 2015 WL 1469212 (E.D.N.Y. Mar. 30, 2015)**
This case is discussed under the topic heading "Contract Issues."

***Texas Ujoints, LLC v. Dana Holding Corp., LLC*, Bus. Franchise Guide (CCH) ¶ 15,537, Case No. 13-CV-1008, 2015 WL 3454431 (E.D. Wis. May 30, 2015)**
This case is discussed under the topic heading "Termination and Nonrenewal."

**UNFAIR COMPETITION/UNFAIR AND DECEPTIVE PRACTICES**

***Creative Am. Educ., LLC v. The Learning Experience Sys., LLC,* Bus. Franchise Guide (CCH) ¶ 15,524, No. 9:14-CV-80900, 2015 WL 2218847 (S.D. Fla. May 11, 2015)**
This case is discussed under the heading "Fraud."

***Grout Doctor Global Franchise Corp. v. Groutman, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,530, No. 7:14-CV-105-BO, 2015 WL 2353698 (E.D.N.C. May 14, 2015)**
This case is discussed under the topic heading "Damages."

***Martin v. Bimbo Foods Bakeries Distribution, LLC,* Bus. Franchise Guide (CCH) ¶ 15,508, No. 5:15-CV-96-BR, 2015 WL 1884994 (E.D.N.C. Apr. 24, 2015)**
This case is discussed under the topic heading "Contract Issues."

***Yumilicious Franchise, LLC v. Barrie*, Bus. Franchise Guide (CCH) ¶ 15,532, Civil Action No. 3:13-CV-4841-L, 2015 WL 2359504 (N.D. Tex. May 18, 2015)**
This case is discussed under the topic heading "FTC Franchising Rule."