Franchising (& Distribution) Currents

Daniel J. Oates, Jan S. Gilbert, and William M. Bryner

ANTITRUST

Mr. Oates

Mr. Gilbert

Mr. Bryner

***Brentlinger Enters. v. Volvo Cars of N. Am., LLC*, Bus. Franchise Guide (CCH) ¶ 15,815, 2016 WL 4480343 (S.D. Ohio Aug. 25, 2016)**

The U.S. District Court for the Southern District of Ohio granted a motion for summary judgment in favor of Volvo Cars of North America, LLC, finding that its dealer incentive program did not constitute price discrimination in violation of the Robinson–Patman Act and the Ohio Motor Vehicle Franchise Act. The tiered incentive program offered dealers in the highest tier, which required an investment in certain facility remodeling, a higher per car sales bonus and increased access to high demand new models. Plaintiff, an Ohio automobile dealer, argued that access to the incentive program was not "functionally available" and was therefore unlawful because the requisite facility remodeling was both expensive and contravened local zoning requirements. The court held that neither of these justifications meant that the program was "functionally unavailable" because other buyers had been able to absorb the remodeling expense and because plaintiff did not seek a variance. The court noted that generally an incentive program is "functionally unavailable" when it is a secret or when the requirements are unknown. Based on this same analysis, the court also found that the program did not constitute constructive termination.

The court further found that the incentive program did not constitute a breach of Volvo's duty to act in good faith, in part, because Volvo launched the facility remodeling incentive to address a documented gap in

Daniel J. Oates (dan.oates@millernash.com) is a partner at Miller Nash Graham & Dunn, LLP in Seattle. Jan Gilbert (jan.gilbert@gpmlaw.com) is principal at Gray Plant Mooty, in Washington, D.C. William M. Bryner (bbryner@kilpatricktownsend.com) is a partner at Kilpatrick Townsend & Stockton, LLP in Winston Salem, North Carolina.

customer satisfaction between the appearance Volvo's facilities and other brands. Similarly rejecting plaintiff's other ancillary claims, the court granted Volvo's motion for summary judgment.

ARBITRATION

Benihana, Inc. v. Benihana of Tokyo, LLC, Bus. Franchise Guide (CCH) ¶ 15,802, 2016 WL 3913599 (S.D.N.Y. July 15, 2016)

In 1995, Benihana, Inc. (BI) and Benihana of Tokyo, LLC (BOT) entered into a license agreement that gave BOT a perpetual, royalty-free license to operate Benihana restaurants in Hawaii. Among the pertinent terms of the license were that BOT was permitted to offer for sale only products that BI sold in its company stores or that BI pre-approved in writing. In addition, BI could terminate the agreement if (a) BOT violated any substantial term or condition of the agreement and did not cure the violation within thirty days after written notice from BI or (b) if BI gave three notices of default within any consecutive twelve-month period and such defaults remained uncured. The agreement also contained arbitration provisions, including a provision that, if the agreement was terminated by BI and BOT "dispute[d] [BI's] right of termination, *or the reasonableness thereof*" (emphasis added), the termination issue was to be decided by mandatory arbitration.

On May 6, 2013, BI notified BOT that BOT's sale of hamburgers in the Honolulu Benihana restaurant was not an authorized menu item and constituted a breach of the agreement. A second notice regarding this violation was sent on July 30, 2013, and eventually BI filed suit in the New York Supreme Court regarding this conduct. BOT removed the case to the U.S. District Court for the Southern District of New York (S.D.N.Y.). On December 13, 2013, BI notified BOT of a number of additional breaches of the agreement, including use of a number of unauthorized advertisements and BOT's failure to confirm compliance with the insurance requirement. When BI discovered the BOT continued to sell hamburgers at the Honolulu location, on February 5, 2014, BI issued a notice of termination, effective February 15, 2014. Two days later, BI filed a motion for preliminary injunction in the S.D.N.Y. case, in aid of arbitration (which had been commenced on January 13, 2014), seeking to prevent BOT from selling hamburgers at Benihana locations in Hawaii and to prevent additional unauthorized advertising conduct during the pendency of the arbitration. The court granted that motion.

Following an arbitration hearing on June 2–5, 2015, on September 18, 2015, the panel issued a two-to-one ruling in favor of BI. Although the majority found that BOT had committed three material breaches of the agreement and that there was good cause for BI to terminate the agreement, the majority held that the termination was nonetheless "unreasonable." The majority instead awarded BI a permanent injunction against the breaching practices and attorney fees. The dissenting panelist found that BI's termination was reasonable and would have awarded termination.

BI filed a petition in the S.D.N.Y. to vacate that portion of the arbitration award that refused to terminate the agreement. BOT filed a cross-petition, seeking to have the award confirmed in its entirety and requesting sanctions against BI on the ground that BI's petition for partial vacatur was frivolous. The court confirmed the award in its entirety and awarded BI its attorney fees in filing the petition, but refused to vacate the award in order to permit termination. The court also denied BOT's motion for sanctions.

The court was clear that it found the dissenting panelist's reasoning, which would have awarded termination, to be the more persuasive position. However, the court concluded that under the Federal Arbitration Act, it must confirm the award "if there is even barely a colorable justification for the outcome reached." The court found that the agreement's "supple reasonableness clause . . . for better or worse, entrusted the arbitral panel with unusually broad latitude to pass judgment on BI's termination decision." The court therefore concluded that the arbitration panel did not exceed its authority or rewrite the agreement, reasoning that if BI had "desired more predictability, it ought to have entered into an agreement that more tightly cabined the trier's discretion."

The court nonetheless determined that BI was entitled to an award of BI's reasonable attorney fees and costs in seeking to confirm the award. Moreover, the court denied BOT's request for sanctions, finding that BOT had failed to comport with the procedural prerequisites of Federal Rule of Civil Procedure 11 and also finding that BI's petition, and its support arguments, "were not—at all—frivolous."

***Capelli Enters., Inc. v. Fantastic Sams Salon Corp.*, Bus. Franchise Guide (CCH) ¶ 15,812, 2016 WL 4492588 (N.D. Cal. Aug. 26, 2016)**

The U.S. District Court for the Northern District of California upheld an arbitration provision in a franchise agreement and therefore denied a franchisee's request that the court enjoin franchisor Fantastic Sams Franchise Corp. from proceeding with a demand for arbitration. The parties' dispute arose when the franchisee closed its Fantastic Sams salon business less than halfway through the term of its salon license agreement. Fantastic Sams sought to collect monies from the franchisee purportedly due to the franchisee's breach, and the franchisee filed a claim before the court seeking a declaration that franchisee did not owe Fantastic Sams any money. Fantastic Sams responded by seeking a motion to compel arbitration and to dismiss or stay the franchisee's claim.

The court examined the language of the arbitration provision, which stated in part that "any controversy or claim arising out of or relating to [the] Agreement, or with regard to its interpretation, formation or breach of any other aspect of the relationship between [Plaintiffs] and [Defendants]" must be referred to arbitration. The court held that this language did not evince unmistakable intent by the parties for issues of arbitrability to be decided by an arbitrator. Rather, the court observed that an agreement conferring clear authority to determine "the validity or application of any provisions of" the arbitration clause to the arbitrator would have manifested the requisite intent. Regardless, the court held that the reference to the American Arbitration Association's (AAA) rules in the parties' agreement constituted clear and unmistakable evidence of the parties' intent for threshold issues of arbitrability to be resolved by an arbitrator. It rejected plaintiff's argument that its lack of sophistication meant that it did not appreciate the significance of the reference to the AAA rules, noting that the franchisee's owners are educated professionals with advanced degrees. The court further rejected the franchisee's argument that a provision permitting a court to enforce the agreement and/or confirm an arbitration award was contradictory. It therefore denied the franchisee's request for a restraining order and, in dicta, further opined that a motion to compel arbitration by Fantastic Sams would be successful.

***Roberts Irrigation Co. v. Hortau Corp.*, Bus. Franchise Guide (CCH) ¶ 15,787, 2016 WL 3440623 (W.D. Wis. June 20, 2016)**

The U.S. District Court for the Western District of Wisconsin denied a Federal Rule of Civil Procedure 12(b)(3) motion to dismiss or stay and to compel arbitration under the Federal Arbitration Act (FAA) filed by defendants Hortau, Inc. and its agent Hortau Corp. (together, Hortau) against dealer Roberts Irrigation Co.

In 2008, Roberts and Hortau, Inc. entered into a distribution agreement for the sale of agricultural goods. The distribution agreement provided for arbitration before the Canadian Commercial Arbitration Center under its commercial arbitration rules. The distribution agreement expired by its terms on April 30, 2009, after the parties failed to renew it, but the parties continued to do business with each other under an implied distributorship agreement. Six years later, Roberts sued Hortau in Wisconsin state court claiming that Hortau breached the implied distributorship agreement by failing to pay service commissions or repurchase inventory. Roberts also claimed that Hortau was unjustly enriched by Roberts' performance under the agreement. Hortau removed the case to the district court and moved to dismiss Roberts' complaint or stay the proceedings pending arbitration.

The court noted that for Hortau's motion to succeed, it needed to show that (1) a valid, written agreement to arbitrate existed, (2) the instant dispute fell within the agreement's scope, and (3) that Roberts has refused to arbitrate according to the agreement's terms. The court rejected Hortau's argument that the arbitration provision of the 2008 distribution agreement remained in force despite the fact the parties continued to do business with each other under essentially the same terms because Section 2 of the FAA explicitly requires that agreements to arbitrate be in writing. In sum, because Hortau failed to provide evidence that the parties had agreed in writing to arbitrate after the expiration of the 2008 distribution agreement, the court denied its motion.

***Rudd Equip. Co. v. John Deere Constr. & Forestry Co.*, Bus. Franchise Guide (CCH) ¶ 15,803, 834 F.3d 589 (6th Cir. 2016)**

John Deere Construction and Forestry Company is the exclusive wholesale supplier of Hitachi-branded products in North America. Rudd Equipment Company, Inc. is a long-time authorized dealer of Hitachi construction equipment. In October 2014, John Deere filed an arbitration seeking a declaration that it had the right to terminate its agreements with Rudd. In response to the confidential arbitration filing, Rudd filed an action in the U.S. District Court for the Western District of Kentucky, seeking an injunction to maintain the status quo between the parties pending resolution of the arbitration proceeding. At the same time, Rudd filed a motion seeking to have the entire case sealed pending the outcome of the arbitration, claiming that the very existence of the lawsuit and arbitration would likely result in loss of Rudd's existing and future customers, the layoff of employees, significant diminution in value of Rudd's financial investments, and loss of goodwill. Without waiting for a response from John Deere and without making any factual findings or conclusions, the district court granted the motion and sealed the entire case.

Thereafter, the parties proceeded to litigate the case in arbitration and mediate the lawsuit seeking injunctive relief. Eventually, the parties entered into an agreed order in the lawsuit. The arbitration panel learned of the agreed order in the civil case, and requested a copy, which John Deere provided without advance notice to Rudd. In response, Rudd filed a motion for contempt in the federal court action, alleging that John Deere had violated the seal by providing a copy of the agreed order to the arbitration panel. John Deere responded by filing a motion to unseal the lawsuit. The district court denied the motion for sanctions and granted the motion to unseal the case. Rudd then appealed the order unsealing the case.

On appeal, the Sixth Circuit noted that it had jurisdiction to review the order unsealing the case because an order to unseal is conclusive and final and ultimately determines that documents will not be protected from disclosure. The court then went on to note that the Sixth Circuit has long recognized a strong presumption in favor of openness of court records. The district court's initial order sealing the case was unsupported by factual findings, and therefore the district court acted appropriately in reversing its initial decision and unsealing the records. Moreover, the court noted that Rudd had produced no actual evidence of potential harm that would result from unsealing the case, other than Rudd's conclusory assertions that it would lose customers and employees.

The court also rejected two arguments raised by Rudd. First, Rudd argued that John Deere had waived its right to challenge the seal by acquiescing to the agreed order in the litigation. The Sixth Circuit noted that John Deere had no ability or right to waive the public's First Amendment and common law rights to access public court filings. Instead, the court has an independent obligation to keep its records open for public inspection that is not conditioned on an objection from anyone. Second, Rudd argued that it had relied on the order sealing the case to its detriment in the subsequent unsealing. The court rejected that argument as well, noting that Rudd's arguments carried little weight where Rudd itself had initiated the lawsuit. Moreover, although reliance is one factor that district courts may consider in reversing a decision to seal, it is not controlling, and the case did not present the type of extraordinary circumstances where reliance would outweigh the heavy public interest in accessing documents.

***Tigges v. AM Pizza, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,797, 2016 WL 4076829 (D. Mass. July 29, 2016)**
This case is discussed under the topic heading "Class Actions."

ATTORNEY FEES

***Schwartz v. Rent-A-Wreck of Am., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,809, 2016 WL 3906581 (D. Md. July 12, 2016)**
After entry of a mandate following an appeal, plaintiff David Schwartz filed a bill of costs seeking $32,665.21 from defendant Rent-A-Wreck of America, Inc. The clerk of the U.S. District Court for the District of Maryland awarded costs in the amount of $13,405.11 Rent-A-Wreck filed a motion to review the order on the bill of costs, arguing that the clerk had erred because (1) Schwartz was not the prevailing party in the litigation because he had not prevailed on all claims and arguments raised in the case, (2) Schwartz had failed to differentiate costs between the claims he prevailed on, and those he had not, or (3) the cost bill should be reduced by $4,442.83 to take into account costs for five depositions of witnesses who did not testify at either of the two previous trials in the case.

Reviewing the order on the bill of costs, the court noted that the clerk must award fees to a party that prevails on any significant claim affording some relief sought. The two primary claims in the complaint were for declaratory judgment on Schwartz's right to operate a Rent-A-Wreck franchise and for specific performance directing Rent-A-Wreck to add Schwartz's franchise to its customer directories and webpage. Schwartz prevailed on both of these claims at trial and on appeal and therefore had prevailed on a significant claim, entitling him to an award of costs. The court also rejected Rent-A-Wreck's claim that Schwartz was required to differentiate costs on prevailing claims from those that it did not prevail on. The court noted that Rent-A-Wreck had cited no authority for this proposition and that it would be inconsistent with the standard of awarding costs to a party that prevails on any significant claim.

Lastly, the court also rejected Rent-A-Wreck's argument that Schwartz was not entitled to costs for depositions of witnesses who did not testify at trial. The court noted that the depositions were reasonably necessary at the time they were taken and therefore it did not matter that the witnesses ultimately did not testify at trial.

CHOICE OF FORUM

***Carl's Jr. Rests. LLC v. 6Points Food Servs. Ltd.*, Bus. Franchise Guide (CCH) ¶ 15,796, 2016 WL 3671116 (C.D. Cal. July 7, 2016)**

In 2013, Carl's Jr. Restaurants LLC (CJR), a Delaware corporation with its principal place of business in California, entered into a development agreement with 6Points Food Services Ltd., a limited liability company organized under the laws of Ontario, Canada, with its principal place of business in Saskatchewan. Pursuant to the development agreement, 6Points agreed to open thirty Carl's Jr. branded fast food restaurants in Canada by 2020. The development agreement contained a choice of law provision applying Ontario law to any dispute and a choice of forum provision that granted CJR the right to file suit in any state or federal court where its principal offices were then located, or alternatively, in any province of Canada where 6Points resided or did business.

The development agreement also required that 6Points' principal owners and operators sign guaranty agreements. 6Points' owners convinced CJR to accept a letter of credit from 6Points in lieu of the guaranty agreements.

After entering into franchise agreements to open four restaurants in Ontario, Canada, 6Points announced that it would cease operations and sent CJR a notice of rescission, demanding payment of $7 million. 6Points never provided CJR with the letter of credit, as promised by its owners.

Shortly after receiving the notice of rescission, CJR filed suit against 6Points in the U.S. District Court for the Central District of California. CJR also brought claims against CJR's principals arising out of their failure to obtain a letter of credit in lieu of signing the guaranty agreements. The following day, 6Points filed suit against CJR in the Ontario Superior Court of Justice. 6Points then filed a motion to dismiss CJR's lawsuit in California under the doctrine of forum non conveniens. The Canadian action was stayed pending resolution of the motion in California.

In addressing the forum non conveniens motion, CJR argued that the court must apply the modified standard applicable to cases where there is a valid forum selection clause. The court rejected this argument, noting that the modified forum non conveniens analysis applies only where the forum selection clause is mandatory. The forum selection clause between CJR and 6Points was not mandatory because it did not require that California be the exclusive forum for all disputes. Instead, the clauses were merely permissive because it identified areas where CJR could file an action if it chose to do so. Accordingly, the court applied the traditional test for forum non conveniens.

Under the traditional test, the court must determine whether an adequate alternative forum exists and whether the balance of private and public interests favor dismissal. The court first noted that there was no dispute that Ontario, Canada, represented an adequate alternative forum that offered a satisfactory remedy to whichever party would prevail. Next, the court evaluated the private factors, which include (1) the residence of the parties and the witnesses; (2) the forum's convenience for the litigants; (3) access to physical evidence and other sources of proof; (4) whether unwilling witnesses can be compelled to testify; (5) the cost of bringing witnesses to trial; (6) the enforceability of the judgment; and (7) all other practical problems that make trial of a case easy, expeditious, and inexpensive. Of principal importance to the court in evaluating these factors was the fact that CJR acknowledged that it was planning to move its corporate headquarters from California to Tennessee. As a result, factors (1)-(3), (5) and (7) weighed in favor of Canada because all of the principal witnesses were either in Canada or Tennessee, and Tennessee was closer to Ontario than California. The court noted that the other factors were at best neutral because regardless of the location of the litigation, the parties may face challenges gaining access to witnesses and evidence, and the prevailing party would face challenges to enforcing the judgment. The court also noted that, as a practical matter, there was nothing to stop the Canadian court from proceeding in parallel (and potentially to a different result), if the court did not grant the dismissal.

Finally, the court turned to the public factors, which include: (1) the local interest in the lawsuit, (2) the court's familiarity with the governing law, (3) the burden on local courts and juries, (4) congestion in the court, and (5) the costs of resolving the dispute unrelated to a particular forum. The court noted that, in light of CJR's intended move from California to Tennessee, California had no justifiable interest in trying the case, and as a result, the burden on the local courts and the court's docket was unjustified. Conversely, the Ontario court was much more familiar with the governing law because the contract called for application of Ontario law to any dispute.

Having reviewed all the factors, the court found that all of the public factors and most of the private factors weighed in favor of dismissal. All of the other private factors were at worst neutral. Accordingly, the court concluded that dismissal was the appropriate remedy, granted 6Points motion, and dismissed the case.

DTV, Inc. v. Brunkswick Corp., Bus. Franchise Guide (CCH) ¶ 15,823, 2016 WL 4225556 (N.D. Ohio Aug. 11, 2016)

DTV, Inc. entered into retail dealer agreements with Brunkswick Corp., a manufacturer of billiards tables and related products. The retail dealer agreements gave DTV the exclusive right to sell Brunkswick's products in Northeast Ohio and Milwaukee. The contracts also contained a venue provision that selected the U.S. District Court for the Northern District of Illinois as the exclusive venue for any disputes arising out of or in connection with the parties' agreements.

Shortly thereafter, Brunkswick terminated the agreements. DTV responded by filing suit against Brunkswick in the Northern District of Ohio, alleging breach of contract and violations of Ohio and Wisconsin law. Brunkswick then filed a motion to transfer venue, arguing that the provisions of the contracts controlled and that the case should be moved to the Northern District of Illinois. The trial court noted that the decision to transfer venue pursuant to 28 U.S.C. § 1404(a) requires that the court balance several private and public factors. Before evaluating the private factors, the court noted that under the U.S. Supreme Court's ruling in *Atlantic Marine Construction Co. v. U.S. District Court for the Western District of Texas*, 134 S. Ct. 568 (2013), a valid forum selection clause in a contract should be given controlling weight in all but the most exceptional circumstances. If a contract contains a valid forum selection clause, the court may evaluate only the public factors.

Concluding that the forum selection clause in the contract was valid and enforceable, the court held that venue transfer was appropriate, noting that all DTV's arguments related to the private factors for transferring venue. The contractual venue clause superseded those factors, and none of the public factors weighed against transfer. The court transferred the action to the Northern District of Illinois.

***Fraser v. BrightStar Franchising, LLC*, Bus. Franchise Guide (CCH) ¶ 15,821, 2016 WL 4269869 (N.D. Cal. Aug. 15, 2016)**

Plaintiffs, one a resident of Georgia and one a resident of California, were joint owners of a home health care services franchise in Buckhead, Georgia, operated by franchisor BrightStar Franchising, an Illinois limited liability company. On March 11, 2016, plaintiffs brought suit against BrightStar and against individuals who were current or former officers or directors of BrightStar in state court in California. The complaint alleged various state law causes of action arising from allegations that (a) BrightStar failed to disclose that its prior franchises in the Buckhead territory had failed, (b) BrightStar misrepresented the geographic area and potential client population of the franchise territory, and (c) BrightStar provided misleading financial information.

The case was removed to federal court on grounds of diversity of citizenship. All of the defendants moved to dismiss the action based on improper venue under Federal Rule of Civil Procedure 12(b)(3) or, in the alternative, to transfer venue to the Northern District of Illinois. The individual defendants also moved to dismiss for lack of personal jurisdiction and for insufficient service of process.

After finding complete diversity of citizenship and that the amount in controversy requirement had been satisfied, the court assessed the venue issue. Defendants did not argue that the Northern District of California failed to satisfy one of 28 U.S.C. § 1391(b)'s criteria for venue. Instead, defendants argued that the governing franchise agreement contained a forum-selection clause specifying federal court in Illinois as the venue for the dispute. Citing *Atlantic Marine Construction Co. v. U.S. District Court for the Western District of Texas*, 134 S. Ct. 568 (2013), the court held that the forum selection clause did not render venue in the Northern District of California "wrong" or "improper." As a result, the court declined to dismiss the case but, instead, analyzed the defendants' alternative motion to transfer venue under 28 U.S.C. § 1404(a) and did so separately as to BrightStar and to the individual defendants.

As to BrightStar, the court gave "controlling weight" to the agreement's forum selection clause and held that the plaintiffs did not carry "their heavy burden of establishing exceptional circumstances to warrant disregarding the parties' choice of forum." In particular, and contrary to the plaintiffs' arguments, the court held that the forum selection clause was not the result of fraud, undue influence, or overweening bargaining power; did not effectively deprive the plaintiffs of their day in court in Illinois; and did not contravene any strong public policy of California.

As to the individual defendants, who were not signatories to the franchise agreement and thus were not subject to the forum selection clause, the parties did not dispute that the case could have been brought in the first instance in the Northern District of Illinois. The court therefore analyzed whether the interests of justice and the convenience of the parties and the witnesses, favored a transfer of venue. Because the claims against the individual defendants were essentially the same as those against BrightStar, the court held that judicial economy would not be served by having litigation of the same claims proceeding in two different courts. In addition, the court found that overall convenience for the parties and the witnesses would be enhanced if the case proceeded in Illinois.

Finally, having transferred venue, the court denied without prejudice the individual defendants' motion to dismiss for lack of personal jurisdiction and for insufficient service of process.

***Get in Shape Franchise, Inc. v. Killingsworth*, Bus. Franchise Guide (CCH) ¶ 15,819, 2016 WL 4445230 (D. Mass. Aug. 17, 2016)**

Get in Shape Franchise, Inc. brought two cases against franchisees in the U.S. District Court for the District of Massachusetts alleging breaches of the franchise agreement. Both franchisees moved to dismiss the cases, alleging improper venue.

In the first case, the franchisee cited to a provision of the franchise agreement requiring that venue for all disputes be situated in Norfolk County, Massachusetts. As no federal courts are located in Norfolk County, the magistrate judge assigned to the case recommended dismissal of the case for improper venue, and the recommendation was adopted by the district court.

In the second case, with Killingsworth as the defendant, the motion to dismiss did not reference the forum selection clause in the franchise agreement, which was identical to the forum selection clause in the first case. Accordingly, the magistrate judge did not recommend dismissal. On review of the report and recommendation from the magistrate, the court concluded that it would work an injustice to treat the identical cases differently. Accordingly, the court rejected the report and recommendation and dismissed the claims against Killingsworth for the same reasons as the dismissal of the claims against the first franchisee.

CHOICE OF LAW

Rimrock Chrysler Grp., LLC v. Montana, Bus. Franchise Guide (CCH) ¶ 15,799, 375 P.3d 392 (July 12, 2016)

Following the bankruptcy filing of Chrysler, LLC (Old Chrysler) in 2009, Congress enacted a new law in 2010 designed to protect the interests of automobile dealerships that had their contracts with Chrysler rejected during the bankruptcy process. Specifically, Section 747 of the Consolidated Appropriations Act of 2010 established a disclosure and arbitration process to determine whether dealers that had their franchise agreements terminated by Chrysler (and any other bankrupt automobile manufacturer) could have their dealerships added to the networks of the manufacturers after they came out of bankruptcy. A dealer that prevailed in arbitration would receive a letter of intent from the manufacturer to enter into a new franchise agreement. In addition to the right to arbitration, Section 747 granted manufacturers and dealers the right to opt out of arbitration and voluntarily negotiate a new agreement.

Chrysler Group, LLC (New Chrysler) acquired Old Chrysler's assets out of the bankruptcy. Among other things, this included an arbitration claim made by a terminated franchisee, Rimrock Chrysler Group, LLC, which had previously operated a Chrysler dealership in Billings, Montana. Rimrock prevailed in the arbitration and received a letter of intent from New Chrysler for a new dealership in Billings.

After receiving the letter of intent, a then existing dealer located in Billings, Lithia Motors, Inc., filed an administrative complaint with the Montana Department of Justice, Motor Vehicle Division, pursuant to the Montana's dealer protest laws. The dealer protest laws allow existing franchisees to object to the establishment of a new or additional motor vehicle dealership of the same line-make by filing a written objection with the department. The department then conducts an administrative hearing to determine whether good cause exists for entering into an additional franchise of the same line-make.

Lithia prevailed in the administrative hearing, and the department entered an order in its favor over New Chrysler's and Rimrock's objections. Rimrock then appealed the decision to state superior court. New Chrysler did not appeal the decision. Instead, New Chrysler filed an action against Rimrock and a host of other dealers in U.S. District Court in Michigan, seeking a declaration that it had no obligation to offer defendants a new franchise agreement. Rimrock and New Chrysler ultimately settled the federal case. In exchange for the dismissal, Rimrock agreed not to assert in any forum that Section 747 generally preempts Montana state dealer laws.

After settling the case, but before resolution of the appeal of the administrative action in Montana, the Sixth Circuit ruled in the Michigan case that, as to the remaining defendants that had not settled with New Chrysler, Section 747 preempted state dealership laws. Rimrock then filed a motion to vacate the administrative proceedings in the Montana action, arguing that Section 747 preempted Montana's dealer protest laws and deprived the State of Montana of subject matter jurisdiction to hear the administrative claim. Rimrock's motion was denied because Rimrock had waived the right to argue preemption in its settlement agreement with New Chrysler, and because the action was not justiciable where New Chrysler had never appealed the Department's order. Rimrock appealed to the Supreme Court of Montana.

On appeal, the court first addressed the question of subject matter jurisdiction over the proceedings. Rimrock argued that the superior court did not have subject matter jurisdiction because Section 747 preempted any claim under the state dealer protest law and, as such, the court had no subject matter jurisdiction to hear the claim. Lithia and New Chrysler argued that Rimrock had waived that argument in its settlement agreement with New Chrysler in the Michigan case when it agreed not to argue preemption in any other jurisdiction. The court noted that preemption is an affirmative defense that may be waived if not raised, but only if it is federal preemption of choice of law. Federal preemption of forum cannot be waived. In evaluating Section 747, the court noted that the statute permits dealers and manufacturers to opt out of arbitration as the exclusive forum for resolving disputes and instead negotiate directly. As such, Section 747 did not preempt forum and instead only preempted choice of law, which could be waived. Accordingly, the court held that Rimrock had waived its right to argue that Section 747 preempted the state dealer protest law.

Next, the court addressed whether the appeal on the merits was justiciable even though Rimrock was not a party to the dispute between New Chrysler and Lithia and New Chrysler never appealed the department's administrative ruling. The court noted that Montana dealer protest law expressly provides that "any person . . . who is aggrieved" by a final decision by the department can appeal that decision to the superior court. Given that Rimrock lost its letter of intent by virtue of the department's ruling, it was an "aggrieved" party that had the right to appeal the decision. Accordingly, the court remanded the case for further proceedings in the superior court on the propriety of the department's ruling in the administrative hearings.

CLASS ACTIONS

***Martinez v. Stratus Franchising, LLC*, Bus. Franchise Guide (CCH) ¶ 15,788, 2016 WL 3402546 (Ind. Ct. App. June 21, 2016).**

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

***Salazar v. McDonald's Corp.*, Bus. Franchise Guide (CCH) ¶ 15,818, 2016 WL 4394165 (N.D. Cal. Aug. 16, 2016)**

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

***Tigges v. AM Pizza, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,797, 2016 WL 4076829 (D. Mass. July 29, 2016)**

Plaintiffs in this case, Atila Tigges and Tylor Reeves were pizza delivery drivers who worked for Domino's Pizza franchisees located in Massachusetts. Defendant franchisees paid their drivers a "tipped minimum wage," that is, a wage that is lower than the statutory minimum wage, but supplemented by tips. Tigges and Reeves each filed class action lawsuits in the U.S. District Court for the District of Massachusetts against their respective employers, alleging that the delivery surcharges assessed to consumers who purchased pizza for delivery were in fact "service charges" that the franchisees were required to pay to their delivery drivers under the Massachusetts Tips Act and the Massachusetts Wage Act. The prospective class representatives were not on identical footing, however, because Reeves had signed an arbitration agreement with the franchisees that included a class action waiver. Tigges did not sign a similar arbitration agreement.

The franchisees had already litigated a class action lawsuit brought by another delivery driver, Edione Lisandro. The *Lisandro* case alleged the same claims against the franchisees for violations of the Tips Act and the Minimum Wage Act. The court held an exemplar trial on the merits of Lisandro's claims, and the franchisee prevailed. As a result, Lisandro's motion to certify a class was denied, because he was deemed to be an inadequate class representative.

On March 23, 2016, Tigges and Reeves moved to certify their respective classes under Federal Rule of Civil Procedure 23(b). Shortly thereafter, the Reeves defendants moved to dismiss the claims, arguing that the claims were barred by the court's decision in *Lisandro*, or alternatively, the claims were precluded by the arbitration agreement signed by Reeves, which included the class action waiver. The court addressed all three of these motions in a consolidated order.

First, the court addressed whether the *Lisandro* case precluded re-litigation of the class action claims brought by Tigges and Reeves. The court noted that issue preclusion applies only in a subsequent action between the same parties. Although the attorneys representing Tigges and Reeves also represented Lisandro, Reeves was not a party to the *Lisandro* action; as such, issue preclusion did not apply to preclude the two new lawsuits.

The court next addressed the merits of the motions to certify the class actions. In order to certify a class under Rule 23(a), a plaintiff must show that (1) the class is so numerous that joinder of all members is impractical, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. Rule 23(b)(3) also requires that the district court find that the questions of law or fact common to class members predominate over any questions affecting only individual members and that a class action is superior to other available methods for adjudicating the controversy.

Having set down the rules for certification, the court noted that the only disputed elements were commonality and typicality and whether common questions predominate over individual questions, such that a class action is the most appropriate vehicle for addressing the dispute.

Starting with the question of commonality, the franchisees argued that the questions at issue in the lawsuit are not common as between prospective class members because the charging of the service fee depended upon individualized assessments of such questions as the manner in which the pizza order was placed, whether the customer asked about the delivery charge, whether the driver offered information voluntarily about the delivery charge, the demographics of the area where the pizza was delivered, and other highly fact specific analyses. Conversely, plaintiffs argued that the common question in all the cases was simply whether the charging of a service charge was a violation of the Tips Act. The court agreed with plaintiffs, noting that any differences in underlying factual questions (i.e., whether the violation of the statute would benefit an individual class member) could be sorted out by separate subquestions submitted to the jury. In so holding, the court rejected a recent Eighth Circuit case that indicated that individual differences prevented a finding of commonality, noting that the differences could be sorted out after trial.

Next, the court addressed the typicality requirement of Rule 23(a)(3). To satisfy typicality, it suffices that the claims arise from the same event or practice or course of conduct that gives rise to claims of other class members and are based on the same legal theory. Defendants argued that plaintiffs could not satisfy typicality because some of the individual defenses at issue in the case made their factual circumstances too different from typical class members. For example, defendants cited to the arbitration agreements signed by the proposed members of the Reeves class as grounds for finding that Reeves was not typical of the class. With respect to Tigges, defendants argued that Tigges had not been a delivery driver in many years and the Tigges defendants changed their practices (such as disclosure of the surcharge policy to drivers and customers) over time. Thus, Tigges' claims were not typical of claims brought by later class members. The court rejected these arguments, noting that individual defenses threaten typicality only when they stand to become the focus of the litigation. According to the court, in a somewhat conclusory fashion, nothing cited by defendants arose to this level.

On the class certification question, the court last addressed the predominance requirements of Rule 23(b)(3). The court noted that predominance requires only that the individual questions not overwhelm common ones. Having already held that the claims of the class representatives satisfied the commonality requirement of Rule 23(a)(2), the court held that the claims were sufficiently common that they also satisfied Rule 23(b). Although there were some questions about variations in damages to different plaintiffs, those questions could be easily addressed after trial. The court also noted that a class action would be superior to all other methods of adjudicating the controversy because the amounts at issue (service charges) were relatively small and would not be well suited to individual claims by pizza delivery drivers.

Having concluded that all of the elements of Rule 23 were satisfied, the court granted the motion to certify both class action complaints.

Lastly, the court addressed the argument in the motion to dismiss that the arbitration agreements signed by Reeves and other class members precluded their claims. Plaintiffs argued that the class action waivers were unenforceable because they violated the National Labor Relations Act (NLRA). Specifically, they argued that the purpose of the NLRA is to encourage collective action by workers. This argument had previously been rejected by the Fifth, Eighth, and Second Circuits, but not by the First Circuit, where the district court was located. Moreover, a recent decision by the Seventh Circuit had concluded that a class action waiver in an arbitration agreement violated the NLRA and was therefore unenforceable. Siding with the reasoning in the Seventh Circuit, which was consistent with the NLRA's only policy guidance, the court held that the class action waiver violated the NLRA and was therefore unenforceable. To reach this conclusion, the court noted that the Federal Arbitration Act contained no specific language suggesting that it was intended to supersede the NLRA. Defendants argued that the Seventh Circuit's decision was distinguishable because, unlike the agreements signed by Reeves, the arbitration and class action waiver agreements in the other case contained no provision that allowed workers to opt out of arbitration. But the court noted that the National Labor Relations Board had previously ruled in administrative actions that arbitration agreements with employees that contain opt-out agreements still violate the NLRA. Deferring to the agency's interpretation of the statute, the court held that the opt-out provision did not save the arbitration agreement. Accordingly, the court denied defendants' motion to dismiss.

CONTRACT ISSUES

Andrea Distrib., Inc. v. Dean Foods of Wis., LLC, Bus. Franchise Guide (CCH) ¶ 15,784, 2016 WL 3199544 (W.D. Wis. June 8, 2016)

The U.S. District Court for the Western District of Wisconsin granted a summary judgment motion by dairy products supplier Dean Foods of Wisconsin, LLC against dairy hauler and distributor Andrea Distributing, Inc. on Andrea's claim under the Wisconsin Fair Dealership Law (WFDL) for unlawful termination of a hauling agreement and Dean Foods' counterclaim to recover a past due balance under a separate distribution agreement between the parties.

Dean Foods entered into a hauling agreement with Andrea, pursuant to which Dean Foods paid Andrea to transport dairy products to its customers in Wisconsin. The parties also entered into a distribution agreement pursuant to which Andrea purchased dairy products from Dean Foods for resale. Years later, Andrea began to have financial problems and accumulated a large past due balance on the products it purchased from Dean Foods under the distribution agreement. As part of a plan to pay down the arrearages, Andrea proposed to increase the "per stop" hauling rates it charged Dean Foods under the hauling agreement. After the parties failed to come to a longer-term agreement regarding the hauling rates, Dean Foods notified Andrea that it was terminating the hauling agreement. In turn, Andrea stopped making payments on its past due balance under the distribution agreement and sued Dean Foods in Wisconsin state court. Dean Foods subsequently decided to terminate the distribution agreement. It also removed the state court case to the federal district court and asserted a counterclaim for nonpayment under the distribution agreement.

The crux of Andrea's WFDL claim was that it had one omnibus dealership agreement with Dean Foods that the latter terminated without good cause. The court looked to the following four factors to determine whether the two agreements were distinct for the purposes of the WFDL: "(1) the language and history of the agreements, (2) the extent to which the grantor distinguished between the activities, (3) the extent to which the grantee distinguished between the activities, and (4) whether there were third parties performing the activities separately." The court agreed with Dean Foods' argument that there were two separate agreements covering Andrea's hauling and distribution activities. It noted some evidence that the activities under the agreements were comingled, but found that the remaining three out of four factors supported Dean Foods' claim. Having found that the two agreements were distinct, the court held that Dean Foods had cause good cause to terminate the distribution agreement for non-payment and that it complied with the requisite WFDL notice requirements. The court also found that the hauling agreement did not create a dealership between the parties under the WFDL because Andrea was not required to purchase equipment, build facilities, use Dean Foods' logos, or make other substantial investments in Dean Foods' business. Therefore, Dean Foods was entitled to terminate the hauling agreement at will.

***Bull Int'l, Inc. v. MTD Consumer Grp., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,791, 2016 WL 3542249 (3rd Cir. June 29, 2016).**
This case is discussed under the topic heading "Statutory Claims."

***Caudill v. Keller Williams Realty, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,805, 828 F.3d 575 (7th Cir. 2016)**
In 2012, Jana Caudill and Keller Williams Realty settled a suit arising from Keller Williams's termination of Caudill's realty franchise. The settlement

agreement contained a confidentiality provision that prohibited the disclosure of the agreement's terms, but permitted disclosure to certain recipients, such as tax professionals and insurance carriers, as long as these recipients promised to keep the terms confidential. The agreement's confidentiality provisions also contained a liquidated damages clause, setting compensation at $10,000 for any violation of the confidentiality provisions.

Three months later, Keller Williams issued a franchise disclosure document to 2,000 of its franchisees, disclosing confidential terms of the agreement with Caudill. Caudill sued, seeking $20 million in liquidated damages, namely, $10,000 for each of the 2,000 violations of the agreement. The district court refused to grant relief, finding under Texas law that the liquidated damages clause was not a reasonable forecast of compensation to Caudill. The district court held that there was no evidence that the unauthorized disclosure in the FDD had caused $20 million in damages to Caudill, and Keller Williams had adduced evidence that any damage to Caudill did not approach anything close to an average of $10,000 per unauthorized recipient of the disclosure.

The Seventh Circuit, in short order, affirmed the district court's ruling, holding that although one could conceivably imagine serious damage to Caudill, the record reflected only speculation as to the amount of such damage.

***Choice Hotels Int'l, Inc. v. Frontier Hotels, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,817, 2016 WL 4367993 (S.D. Tex. Aug. 15, 2016)**
This case is discussed under the topic heading "Trademark Infringement."

***Get in Shape Franchise, Inc. v. Killingsworth*, Bus. Franchise Guide (CCH) ¶ 15,819, 2016 WL 4445230 (D. Mass. Aug. 17, 2016)**
This case is discussed under the topic heading "Choice of Forum."

***Howard Johnson Int'l, Inc. v. Tyler Texas Lodging, LLC*, Bus. Franchise Guide (CCH) ¶ 15,786, 2016 WL 3436402 (D.N.J. June 16, 2016)**
The U.S. District Court for the District of New Jersey granted a motion by Howard Johnson International, Inc. (HJI) for default judgment under Federal Rule of Civil Procedure 55(b)(2) against defendants franchisee Tyler Texas Lodging, LLC and guarantor Joseph Garrison where defendants failed to plead or otherwise defend HLJ's complaint for breach of the parties' franchise agreement and monetary damages exceeding $300,000.

HLJ, franchisor of Howard Johnson hotels, entered into a franchise agreement and related agreements with Texas Lodging for the operation of a ninety-one room Howard Johnson hotel in Tyler, Texas, in 2009. After Texas Lodging repeatedly failed to timely pay HJI, the latter terminated the franchise agreement and subsequently sued Texas Lodging in district court to recover recurring fees, including royalties, system assessments, reservation system user fees, annual conference fees, other fees, and taxes and interest. It also sued to recover liquidated damages for premature termination of the franchise agreement. After defendants failed to answer or otherwise respond to the complaint, the clerk of the district court entered default against both defendants and HLJ moved for default judgment. Noting that service of process was proper, default judgment was appropriate under the circumstances because defendants did not have a meritorious defense, HLJ would be prejudiced absent entry of the default judgment, and defendants acted culpably, the court also assessed HLJ's the damages sought by HLJ and found that HLJ had adequately proven its damages in the amount claimed.

***Jack In the Box Inc. v. Mehta*, Bus. Franchise Guide (CCH) ¶ 15,793, 2016 WL 3401988 (N.D. Cal. June 21, 2016)**

Beginning in 1992, plaintiff Jack In the Box Inc. (JIB) entered into a series of nineteen franchise agreements with various defendants. The parties also entered into a series of lease agreements in connection with the franchise agreements, in which JIB acted as landlord and defendants acted as tenants. Between September 1, 2011, and August 22, 2012, defendants failed to pay rent, royalties, marketing fees, and other charges pursuant to the agreements. In May 2013, defendants attempted to secure refinancing from a bank for their existing debts, but those efforts eventually failed due to significant differences between what defendants told the bank they owed JIB and the amount JIB told the bank defendants owed. Effective September 17, 2013, JIB terminated the agreements, but defendants continued to use JIB's trademarks following termination of the agreements.

Thereafter, JIB sued defendants for breach of contract and for trademark infringement and unfair competition under the Lanham Act. JIB then moved for partial summary judgment on its first claim under the contract; summary judgment on its Lanham Act claims; and summary judgment dismissing defendants' counterclaims for breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel, and negligent interference with contract and economic advantage.

In a near complete victory for JIB, the court granted, in its entirety, JIB's motion for partial summary judgment on its breach of contract claims as well as the JIB's summary judgment motion on its trademark infringement and unfair competition claims. The court also granted plaintiff's summary judgment motion seeking dismissal of all of defendants' counterclaims

Concerning JIB's breach of contract claim, the court found that there was no genuine issue of material fact that (1) the parties had a contract, (2) JIB had performed under the contract, (3) defendants breached, and (4) JIB was damaged thereby. In particular, the court rejected, due to lack of substantiating evidence, defendants' arguments that JIB improperly terminated the agreements and improperly interfered with their efforts to obtain refinancing that, according to defendants, would have cured the breaches. In particular, defendants failed to point to any provisions of the agreements that required JIB to undertake the obligations of which defendants complained, namely, the provision of monthly invoices and an accounting of the amount JIB had demanded from defendants' bank.

As to defendants' breaches, the court overruled various evidentiary objections and held that defendants did not create any genuine issue of material fact that they had breached the agreements in the ways asserted by JIB. These asserted breaches included failure to timely pay rent, marketing and other fees required by the agreements; failure to pay taxes, such that state and county tax liens were recorded; and failure to provide quarterly accounting statements. Defendants did not dispute that these breaches had occurred.

Regarding JIB's claims of trademark infringement and unfair competition, the court found that it was undisputed that, following termination of the agreements, defendants nonetheless continued to use JIB's Jack In the Box trademarks without permission as "holdover" franchisees. Because defendants did not dispute these facts, except for raising the same arguments that the court rejected in assessing the breach of contract claim, the court held that defendants were liable to JIB, as a matter of law, under the Lanham Act.

Finally, the court similarly granted JIB's motion for summary judgment seeking dismissal of defendants' counterclaims. In particular, defendants (1) failed to submit evidence of their own performance under the agreements and JIB's breach of the agreements in order to support their breach of contract claim; (2) failed to adduce evidence that JIB had made a clear and unambiguous promise not to terminate the agreements, which was necessary to support a counterclaim for promissory estoppel; and (3) did not sufficiently establish that JIB negligently interfered in defendants' refinancing efforts in order to support their counterclaims for negligent interference with contract.

Midas Int'l Corp. v. Poulah Inv'rs, LLC, Bus. Franchise Guide (CCH) ¶ 15,811, 2016 WL 4532033 (D. Md. Aug. 29, 2016)

Midas International Corp. brought suit in the U.S. District Court for the District of Maryland against its former franchisee, Poulah Investors, LLC and its principal operators, alleging trademark infringement, breach of the franchise agreement, and breach of guarantee. The claims arose following expiration of the franchise agreement in November 2014. Prior to expiration, Midas sent Poulah a letter offering a renewal, provided that Poulah paid the delinquent amounts owing. At the time of expiration, Poulah owed Midas $13,587.10. Midas notified Poulah in writing of its obligations to de-identify its franchised location and to pay the outstanding delinquent amounts. Despite the warning, Poulah continued to use the Midas trademarks until August 15, 2015, when the company went out of business.

When Poulah failed to answer the complaint, Midas filed a motion for default judgment. At the same time, Midas brought a motion for summary judgment against the individual defendants (who had answered the complaint). The court reviewed the allegations in the complaint and concluded that Midas had stated claims against Poulah for breach of contract. The court awarded damages for the delinquent amounts owing, plus late fees, and liquidated damages for Poulah's use of the trademark following expiration of the franchise agreement.

Midas also prevailed on its claims for trademark infringement, which the court concluded were sufficient based on the allegations in the complaint that Midas owned the trademarks and that Poulah had continued to use them without permission after the franchise agreement expired. However, the court refused to award treble damages under the Lanham Act, noting that the Lanham Act allows only an award of "actual damages" incurred by reason of the infringement, which does not include contractually agreed-upon damages.

The court also granted in part the motion for summary judgment against the individual defendants. The court held that the guaranty agreements signed by Poulah's principals required that they pay any amounts due and owing to Midas by Poulah, including amounts due and owing under the contract or for trademark infringement. But because the court had already concluded that Midas established only contractual damages owing against Poulah and failed to present any evidence of actual damages for trademark infringement, the court limited the damages award against the individual defendants to the contractual damages against Poulah. In so holding, the court rejected the individual defendants' argument that they could setoff the amounts owed by Poulah to Midas under the franchise agreement. Specifically, the individual defendants claimed that Midas owed Poulah more money than Midas was seeking from Poulah, allegedly for warranty repair work that Midas had never credited to Poulah's account. The court noted that the individual defendants had presented no evidence of any offsets, and in any event, the franchise agreement specifically prohibited any offset by the franchisee absent the express written consent of Midas.

Finally, the court held that Midas failed to establish a claim for trademark infringement against the individual defendants, noting that there was no evidence that the individuals had personally participated in the company's trademark infringement.

***Mrs. Fields Franchising, LLC v. Bektrom Foods, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,810, 2016 WL 4051848 (D. Utah July 27, 2016)**

Mrs. Fields Franchising, LLC entered into a franchise agreement with Bektrom Foods, Inc., pursuant to which Bektrom agreed to make minimum annual guarantee payments as well as quarterly royalty payments. After making the first guarantee payment and all quarterly royalty payments, in September 2013, Bektrom failed to make the second payment in the amount of $150,000. Mrs. Fields sent Bektrom a notice of default for the missed payments, and the parties began negotiating a resolution to their dispute via email. The parties reached a tentative agreement, pursuant to which Bektrom agreed to continue making quarterly royalty payments and to make a payment of $75,000 in exchange for a release from its obligation to make the missed guarantee payment and future guarantee payments. Mrs. Fields prepared a draft agreement memorializing the terms of the parties' understanding, although it was never sent to Bektrom and never signed by either party.

Thereafter, Mrs. Fields filed suit, seeking damages for Bektrom's failure to make the $150,000 guarantee payment and other minimum guarantees up to $920,000. Bektrom argued that the parties had modified their contract when they agreed to waive the payment of the guarantees in exchange for a payment of $75,000. In support of this argument, Bektrom noted that Mrs. Fields had entered the terms of the parties' agreement into its accounting system, which internal records showed had forgiven the amount of the minimum guarantee payments in the company's records of accounts receivable.

The trial court agreed, noting that the email exchanges between the parties, the accounting notation, and the unsigned draft of the written agreement demonstrated sufficient evidence of Mrs. Fields' intentional waiver of a known right. In exchange for the waiver, Mrs. Fields was entitled to payment of the negotiated amount from Bektrom ($75,000). Accordingly, the court entered judgment in favor of Mrs. Fields in the amount of $75,000.

***Roadtrek Motorhomes, Inc. v. Calif. New Motor Vehicle Bd.*, Bus. Franchise Guide (CCH) ¶ 15,808, 2016 WL 3885006 (Cal. Ct. App. July 14, 2016)**

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

***Jade Grp., Inc. v. Cottman Transmission Ctrs., LLC*, Bus. Franchise Guide (CCH) ¶ 15,806, 2016 WL 3763024 (E.D. Pa. July 13, 2016)**

Plaintiffs in this case were four individual franchisees of Cottman Transmission Centers, an automotive transmission repair franchise. In 2006, Cottman's parent acquired Cottman's most significant competitor, AAMCO, and announced that it would be phasing out the Cottman brand. In the face of pushback from franchisees, Cottman continued to receive at least some support over the course of several years. However, in May 2014, it was announced at Cottman's annual convention that resources would be focused on growing the AAMCO brand and that no further resources would be invested into growing the Cottman brand.

Plaintiffs filed suit, alleging claims of breach of contract and breach of the implied covenant of good faith and fair dealing against Cottman. Plaintiffs also asserted claims of tortious interference against Cottman's parent. In addition, plaintiffs sought declaratory relief that the franchise agreements were terminated and, therefore, that the agreements' covenants not to compete were unenforceable. Defendants moved to dismiss all of these claims for failure to state a claim on which relief could be granted.

The court denied defendants' motion except as to the claim for a breach of the implied covenant of good faith and fair dealing. Concerning the breach of contract claims, the court held that the face of the complaint, viewed in the light most favorable to plaintiffs, plausibly alleged claims for various breaches of the agreement. In particular, plaintiffs plausibly stated a claim that Cottman failed to "develop, grow, and protect the company's goodwill" in violation of the agreement. The court also denied defendants' motion that the claims were barred by Pennsylvania's four-year statute of limitations, reasoning that the court could not determine, from the face of the complaint, whether the breaches were consummated at the May 2014 annual convention or at some earlier time.

Regarding the claim for breach of the implied covenant of good faith and fair dealing, the court granted defendants' motion. The court held that, because plaintiffs relied on the same facts to support both this claim and their breach of contract claims, they had an adequate remedy under the breach of contract claims and thus could not state a claim for breach of the implied covenant of good faith and fair dealing.

The court also denied defendants' motion to dismiss the tortious interference claims. Defendants argued that, because plaintiffs could not state a claim for the underlying breach of contract, the tortious interference claims must be dismissed. In light of the court's denial of the motion on the breach of contract claims, however, the court rejected this argument. Additionally, the court also refused to shield Cottman's parent from such a claim, holding that the parent's conduct "was not motivated by a desire to protect Cottman's assets. Rather, the allegations demonstrate that [the parent] was driven by an interest in aggrandizing itself through the growth of Cottman's corporate sibling."

Finally, the court held that declaratory relief may be available to plaintiffs. In particular, the court held that, when viewed in the light most favorable to plaintiffs, the asserted breaches of the agreement may have been sufficiently material to warrant rescission and, therefore, to warrant declaratory relief that the agreement had been terminated. Moreover, the court held that the applicability and reasonableness of the covenant not to compete was a fact-intensive inquiry that it was unwilling to resolve at the pleadings stage.

***Touch Holding Co. v. Copeland's Cheesecake Bistro, LLC*, Bus. Franchise Guide (CCH) ¶ 15,816, 2016 WL 4272908 (E.D. La. Aug. 12, 2016)**

Touch Holding Company approached Copeland's Cheesecake Bistro LLC about opening Copeland's branded restaurants in six countries. After some negotiations, Touch entered into a letter of interest with Copeland, pursuant to which it agreed to pay a "good faith deposit" of $100,000, with the "[b]alance of upfront fees to be paid upon execution of a Master Franchise Agreement." After the parties executed the agreement, Touch deposited the money and the parties began negotiating a master franchise agreement. During negotiations, Touch requested that Copeland begin modifying its menu to offer additional items, while Touch sought to secure a location for the first store. Copeland regularly reported progress on the changes to the menu and on purchasing and distribution issues. After several weeks, however, the parties were unable to reach agreement on the terms of a master franchise agreement. Accordingly, Touch demanded that Copeland return the deposit. When Copeland refused, Touch filed suit seeking return of the deposit in the U.S. District Court for the Eastern District of Louisiana. Copeland brought counterclaims for promissory estoppel, alleging that it had relied upon Touch's representations that it would be opening new restaurants when it agreed to modify its menu.

Touch moved for summary judgment, demanding return of the deposit, and dismissal of Copeland's promissory estoppel and detrimental reliance counterclaims. Touch argued that, under Louisiana law, a deposit of money that is not specifically denominated as "earnest money" is presumed to be refundable. The court rejected Touch's argument, noting that the "earnest money" statute applied to real estate transactions and not to commercial transactions. Looking at the plain language of the parties' agreement, the court held that it could not ascertain whether the parties intended that the deposit be refundable. Accordingly, the court turned to extrinsic evidence, noting that in various exchanges, the parties had noted that the money was referred to as a "down payment" on a future franchise fee. As a result, the court held that there was a genuine issue of material fact as to whether the deposit was intended to be refundable or instead the first part of several agreed-upon payments.

With respect to the promissory estoppel claim, the court held that the evidence in the record demonstrated that Copeland had relied upon Touch's statements by spending money to add items to its menu and address product distribution questions. As such, there were material issues of fact on the promissory estoppel claim. Given these issues of material fact, the court denied the motion for summary judgment.

CORPORATE VEIL PIERCING

***Uninsured Employer's Fund v. Crowder*, Bus. Franchise Guide (CCH) ¶ 15,794, 2016 WL 2605624 (Ky. May 5, 2016)**
This case is discussed under the topic heading "Statutory Claims."

DAMAGES

***Choice Hotels Int'l, Inc. v. Frontier Hotels, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,817, 2016 WL 4367993 (S.D. Tex. Aug. 15, 2016)**
This case is discussed under the topic heading "Trademark Infringement."

***Legacy Acad., Inc. v. Doles-Smith Enters. Inc.*, Bus. Franchise Guide (CCH) ¶ 15,781, 789 S.E.2d 194 (June 9, 2016)**
In an ongoing dispute between daycare center franchisor Legacy Academy, Inc. and franchisee Doles-Smith Enterprises, Inc. (DSE), the Georgia Court of Appeals found that the trial court erred in denying Legacy's motion

for a directed verdict and judgment notwithstanding the verdict (JNOV) on DSE's negligent misrepresentation claim but was correct in denying DSE's motion for directed verdict and JNOV on Legacy's breach of contract counterclaim seeking to recover lost royalties.

In 2006, Legacy entered into a franchise agreement with another entity owned by DSE's owners whereby DSE acquired the rights to operate a Legacy daycare center franchise in Fulton County. After opening in June 2008, DSE's center suffered yearly net losses. DSE stopped paying Legacy monthly royalties and advertising fees after March 2011. In August 2012, DSE terminated its relationship with Legacy and sued Legacy for, among other things, negligent misrepresentation and negligence under Georgia law. It also sued for rescission, but subsequently withdrew that claim. A jury found in favor of DSE on its claim for negligent misrepresentation and negligence, awarding it $350,000 and $40,000 respectively. It also found in favor of Legacy on its counterclaim for lost royalties and lost advertising fees, awarding Legacy $46,300.

The court reversed the award to DSE for negligent misrepresentation, noting that DSE had failed to provide proof of actual economic loss proximately resulting from the alleged negligent misrepresentation. It determined that DSE did not introduce any evidence at trial of the difference between the purchase price it paid for the Legacy daycare center franchise and the value of the franchise actually sold to them in light of the alleged misrepresentation. The fees DSE sought to recover, $40,000 for the franchise fee and $200,000 in personal debt obligations, were not recoverable as consequential damages as a matter of law for a negligent misrepresentation claim, but they would have been under the withdrawn rescission claim. The court affirmed the award of lost future royalties to Legacy noting that under Georgia law, a claim for lost royalties is treated in the same matter as a claim for lost profits. It determined that Legacy presented sufficient evidence of its lost gross revenue resulting from DSE's unpaid royalty fees. The court also determined that Legacy could use the advertising fee percentage to measure the value of DSE's broken promise to pay monthly advertising fees as a basis for its damages.

***Midas Int'l Corp. v. Poulah Inv'rs, LLC*, Bus. Franchise Guide (CCH) ¶ 15,811, 2016 WL 4532033 (D. Md. Aug. 29, 2016)**

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

***Mrs. Fields Franchising, LLC v. Bektrom Foods, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,810, 2016 WL 4051848 (D. Utah July 27, 2016)**

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

***Tri County Wholesale Distribs., Inc. v. Labatt USA Operating Co., LLC*, Bus. Franchise Guide (CCH) ¶ 15,807, 828 F.3d 421 (6th Cir. 2016)**

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

DEFINITION OF FRANCHISE

***Benson v. City of Madison*, Bus. Franchise Guide (CCH) ¶ 15,184, 2016 WL 4468411 (Wis. Ct. App. Aug. 25, 2016)**
This case is discussed under the topic heading "Definition of Franchise."

DISCRIMINATION

***Brentlinger Enters. v. Volvo Cars of N. Am., LLC*, Bus. Franchise Guide (CCH) ¶ 15,815, 2016 WL 4480343 (S.D. Ohio Aug. 25, 2016)**
This case is discussed under the topic heading "Antitrust."

ENCROACHMENT

***Rimrock Chrysler Grp., LLC v. Montana*, Bus. Franchise Guide (CCH) ¶ 15,799, 384 Mont. 76, 375 P.3d 392 (July 12, 2016)**
This case is discussed under the topic heading "Choice of Law."

***Roadtrek Motorhomes, Inc. v. Calif. New Motor Vehicle Bd.*, Bus. Franchise Guide (CCH) ¶ 15,808, 2016 WL 3885006 (Cal. Ct. App. July 14, 2016)**
This case is discussed under the topic heading "Statutory Claims."

***W. Colo. Motors, LLC v. Gen. Motors, LLC*, Bus. Franchise Guide (CCH) ¶ 15,792, 2016 WL 3600289 (Colo. App. June 30, 2016)**
This case is discussed under the topic heading "Statutory Claims."

FRAUD

***Devayatan LLC v. Travelodge Hotels, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,790, 2016 WL 3477205 (M.D. Fla. June 24, 2016)**
This case is discussed under the topic heading "Statutory Claims."

***Legacy Acad., Inc. v. Doles-Smith Enters. Inc.*, Bus. Franchise Guide (CCH) ¶ 15,781, 337 Ga. App. 575, 789 S.E.2d 194 (June 9, 2016)**
This case is discussed under the topic heading "Damages."

***Martinez v. Stratus Franchising, LLC*, Bus. Franchise Guide (CCH) ¶ 15,788, 2016 WL 3402546 (Ind. Ct. App. June 21, 2016).**
The Court of Appeals of Indiana affirmed a trial court judgment in favor of commercial cleaning franchisor, Stratus Franchising, L.L.C., against a class of franchisees of master franchisee Shamrock Building Services, Inc. d/b/a Stratus Building Solutions of Indianapolis (Shamrock), holding that the

trial court's findings of fact and conclusion of law that Stratus did not aid and abet franchise fraud were not clearly erroneous.

As a threshold matter, the class claimed that Stratus aided and abetted franchise fraud under Indiana law and the FTC Franchise Rule. It argued that because Section 23-2-2.5-13 of the Indiana Franchise Act referenced the FTC Franchise Rule, any deceptive act in violation of the FTC Franchise Rule constituted fraud under the Act. The court rejected that argument and reiterated long-standing precedent from the state supreme court that the Act does not provide a private right of action for violations of its disclosure provisions.

At trial, the members of the class claimed that they failed to receive customer accounts that generated the total income Shamrock had essentially guaranteed through its advertisements and sales presentations. In finding for Shamrock and Stratus on the fraud claims, the court noted that (1) the franchise disclosure document (FDD), unit franchise agreement (UFA) and sales presentations provided by Shamrock to the class contextualized any misleading statements in the sales presentation; (2) there was insufficient evidence that Shamrock and Stratus failed to act in good faith; and (3) the class could not justifiably rely on Shamrock's statements where the UFA contained a provision disclaiming reliance on any express or implied representations or guarantees.

Finally, the court noted that the record demonstrated that Stratus provided Shamrock with the FDD and UFA, which disclosed the franchise system in sufficient detail to allow prospective franchisees the opportunity to exercise independent judgment before purchasing a franchise. Therefore, the court affirmed the trial court's conclusion that Shamrock did not make material false statements concerning income guarantees in exchange for the individual class plaintiffs' payments of certain levels of franchise fees. Absent fraud on Shamrock's part, it also affirmed the entry of judgment in favor of Stratus on the aiding and abetting claim.

FTC FRANCHISING RULE

***Martinez v. Stratus Franchising, LLC*, Bus. Franchise Guide (CCH) ¶ 15,788, 2016 WL 3402546 (Ind. Ct. App. June 21, 2016).**

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

GOOD FAITH AND FAIR DEALING

***Brentlinger Enters. v. Volvo Cars of N. Am., LLC*, Bus. Franchise Guide (CCH) ¶ 15,815, 2016 WL 4480343 (S.D. Ohio Aug. 25, 2016)**

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

***Devayatan LLC v. Travelodge Hotels, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,790, 2016 WL 3477205 (M.D. Fla. June 24, 2016)**

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

***Martinez v. Stratus Franchising, LLC*, Bus. Franchise Guide (CCH) ¶ 15,788, 2016 WL 3402546 (Ind. Ct. App. June 21, 2016).**
This case is discussed under the topic heading "Fraud."

***Jade Grp., Inc. v. Cottman Transmission Ctrs., LLC*, Bus. Franchise Guide (CCH) ¶ 15,806, 2016 WL 3763024 (E.D. Pa. July 13, 2016)**
This case is discussed under the topic heading "Contract Issues."

INJUNCTIVE RELIEF

***Choice Hotels Int'l, Inc. v. Frontier Hotels, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,817, 2016 WL 4367993 (S.D. Tex. Aug. 15, 2016)**
This case is discussed under the topic heading "Trademark Infringement."

JURISDICTION

***859 Boutique Fitness, LLC v. CycleBar Franchising, LLC*, Bus. Franchise Guide (CCH) ¶ 15,820, 2016 WL 4414786 (E.D. Ky. Aug. 18, 2016)**
859 Boutique Fitness, LLC filed a complaint against CycleBar Franchising LLC in Kentucky state circuit court alleging breach of a franchise agreement and seeking damages in excess of $2,500,000. Because there was complete diversity of citizenship between the two corporations and the amount in controversy exceeded $75,000, CycleBar removed the case to the U.S. District Court for the Eastern District of Kentucky. After removal, CycleBar moved to dismiss the claims asserted in the complaint and prevailed after a hearing on the motion. The court granted Boutique leave to amend its complaint to state a claim.

Boutique's amended complaint reduced the demand for damages to $74,383.79. After filing the amended complaint, Boutique filed a motion to remand the case to state court, arguing that the amount in controversy no longer satisfied the statutory minimum for diversity jurisdiction cases. The district court noted that when analyzing the amount in controversy for purposes of determining whether the court has subject matter jurisdiction over a removed matter, the court must examine the amount in controversy at the time of removal. Because the amount in controversy at the time of removal was $2,500,000, the court determined that the removal was proper, and denied the motion for remand.

***Jani-King Franchising, Inc. v. Falco Franchising, S.A.*, 2016 WL 2609314 (Tex. App. May 5, 2016)**
In 2004, plaintiff Jani-King Franchising, Inc., a commercial cleaning franchisor, was contacted by two shareholders of Belgian company Falco S.A. seeking to enter into franchising relationship. Jani-King and Falco subsequently entered into a franchise agreement, governed by Texas law, that granted

Falco an exclusive right to operate a Jani-King franchise in Belgium for a period of twenty years.

In November 2010, Falco defaulted on certain reporting obligations and began falling behind on payment obligations to Jani-King. In March 2014, Falco informed Jani-King that it no longer intended to pay royalties and gave notice of its intention to terminate the agreement. Following additional investigation, Jani-King learned that Falco had surreptitiously commenced a competing business in Belgium and had misused certain of Jani-King's personal property and confidential information. Jani-King brought suit in Texas state court against Falco, its three shareholders, and its branch manager, alleging claims of common law fraud and fraudulent concealment. Defendants filed special appearances, a procedure by which they challenged the Texas trial court's exercise of personal jurisdiction over them. The trial court granted those special appearances and found personal jurisdiction was lacking as to all of defendants, except Falco. Jani-King sought an interlocutory appeal, and Falco cross-appealed.

The Texas Court of Appeals refused to apply the fiduciary shield doctrine. That doctrine, if applicable, would have immunized the individual defendants from the exercise of jurisdiction because they could not be held individually liable for the claims asserted against them. However, because Jani-King had alleged torts against the individual defendants for which they could be held individually liable, the fiduciary shield doctrine did not preclude the exercise of personal jurisdiction over the individual defendants if such exercise was otherwise proper.

As to the individual defendants' substantive amenability to suit, the trial court had ruled that none of the individual defendants were subject to personal jurisdiction in Texas. The Texas Court of Appeals, however, reversed the trial court's rulings as to all of the individual defendants except Falco's branch manager. Regarding the branch manager, the court applied prior precedents to hold that, because the branch manager did not reside in Texas and communicated only by email regarding performance of the franchise agreement, his contacts with Texas were insufficient to support the exercise of personal jurisdiction. By contrast, the other individual defendants had traveled to Texas and had made statements and omissions, while in Texas, that were relevant to Jani-King's claims of fraud and fraudulent concealment. Consequently, and after determining that the exercise of personal jurisdiction by the Texas courts would not offend traditional notions of fair play and substantial justice, the court reversed the trial court and found that these individual defendants were subject to jurisdiction in Texas.

Similarly, on Falco's cross-appeal, the court held that Falco's contacts with Texas were sufficiently extensive that Falco could reasonable anticipate being sued there. In particular, under the agreement, Falco agreed to the jurisdiction of U.S. courts, and the only state in the United States in which Falco performed tasks under the contract was Texas (and did so for ten years). The agreement was also governed by Texas law. As a result, the court affirmed the trial court's denial of Falco's special appearance.

The significance of this decision is reflected in the court's efforts to draw lines concerning conduct that will or will not give rise to personal jurisdiction, at least under Texas law. Relatively innocuous emails or telephone calls in the day-to-day performance of a franchise agreement do not appear to give rise to personal jurisdiction in Texas. By contrast, visiting the state and engaging in conduct that give rise to the allegations of the lawsuit will result in the exercise of personal jurisdiction by Texas courts. Similarly, a foreign-based franchisee will be subject to personal jurisdiction in Texas if it enters into a franchise agreement that is governed by Texas law and if the parties assent to jurisdiction in the United States in circumstances in which Texas is the only U.S. state in which pertinent conduct occurs.

***Rimrock Chrysler Grp., LLC v. Montana*, Bus. Franchise Guide (CCH) ¶ 15,799, 375 P.3d 392 (July 12, 2016)**

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

***Tigges v. AM Pizza, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,797, 2016 WL 4076829 (D. Mass. July 29, 2016)**

This case is discussed under the topic heading "Class Actions."

***Tilted Kilt Franchise Operating, LLC v. 1220, LLC*, Bus. Franchise Guide (CCH) ¶ 15,798, 2016 WL 463172 (N.D. Ill. July 29, 2016)**

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

***W. Colo. Motors, LLC v. Gen. Motors, LLC*, Bus. Franchise Guide (CCH) ¶ 15,792, 2016 WL 3600289 (Colo. Ct. App. June 30, 2016)**

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

LABOR AND EMPLOYMENT

***Salazar v. McDonald's Corp.*, Bus. Franchise Guide (CCH) ¶ 15,818, 2016 WL 4394165 (N.D. Cal. Aug. 16, 2016)**

In 2010, the defendants (collectively, McDonald's) entered into a franchise agreement with a franchisee (Haynes). Pursuant to that agreement, and in general terms, McDonald's possessed control over setting general operational standards and Haynes was in charge of personnel. Plaintiffs were crew members at Haynes-owned McDonald's restaurants in Oakland, California, and brought a putative class action suit against McDonald's, seeking to recover wages allegedly owed to them under California state law.

McDonald's moved for summary judgment, on the theory that it does not jointly employ the plaintiffs because McDonald's, as opposed to Haynes, does not exert direct or indirect control over the plaintiffs' hiring, firing, wages, or working conditions. The court granted a substantial portion of McDonald's motion, but denied that part of the motion that concerned plaintiffs' claims under an "ostensible agency" theory.

In ruling on the motion, the court initially recognized that California law imposes a duty to pay minimum wages only upon "employers" and, as such, McDonald's could only be liable if it "employed" the plaintiffs. Applying *Martinez v. Combs*, 49 Cal. 4th 35 (2010), and *Patterson v. Domino's Pizza, LLC*, 60 Cal. 4th 474 (2014), and with a lengthy and detailed analysis, the court found that there was no genuine issue of material fact that McDonald's was not the plaintiffs' employer on an actual agency theory. The court found it to be undisputed that McDonald's did not control the plaintiffs' wages, hours, or working conditions and held that McDonald's did not retain a contractual right to do so. Similarly, the court held that McDonald's did not "suffer or permit" the plaintiffs to work because Haynes alone possessed the ability "to hire and fire workers, to set their wages and hours, and to tell them when and where to report to work." Moreover, the court determined that McDonald's ability, as a franchisor, to exert some measure of economic pressure due to its operational oversight capabilities was insufficient, as a matter of law, to make it a joint employer under *Martinez* and *Patterson*.

The court denied summary judgment to McDonald's, however, on the plaintiffs' theory of "ostensible agency." The court reasoned that ostensible agency arises if "(1) the person dealing with the agent does so with reasonable belief in the agent's authority; (2) that belief is generated by some act or neglect of the principal sought to be charged; and (3) the relying party is not negligent." McDonald's argued that because, under *Patterson*, uniform workplace standards intended to protect the franchisor's brand did not establish actual agency, the fact that the plaintiffs wore McDonald's uniforms and logos and served food packaged with McDonald's trademarks was also insufficient to give rise to ostensible agency. The court rejected this argument, reasoning that California courts had previously permitted a finding of ostensible agency even when actual agency did not exist and finding a lack of legal authority that foreclosed a finding of ostensible agency under these facts. Of particular relevance were facts that the plaintiffs believed that they and Haynes were employed by McDonald's; that the plaintiffs were required to wear McDonald's uniforms; that the plaintiffs were required to prepare and serve McDonald's-branded food; that the plaintiffs applied for their jobs through a McDonald's website; that the plaintiffs regularly interacted directly with McDonald's consultants; and that no one ever told the plaintiffs that McDonald's was not their employer. Although the court conceded that this case was "a close call," it found that, when taken in the light most favorable to the plaintiffs, a jury could reasonably find McDonald's to be a joint employer under an ostensible agency theory.

Finally, the court granted summary judgment to McDonald's concerning the plaintiffs' negligence theory. The court found that the plaintiffs' negligence claim simply duplicated its claims under California's labor and employment statutes. Because the court found California's statutory scheme to be exclusive, it held that the negligence claims could not proceed as a matter of law.

***Tigges v. AM Pizza, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,797, 2016 WL 4076829 (D. Mass. July 29, 2016)**
This case is discussed under the topic heading "Class Actions."

***Uninsured Employer's Fund v. Crowder*, Bus. Franchise Guide (CCH) ¶ 15,794, 2016 WL 2605624 (Ky. May 5, 2016)**
This case is discussed under the topic heading "Statutory Claims."

NON-COMPETE AGREEMENTS

***ReBath, LLC v. New England Bath Inc.*, Bus. Franchise Guide (CCH) ¶ 15,801, 2016 U.S. Dist. LEXIS 93033 (D. Ariz. July 15, 2016)**
Following the expiration of three franchise agreements with New England Bath (NEB), ReBath twice notified NEB of its post-expiration obligations. These obligations included, among others, ceasing use of ReBath's marks and logos; turning over operations manuals and customer contracts; and refraining from operating a competing business within the franchise territory, or within fifty miles of the franchise territory, for a period of one year. When NEB did not comply, ReBath brought suit, asserting claims of trademark infringement, false advertising, breach of the non-compete agreement, and trade secret misappropriation. ReBath moved for a preliminary injunction.

While ReBath's motion was pending, NEB certified to the court that it had returned the operations manual, removed ReBath's logos from service vehicles, removed signage, ceased use of NEB's ReBath-associated website, and provided information regarding business leads and service calls. The court therefore found it unnecessary to assess whether ReBath was likely to succeed on its trademark infringement and trade secret misappropriation claims. Instead, the court focused its likelihood-of-success analysis on ReBath's claims for breach of the non-compete and false advertising.

With respect to the non-compete claims, the court first held that the scope of the agreement's non-compete was likely not overly broad. In particular, the court reasoned that the non-compete provisions prohibited NEB from only operating a bathroom remodeling business and did not prevent it from continuing to operate a kitchen remodeling business. In addition, the court found that the geographic scope of the covenant—a fifty-mile radius from the franchise territory—was also likely reasonable, citing other decisions that enforced non-compete agreements of similar geographic scope. The court therefore held that ReBath was likely to succeed on its claim for breach of the non-compete.

ReBath's false advertising claim was directed to NEB's continued posting on its new website of customer testimonials about work it had performed while a ReBath franchisee. The court held that continued display of those testimonials was likely to mislead consumers into believing the NEB was wholly responsible for these customers' satisfactory experience when, instead, the goodwill associated with NEB's performance while a ReBath franchisee belonged to ReBath. The court therefore held that ReBath was likely to succeed on its claim for false advertising.

The court also concluded that ReBath likely would suffer irreparable harm absent an injunction. In particular, the court determined that ReBath's goodwill would be harmed because NEB's "overnight switch" to a newly named business in the same location in which it had operated as a ReBath franchisee for seven years "may signal to potential customers that [NEB has] lost faith in the ReBath brand." The court also concluded that the balance of harms favored ReBath and that the public interest would be served by an injunction. Therefore, the court granted ReBath's motion and enjoined NEB from using ReBath's marks; suggesting that NEB was affiliated with ReBath; operating a competing bathroom remodeling business for a period of one year within a fifty-mile radius from the franchise territory; and maintaining, using, or disclosing ReBath's operations manual or other trade secret information.

STATE DISCLOSURE/REGISTRATION LAWS

***Tilted Kilt Franchise Operating, LLC v. 1220, LLC*, Bus. Franchise Guide (CCH) ¶ 15,798, 2016 WL 463172 (N.D. Ill. July 29, 2016)**

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

STATUTE OF LIMITATIONS

***Jade Grp., Inc. v. Cottman Transmission Ctrs., LLC*, Bus. Franchise Guide (CCH) ¶ 15,806, 2016 WL 3763024 (E.D. Pa. July 13, 2016)**

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

STATUTORY CLAIMS

***Andrea Distrib., Inc. v. Dean Foods of Wis.*, LLC, Bus. Franchise Guide (CCH) ¶ 15,784, 2016 WL 3199544 (W.D. Wis. June 8, 2016)**

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

***Benson v. City of Madison*, Bus. Franchise Guide (CCH) ¶ 15,184, 2016 WL 4468411 (Wis. Ct. App. Aug. 25, 2016)**

The Wisconsin Court of Appeals held that the City of Madison, Wisconsin, did not grant a "dealership," as defined by the Wisconsin Fair Dealership

Law (WFDL), when it contracted with several professional golf services companies to operate and maintain city golf courses. The court observed that for a dealership to be formed under the WFDL, an agreement must grant a person the right to sell or distribute goods or services or the right to use a commercial symbol. The court noted that the parties' agreement expressly stated that the city did not grant any of these rights. Moreover, the court held that the services that the companies provided to the city, e.g., providing golf equipment for rental and managing concession stands, had no distribution component. Lastly, the companies' use of the city's trademark was minimal and consisted of a small pooled advertising budget and a single sign. Hence, the court found insufficient evidence that the parties' arrangement constituted a dealership and therefore dismissed the companies' suit against the city.

***Bull Int'l, Inc. v. MTD Consumer Grp., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,791, 2016 WL 3542249 (3rd Cir. June 29, 2016).**
The Third Circuit affirmed in part and dismissed in part an order from the U.S. District Court for the Western District of Pennsylvania granting an equipment manufacturer's motion to dismiss claims asserted by an equipment dealer for wrongful termination under Ohio's farm equipment dealer law (OEDA) and for breach of an implied warranty of merchantability with respect to the products furnished by the manufacturer to the dealer.

Bull International, Inc. and Cub Cadet Corp. d/b/a as MTD Products, Inc. entered into a dealer wholesale finance agreement and a sales and service agreement on August 1, 1985. The dealer agreement provided that either party could terminate it at any time, with or without cause, upon thirty days' prior written notice. In 2013, MTD informed Bull that it was terminating the dealer agreement after expiration of the thirty-day notice period. When Bull asked for an explanation for the termination, MTD, citing the dealer agreement, stated that it did not have to provide cause for the termination. Bull sued MTD in a multicount complaint alleging, among other claims, that MTD failed to comply with certain requirements of the OEDA, including that a manufacturer have good cause to terminate a dealer agreement and provide 180 days' prior notice to do so, and that MTD breached the implied warranty of merchantability with respect to the parts sold by MTD. The district court granted MTD's motion to dismiss, concluding that applying the OEDA to the dealer agreement would violate the Ohio constitution by retroactively burdening MTD's substantive rights and that Bull had failed to state a claim for breach of the implied warranty of merchantability.

The Third Circuit agreed with the district court's holding as to the OEDA claim. It found that OEDA, enacted in 2001, was substantive and could not be applied retroactively to the dealer agreement because it would negate MTD's contractual rights that vested more than fifteen years prior to the OEDA's enactment and because it would impose additional burdens, duties, and obligations on MTD that the parties did not include in the dealer agreement. In contrast, the Third Circuit found that Bull's allegations that MTD breached the implied warranty of merchantability were sufficient to survive a motion to dismiss. Claims that Bull had made, including that several parts manufactured by MTD were not merchantable and fit for a particular purpose, satisfied the common law criteria to sufficiently allege such a claim.

***Choice Hotels Int'l, Inc. v. Frontier Hotels, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,817, 2016 WL 4367993 (S.D. Tex. Aug. 15, 2016)**
This case is discussed under the topic heading "Trademark Infringement."

***Devayatan LLC v. Travelodge Hotels, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,790, 2016 WL 3477205 (M.D. Fla. June 24, 2016)**
The U.S. District Court for the Middle District of Florida denied a summary judgment motion filed by plaintiff Devayatan, LLC and its guarantors (third party defendants) and granted in part and denied in part a summary judgment motion filed by defendant Travelodge Hotels, Inc. (THI). The court held that THI was entitled to judgment as a matter of law on Devayatan's claims of negligent misrepresentations and violations under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), but genuine issues of material fact existed on THI's counterclaims and third-party claims and related affirmative defenses.

THI and franchisee Devayatan executed a transfer franchise agreement and related agreements for Devayatan's operation of a 134-room Travelodge hotel. During negotiations for the hotel, two of Devayatan's representatives visited and stayed at the hotel but failed to request a more in-depth visit of the facility. Devayatan also engaged an architect to create proposals for suggested renovations but did not retain a property inspector to inspect the facility. Prior to the transfer, THI informed Devayatan that the hotel was not in compliance with THI brand standards, it was in default at the time of transfer, and the transferor had not cured all of the defaults. THI also stated in its FDD that estimated costs to convert the hotel ranging up to $1.4 million for a 100-room facility. Post-transfer problems quickly ensued as Devayatan failed to timely cure deficiencies identified by THI while it completed other renovations required to bring the hotel up to code. After several failed inspections, THI terminated the franchise agreement and sued for fees THI claimed Devayatan refused to pay post-termination.

In its motion for summary judgment, Devayatan claimed that THI negligently mispresented the scope of work required to bring the hotel into compliance with brand standards. The court rejected this argument, finding that certain presumptions Devayatan made were unreasonable in light of explicit statements made by THI concerning the condition of the hotel during negotiations, including a punch list THI attached to the franchise agreement identifying items for repair at the hotel. Although the parties' agreement was governed by New Jersey law, the court also considered and rejected Devayatan's FDUPTA argument, finding that Devayatan had failed to establish that THI's statements were likely to mislead and to offer any arguments that THI acted unethically in any manner other than making representations that Devayatan simply misunderstood.

Devayatan also argued that THI improperly terminated the franchise agreement through allegations the court viewed as constituting claims for violation of the covenant of good faith and fair dealing. In denying THI's motion for summary judgment on this claim, the court found persuasive evidence that Devayatan failed its last inspection by a small margin and would have passed the inspection within the thirty-day time frame provided by THI to do so, notwithstanding a technical issue that prevented Devayatan from uploading proof of the repairs to THI's web portal. There was also an issue of fact as to whether a representative of THI had led Devayatan to believe it was under an improvement plan that would be submitted for approval to THI prior to THI's termination of the franchise agreement.

***H.B. Auto. Grp., Inc. v. Kia Motors Am.*, Bus. Franchise Guide (CCH) ¶ 15,813, 2016 WL 4446333 (S.D.N.Y. Aug. 22, 2016)**

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

***Martinez v. Stratus Franchising, LLC*, Bus. Franchise Guide (CCH) ¶ 15,788, 2016 WL 3402546 (Ind. Ct. App. June 21, 2016).**

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

***Midas Int'l Corp. v. Poulah Inv'rs, LLC*, Bus. Franchise Guide (CCH) ¶ 15,811, 2016 WL 4532033 (D. Md. Aug. 29, 2016)**

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

***Rimrock Chrysler Grp., LLC v. Montana*, Bus. Franchise Guide (CCH) ¶ 15,799, 375 P.3d 392 (July 12, 2016)**

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

***Roadtrek Motorhomes, Inc. v. Calif. New Motor Vehicle Bd.*, Bus. Franchise Guide (CCH) ¶ 15,808, 2016 WL 3885006 (Cal. Ct. App. July 14, 2016)**

Roadtrek Motorhomes, Inc. is a manufacturer of recreational vehicles. Roadtrek entered into an agreement with Mega RV Corp. pursuant to which Mega would sell Roadtrek's vehicles at its RV dealerships in California. Mega's dealerships sold a variety of RV products from sixty different brands. Roadtrek assisted Mega in financing the vehicles by delivering them without charge. Mega would then pay Roadtrek for each vehicle as it was sold. The parties did not memorialize the agreement in writing, and although they discussed the obligation to pay interest on this arrangement, no invoices were ever sent to Mega for interest. Moreover, the parties never agreed on when Mega would pay Roadtrek for vehicles it sold. Eventually, in 2006 the parties did enter into a written dealership agreement for the three relevant locations (Colton, Irvine, and Scotts Valley). Pursuant to the three-year dealership agreements, Roadtrek granted Mega an exclusive territory for sixty miles surrounding each dealership location, provided that Mega remained "in good standing" under the dealership agreements. Among other things, Mega was required to stock and prominently display Roadtrek products at its dealerships. Mega was also obligated to purchase a set number of vehicles, perform warranty and service repairs on Roadtrek vehicles, and maintain adequate working capital to enable the company to fulfill its obligations under the dealership agreements.

The agreements also imposed an obligation on Roadtrek to reimburse Mega for labor and parts on warranty repairs. Roadtrek also promised not to terminate, cancel, or fail to renew the dealership agreement without good cause. Good cause was defined as including any material breaches of the dealership agreements.

Beginning in 2007, the recreational vehicle industry entered a downturn. Many manufacturers and dealers began filing for bankruptcy protection and going out of business. Around this time, Roadtrek demanded payment for interest owing on the vehicles delivered to Mega that it kept on its lot until sale. The parties reached an agreement on payment, but Mega was unable to make the regular payments required by that agreement. Over the next two years, the parties tried to negotiate a resolution to their dispute over unpaid interest, but when they could not reach a resolution, Roadtrek repossessed its vehicles from Mega's dealerships in 2009 and stopped sending new vehicles to Mega. Roadtrek sent a letter to Mega under the UCC, asking for adequate assurances that the parties could conduct any further business transactions, and Mega responded with "good luck."

Approximately one month after receiving the email from Mega, in January 2010, Roadtrek entered into a dealer agreement with Mike Thompson RV (MTRV), one of Mega's competitors. MTRV had four dealerships in the area, one located across the street from Mega's Colton location. In June 2010, Roadtrek sent Mega notice of its intent to terminate the Colton, Irvine, and Scotts Valley dealer agreements.

Between January and July 2010, Mega filed eighteen complaints with the California New Motor Vehicle Board alleging that Roadtrek violated provisions of the parties' dealer agreements and its statutory obligations under the New Motor Vehicle Board Act. These complaints were reduced down to eleven and consisted of the following complaints: (1) two alleging that Roadtrek unlawfully terminated the Colton, Irvine, and Scotts Valley dealer agreements; (2) two alleging Roadtrek unlawfully modified the Colton and Irvine franchises by establishing MTRV as a Roadtrek dealer within Mega's exclusive territory; (3) one alleging Roadtrek violated the statute by establishing MTRV as a Roadtrek dealer within Mega's exclusive Colton territory without notice; (4) three alleging that Roadtrek had violated the statute by not reimbursing Mega for warranty repairs; and (5) three alleging

Roadtrek violated the statute by not paying money owed to Mega under a franchisor incentive plan. After a hearing, the Board rejected the two complaints alleging unlawful termination of the franchise, but sustained all of the other objections. Mega appealed the rejection of the two termination complaints, and Roadtrek appealed the Board's nine other orders.

On appeal, the court first addressed Mega's appeal of the two termination protests. The court noted that the appeal was based on Mega's argument that Roadtrek improperly terminated the agreements constructively when it took actions in 2009 and 2010 to repossess its vehicles. Alternatively, Mega argued that Roadtrek terminated the contracts without sufficient advance written notice in violation of the parties' dealership agreement, which required 365 day advance written notice of termination. The court rejected both of these arguments, noting that the Board's jurisdiction is limited by statute and does not include adjudication of claims pertaining to parties' conduct under their contractual agreements. Accordingly, whether Roadtrek's claims constituted a de facto termination of the contract was something that was outside the Board's jurisdictional authority to adjudicate. Similarly, although the contract called for written notice of termination at least 365 days in advance, the statute itself required only sixty days advance notice. As Roadtrek had provided sixty days advance written notice of termination, the Board had concluded that Roadtrek satisfied the statutory prerequisites to termination, and any other claim for a violation of the contract must be brought in a civil action.

Next, the court addressed Roadtrek's appeal of the modification protest, with Roadtrek arguing that no modification of the dealership agreements occurred when it granted the new dealerships to MTRV because Mega's exclusive territory rights under the dealership applied only as long as Mega was "in good standing" under the dealer agreements. Roadtrek argued that Mega was not in good standing because it was not displaying Roadtrek vehicles prominently, as required by the dealer agreements, and Roadtrek therefore had the right to grant new dealerships in Mega's territorial area. The court rejected these arguments, noting that the reason that Mega was not in good standing was because Roadtrek had repossessed all of its vehicles. Nonetheless, the court noted that the trial court had exceeded its authority by approving the modification protest on grounds not addressed by the Board. Accordingly, the court reversed the trial court on this issue and rejected the protest.

The court then moved on to Mega's protest relating to the establishment of an MTRV dealership in Mega's Colton area. Mega contended that this violated the statute, which requires that franchisors give notice to existing franchisees when awarding new franchises within ten miles of an existing dealer. The franchisor must also have good cause for awarding the new franchise. Roadtrek argued that the statute applied only to dealerships that opened after 2004, and that MTRV's Colton dealership had been in existence since 1999. The court rejected this argument, noting that MTRV had not been a Roadtrek dealer since that time. Accordingly, the court sustained the protest.

Next, the court addressed the warranty reimbursement protests. Mega argued that the statute requires that a franchisor fulfill every warranty agreement by adequately and fairly compensating franchisees for labor and parts used. Mega argued that Roadtrek failed in its obligations to satisfy the statute when it refused to pay for warranty work. Roadtrek had refused to make the claimed payments for warranty work, instead withholding the amounts as an offset for amounts that Mega owed for missed interest payments. But Roadtrek never notified Mega of these policies. The court noted that the failure to notify Mega of this policy was fatal to its defense of the claims and sustained the protests.

Lastly, the court addressed the incentive protests. Mega argued that the statute requires that all claims made by a franchisee for payment under the terms of an incentive program must be approved or disapproved within thirty days. If the claim is disapproved, the franchisor must notify the franchisee in writing of the disapproval and explain the grounds for the decision. As with the warranty reimbursement claims, Roadtrek began withholding amounts due and owing under the incentive program as an offset, but never informed Mega of these policies. For the same reasons, the court held that the failure to notify Mega of the policy was fatal to the defense, and it sustained the protest.

***Tigges v. AM Pizza, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,797, 2016 WL 4076829 (D. Mass. July 29, 2016)**

This case is discussed under the topic heading "Class Actions."

***Uninsured Employer's Fund v. Crowder*, Bus. Franchise Guide (CCH) ¶ 15,794, 2016 WL 2605624 (Ky. May 5, 2016)**

The Supreme Court of Kentucky affirmed an appellate decision that QFA Royalties, LLC (Quiznos) and two individual owners of a franchised Quiznos sandwich shop were not liable for workers' compensation payment made to an injured shop employee.

In February 2009, Eugene Davis and James Dick purchased an existing Quiznos sandwich shop, signing a transfer agreement and franchise agreement with Quiznos in their individual capacities. Several days later, Davis and Dick created Pulaski Franchises Inc. to own and operate the franchise, but failed to formally transfer the franchise agreement and franchise assets to Pulaski. However, cash flow from the shop was placed into accounts held by Pulaski and employee wages, taxes, and royalty payments to Quiznos were paid from a Pulaski account.

On April 15, 2010, an employee severely injured her eye while working at the shop. At the time of her injury, the workers' compensation insurance policy held in Pulaski's name had lapsed. The employee filed a claim that joined Quiznos, Pulaski, Davis, Dick, and the Uninsured Employers Fund (UEF) as parties to the claim because the UEF had to pay the injured employee workers' compensation payments as a result of the lapsed policy. An administrative law judge rejected several arguments lodged by the UEF, including that Quiznos had "up-the-ladder" liability to pay the benefits as a contractor under the state workers' compensation law and that Davis and Dick were jointly and severally liable to pay the benefits because there were engaged in a joint venture with Pulaski. The Workers' Compensation Board and Kentucky Court of Appeals agreed with the ALJ in rejecting these arguments.

On appeal, the Kentucky Supreme Court determined that the ALJ's decision was supported by the evidence. It agreed that the record supported a finding that Quiznos was in the business of granting and overseeing franchise agreements, not making and selling sandwiches. Therefore, Quiznos could not have up-the-ladder liability to pay the workers' compensation benefits to the injured employee. As to the individual franchise owners, the court noted that the real underlying question was whether Pulaski was the employer of the injured employee because Davis and Dick never transferred the franchise agreement to Pulaski. It held that the evidence supported the fact that the employee was paid by Pulaski and would have been paid workers' compensation benefits from Pulaski had the insurance not lapsed. For this reason, only Pulaski was responsible to pay the UEF for workers' compensation to the injured employee.

***W. Colo. Motors, LLC v. Gen. Motors, LLC*, Bus. Franchise Guide (CCH) ¶ 15,792, 2016 WL 3600289 (Colo. Ct. App. June 30, 2016)**

The Colorado Court of Appeals affirmed the district court's dismissal of claims lodged by West Colorado Motors, LLC d/b/a Autonation Buick GMC Park Meadows against General Motors, LLC, GM franchisee Alpine Buick GMC, LLC, and the executive director of the Colorado Department of Revenue.

Park Meadows and Alpine are both GM dealers in Colorado. After GM sent Park Meadows a written letter of its intent to approve the relocation of Alpine's dealership to within Park Meadows' "relevant market area," Park Meadows sent a letter to the executive director which, among other things, protested the relocation, requested an investigation of the relocation and a hearing, and/or the issuance of a cease and desist order under Colorado's motor vehicle dealer law. The executive director issued two letters to Park Meadows stating that it failed to include any allegations that a violation of the motor vehicle dealer law had occurred. After Park Meadows' receipt of the second letter, it filed a complaint in district court alleging, among other things, that GM unreasonably approved Alpine's relocation in violation of the motor vehicle dealer law.

The executive director successfully dismissed Park Meadows' complaint for its failure to file a request for judicial review of the executive director's action directly to the Colorado Court of Appeals pursuant to express requirements of the motor vehicle dealer law. The court affirmed finding that the district court had no subject matter jurisdiction over Park Meadows' second claim for relief. It disagreed with Park Meadows' argument that the executive director's subsequent letter did not satisfy the requisite elements of a "final agency action" under Colorado law, finding that the executive director's letter was an order that served in whole or in part as a final agency disposition of the matter under Colorado's administrative procedure act.

TERMINATION AND NONRENEWAL

***Andrea Distrib., Inc. v. Dean Foods of Wis.*, LLC, Bus. Franchise Guide (CCH) ¶ 15,784, 2016 WL 3199544 (W.D. Wis. June 8, 2016)**
This case is discussed under the topic heading "Contract Issues."

***Brentlinger Enters. v. Volvo Cars of N. Am., LLC*, Bus. Franchise Guide (CCH) ¶ 15,815, 2016 WL 4480343 (S.D. Ohio Aug. 25, 2016)**
This case is discussed under the topic heading "Antitrust."

***Bull Int'l, Inc. v. MTD Consumer Grp., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,791, 2016 WL 3542249 (3rd Cir. June 29, 2016).**
This case is discussed under the topic heading "Statutory Claims."

***Choice Hotels Int'l, Inc. v. Frontier Hotels, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,817, 2016 WL 4367993 (S.D. Tex. Aug. 15, 2016)**
This case is discussed under the topic heading "Trademark Infringement."

***Devayatan LLC v. Travelodge Hotels, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,790, 2016 WL 3477205 (M.D. Fla. June 24, 2016)**
This case is discussed under the topic heading "Statutory Claims."

***H.B. Auto. Grp., Inc. v. Kia Motors Am.*, Bus. Franchise Guide (CCH) ¶ 15,813, 2016 WL 4446333 (S.D.N.Y. Aug. 22, 2016)**
This case is discussed under the topic heading "Transfers."

***Howard Johnson Int'l, Inc. v. Tyler Texas Lodging, LLC*, Bus. Franchise Guide (CCH) ¶ 15,786, 2016 WL 3436402 (D.N.J. June 16, 2016)**
This case is discussed under the topic heading "Contract Issues."

***Midas Int'l Corp. v. Poulah Inv'rs, LLC*, Bus. Franchise Guide (CCH) ¶ 15,811, 2016 WL 4532033 (D. Md. Aug. 29, 2016)**
This case is discussed under the topic heading "Contract Issues."

***Roadtrek Motorhomes, Inc. v. Calif. New Motor Vehicle Bd.*, Bus. Franchise Guide (CCH) ¶ 15,808, 2016 WL 3885006 (Cal. Ct. App. July 14, 2016)**
This case is discussed under the topic heading "Statutory Claims."

***Tilted Kilt Franchise Operating, LLC v. 1220, LLC,* Bus. Franchise Guide (CCH) ¶ 15,798, 2016 WL 463172 (N.D. Ill. July 29, 2016)**

Tilted Kilt Franchise Operating, LLC is a franchisor of a nationwide chain of restaurants. In 2007, Tilted Kilt engaged defendants, a limited liability company and its four owners, as an area developer pursuant to the terms of an area developer agreement between the parties. Thereafter, Tilted Kilt alleged that, from July 2009 until December 2012, defendants made a series of misleading financial performance representations to prospective Tilted Kilt franchisees in connection with defendants' efforts to sell franchises. Based on defendants' representations, certain third parties entered into franchise agreements with Tilted Kilt, only to discover that defendants' financial projections were significantly exaggerated. On May 11, 2015, an attorney for these third-party franchisees wrote to Tilted Kilt informing it of the alleged misrepresentations, demanding a refund of fees paid to Tilted Kilt, and seeking a release of their obligations under the franchise agreement.

As a result, Tilted Kilt sued defendants, seeking declaratory relief that (1) defendants had breached the area developer agreement, (2) such breaches constituted good cause for termination, and (3) defendants' conduct justified termination without providing defendants with a cure period. Defendants asserted counterclaims and filed a separate lawsuit asserting affirmative claims against Tilted Kilt that were identical to their counterclaims. Defendants then moved to dismiss Tilted Kilt's claims under Federal Rule of Civil Procedure 12(b)(1) (lack of subject matter jurisdiction) and 12(b)(6) (failure to state a claim). Defendants also moved to consolidate their separate lawsuit with the one filed by Tilted Kilt. Tilted Kilt moved to dismiss the counterclaims.

The court granted defendants' motion to consolidate the two cases and therefore also granted Tilted Kilt's motion to dismiss the counterclaims. However, the court denied defendants' motion to dismiss Tilted Kilt's claims.

With regard to subject matter jurisdiction, the court held that the $75,000 amount in controversy threshold for diversity jurisdiction had been met. Although Tilted Kilt's complaint did not specifically assert any amount in controversy, the court held that this was "quite different from arguing that Tilted Kilt *cannot* prove a set of facts in which it would recover over $75,000." (emphasis in original). Because the court could not say, with certainty, that Tilted Kilt's recovery, or defendants' cost of complying with the judgment, would be less than $75,000, the court found that the amount in controversy requirement had been met.

The court also held that Tilted Kilt had stated a claim for declaratory relief. In particular, the court found that its complaint pleaded an actual controversy because Tilted Kilt had alleged that defendants had breached the area developer agreement and that it was entitled to a declaration from the court that such a breach warranted termination without an opportunity for cure.

As to the substantive matter, defendants argued that Tilted Kilt was seeking relief that was contradicted by Section 19 of the Illinois Franchise Disclosure Act, 815 ILL. COMP. STAT. 705/19 (which sets forth the grounds upon which a franchise can be terminated for good cause but without the need for a cure period) and the terms of the area developer agreement (which specified eleven circumstances under which the agreement could be terminated without affording an opportunity to cure). Tilted Kilt replied that (1) the breaches were incurable and (2) they nonetheless fit within the categories specified in the Act and in the agreement. The court agreed with Tilted Kilt. The court ruled that the pleadings in the complaint, if believed, were adequate to establish that the breaches were incurable, and that defendants' conduct constituted a crime and reflected repeated violations of the law and the area developer agreement, such that Section 19(c)(4) would permit termination without the requirement of a cure period. The pleading of such facts, the court determined, was sufficient to deny defendants' motion to dismiss.

***Tri County Wholesale Distribs., Inc. v. Labatt USA Operating Co., LLC,* Bus. Franchise Guide (CCH) ¶ 15,807, 828 F.3d 421 (6th Cir. 2016)**
Plaintiffs Tri County Wholesale Distributors and Iron City Distributing were parties to franchise agreements with Labatt USA Operating Co. allowing the distribution of several prominent brands of beer. When the agreements were executed, and for a time thereafter, Labatt was 100 percent owned by North American Breweries Holdings (NAB), which was owned by several investors. On December 11, 2012, NAB's investors sold their interests in NAB in a complex transaction that resulted in CCR American Breweries owning 100 percent of NAB. In March 2013, CCR purported to terminate the franchise agreements pursuant to Ohio Rev. Code § 1333.85(D). That section permits a supplier to terminate a franchise agreement for the sale of alcoholic beverages without just cause if "a successor manufacturer acquires all or substantially all of the stock or assets of another manufacturer through merger or acquisition." In that instance, however, the successor manufacturer must repurchase the distributor's inventory of the products and "compensate the distributor for the diminished value of the distributor's business that is directly related to the sale of the product or brand terminated or not renewed by the successor manufacturer."

The distributors sued Labatt, NAB, and CCR (suppliers), alleging that CCR's termination did not qualify under § 1333.85(D) and was therefore improper. In the alternative, the distributors asserted that the termination, if proper, violated the Takings Clause of the federal and Ohio constitutions. Also in the alternative, if the termination was proper, the distributors sought recovery for the diminished value of their businesses. The district court granted the suppliers' judgment on the pleadings as to the Takings Clause claim and granted their motion for summary judgment that § 1333.85(D) was applicable. In addition, the district court held a bench trial and determined the diminution in value of the distributors' respective businesses resulting from the termination. The distributors appealed and the suppliers cross-appealed.

First, the Sixth Circuit affirmed the district court's granting of summary judgment, holding that § 1333.85(D) applied to CCR's purchase of NAB from NAB's prior investors. Both the district court and the Sixth Circuit rejected the distributors' argument that only Labatt could be a "manufacturer" for purposes of the statute. Instead, both the district court and the Sixth Circuit adopted a "functional, control-based" approach. The Sixth Circuit reasoned that "there was a 100% change in ownership, with a complete change in control of the business decisions relating to the brands." It found the distributors' reading of the statute, i.e., technically speaking, the only Labatt could be considered a "manufacturer" because it was the only entity registered with the Ohio Division of Liquor Control, to be "hyperliteral" and to exclude improperly all transactions at the parent company level. The court therefore held that CCR's termination of the distributors was permitted under the statute.

Second, the Sixth Circuit affirmed the district court's grant of judgment on the pleadings dismissing the Takings Clause claims. In particular, the Sixth Circuit held that, even assuming the franchises were considered to be "property," this case presented no government taking of property. Instead, the Sixth Circuit held that the suppliers were "private actors who were not exercising the power of eminent domain under a delegation of authority from the government."

Finally, the Sixth Circuit largely affirmed the district court's calculations of the distributors' diminished business value. In particular, the Sixth Circuit rejected the distributors' argument that they were entitled to recover net operating losses incurred while trying to acquire replacement brands. The district court and the Sixth Circuit held that this constituted an impermissible double recovery because the distributors were awarded the fair market value of the lost brands and this cost was included in that calculation. The Sixth Circuit also affirmed the district court's calculation of the discount rate associated with the value of the lost brands, holding that the parties' arguments were a factual "battle of the experts" in which the Sixth Circuit was not left with "a definite and firm conviction that a mistake had been committed." Lastly, the Sixth Circuit reversed the district court and held that the distributors' award must be reduced by the amount of profits they had earned under the brands during the pendency of the litigation while the franchise agreements effectively remained in force.

TORTIOUS INTERFERENCE

Jade Grp., Inc. v. Cottman Transmission Ctrs., LLC, Bus. Franchise Guide (CCH) ¶ 15,806, 2016 WL 3763024 (E.D. Pa. July 13, 2016)

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

TRADEMARK INFRINGEMENT

***Choice Hotels Int'l, Inc. v. Frontier Hotels, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,817, 2016 WL 4367993 (S.D. Tex. Aug. 15, 2016)**

On November 8, 2008, Choice Hotels International, Inc. entered into a franchise agreement with Frontier Hotels, Inc. pursuant to which Frontier was granted the right to operate a Comfort Inn branded hotel in Houston. In 2014, Choice sent Frontier multiple notices of default, noting Frontier's failure to comply with certain provisions of the franchise agreement between the parties. After several months, Frontier had failed to correct the deficiencies in the notice of default. Accordingly, on December 12, 2014, Choice sent Frontier a notice of termination, which directed it to immediately discontinue using the Comfort Inn trademarks in connection with the advertising and operation of Frontier's hotel.

Frontier failed to de-identify its hotel and continued using the Comfort Inn trademarks. Choice learned that Frontier was continuing to use its trademarks when one of its customers complained to Choice about the quality of his stay. After receiving the complaint, on April 21, 2015, Choice sent Frontier a cease-and-desist letter, demanding that Frontier immediately discontinue its use of Choice's trademarks. Over the course of the next several months, Choice documented Frontier's continued use of its trademarks without Choice's permission.

On August 13, 2015, Choice filed suit against Frontier in the U.S. District Court for the Southern District of Texas alleging federal trademark infringement and false designation of origin as well as common law claims for trademark infringement under Texas law. Following discovery, Choice filed a motion for summary judgment on its claims. Frontier failed to file any opposition to the motion.

Evaluating the motion, the court concluded that all of the different claims presented the same issues under both federal and state law. Accordingly, applying the standard for federal trademark infringement, the court concluded that Choice had presented satisfactory evidence that it owned the Comfort Inn trademark, that Frontier had used the trademark without Choice's permission, and that there had been actual confusion in the marketplace sufficient to establish the likelihood of confusion standard for trademark infringement claims. The court therefore granted summary judgment on Choice's claims.

Having concluded that Choice was entitled to summary judgment, the court went on to evaluate the merits of its request for a permanent injunction, using the four factor test for injunctive relief: (1) success on the merits, (2) whether the failure to grant an injunction will result in irreparable injury, (3) whether the injury to the plaintiff outweighs any damage that the injunction will cause the opposing party, and (4) whether the injunction serves the public interest. Applying the facts of the case, the court held that all of the factors weighed in favor of ordering a permanent injunction, noting that the evidence showed that Choice had prevailed on the merits of its claim, that the injury was causing irreparable harm (as evidenced by the confused consumers complaining about the quality of Frontier's hotel to Choice), and finally, that there was no harm to Frontier given that entry of an injunction would only require that Frontier comply with the law.

Conversely, the court declined to award any damages. Choice had asked for an award under the Lanham Act of damages calculated with reference to the liquidated damages provision in the franchise agreement. The court rejected this argument, noting that the Lanham Act allows an award of "actual damages" incurred by reason of the infringement, which does not include contractually agreed-upon damages. Accordingly, the court granted Choice leave to file supplemental briefing establishing its actual damages caused by Frontier's infringement.

***Jack In the Box Inc. v. Mehta*, Bus. Franchise Guide (CCH) ¶ 15,793, 2016 WL 3401988 (N.D. Cal. June 21, 2016)**
This case is discussed under the topic heading "Contract Issues."

***Midas Int'l Corp. v. Poulah Inv'rs, LLC*, Bus. Franchise Guide (CCH) ¶ 15,811, 2016 WL 4532033 (D. Md. Aug. 29, 2016)**
This case is discussed under the topic heading "Contract Issues."

***MPC Franchise, LLC v. Tarntino*, Bus. Franchise Guide (CCH) ¶ 15,789, 826 F.3d 653 (2d Cir. 2016)**
The Second Circuit affirmed a district court's award of summary judgment against the owner of a pizza parlor (Tarntino) in favor of his cousins (together, Clearys). In 2011, the Clearys sued Tarntino in U.S. District Court for the Western District of New York for various violations of the Lanham Act, including fraudulent procurement of registration of the mark "Pudgie's." The district court canceled Tarntino's registration and dismissed his counterclaim for federal trademark infringement. On appeal, Tarntino challenged the district court's grant of summary judgment to the Clearys on their fraud claim, arguing that he lacked fraudulent intent when he applied for the Pudgie's mark in his individual capacity and signed an oath attesting, among other things, that to the best of his knowledge and belief no other person or entity had the right to use the mark.

On a de novo review, the Second Circuit disagreed. Although it agreed with Tarntino on the degree of scienter required for a plaintiff to successfully allege fraudulent procurement of a trademark, it found no genuine issue of material fact that he had fraudulently obtained his mark in the underlying dispute. The court noted that there was abundant evidence on the record that Tarntino knew others had rights to use the mark that were at least equal, if not superior, to his own rights.

TRANSFERS

***Devayatan LLC v. Travelodge Hotels, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,790, 2016 WL 3477205 (M.D. Fla. June 24, 2016)**

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

***H.B. Auto. Grp., Inc. v. Kia Motors Am.*, Bus. Franchise Guide (CCH) ¶ 15,813, 2016 WL 4446333 (S.D.N.Y. Aug. 22, 2016)**

The plaintiffs H.B. Automotive Group (Bronx Kia) and Major Motors of Long Island City were dealerships associated with the defendant Kia Motors America (KMA), the exclusive distributor of Kia-brand motor vehicles, parts, and accessories in the United States.

In March 2012, KMA, Bronx Kia, Major LIC, and others entered into a master settlement agreement (MSA) that resolved various disputes among them. Under the MSA, Bronx Kia would voluntarily terminate its franchise on September 30, 2013, unless it transferred the franchise, with KMA's consent, before that date. Bronx Kia was given until September 1, 2013, to provide KMA with a fully executed asset purchase agreement and for any prospective buyer to submit a franchise application package. After KMA rejected Bronx Kia's two initial attempts to transfer the franchise, on August 27, 2013, Bronx Kia made a third attempt. However, this prospective buyer did not submit its franchise application package to KMA until September 11, 2013. KMA ultimately rejected this application as well, and Bronx Kia's dealership terminated on October 26, 2013, pursuant to the MSA's terms.

Major LIC also had obligations to KMA to renovate Major LIC's facility by November 5, 2013. Major LIC refused to do so and, consequently, on that date KMA issued a notice of termination. After mediation of this dispute, KMA entered into an interim settlement agreement (ISA) by which KMA would evaluate Major LIC's proposed transfer of its franchise to a potential purchaser. The ISA provided that complete information about the prospective purchaser was to be submitted by June 9, 2014. Although materials were submitted to KMA on June 6, 2014, KMA determined that the information was incomplete and therefore did not consent to Major LIC's transfer of the franchise to this purchaser.

Bronx KIA and Major LIC sued KMA for various causes of action. KMA filed a motion for summary judgment, seeking dismissal of the claims and, in response to the motion, Bronx KIA and Major LIC withdrew a number of claims. Consequently, on summary judgment the court assessed only whether KMA's refusal to accept the transfers of Bronx Kia's and Major LIC's dealerships violated the New York Motor Vehicle Dealer Act. That statute contains provisions that prohibit a franchisor from, among other things, "impos[ing] unreasonable restrictions on the franchised motor vehicle dealer relative to transfer, sale . . . or termination of a franchise."

In both instances, the court ruled in favor of KMA and granted summary judgment. In particular, the court found that there was no genuine issue of material fact that KMA's refusal to accept the proposed transfers was not unreasonable because, at the relevant time, Bronx Kia and Major LIC were each subject to termination and "a dealer properly subject to termination does not have a free and clear right to transfer." The court held that there was no factual dispute that, in each instance, the putative transferor did not fully comply with the terms under which KMA would consider the proposed transfer. As such, KMA was under no obligation under New York's statute to consent to either transfer and therefore did not violate the statute by withholding its consent.

***Uninsured Employer's Fund v. Crowder*, Bus. Franchise Guide (CCH) ¶ 15,794, 2016 WL 2605624 (Ky. May 5, 2016)**
This case is discussed under the topic heading "Statutory Claims."

UNFAIR COMPETITION/UNFAIR AND DECEPTIVE PRACTICES

***Devayatan LLC v. Travelodge Hotels, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,790, 2016 WL 3477205 (M.D. Fla. June 24, 2016)**
This case is discussed under the topic heading "Statutory Claims."

***Martinez v. Stratus Franchising, LLC*, Bus. Franchise Guide (CCH) ¶ 15,788, 2016 WL 3402546 (Ind. Ct. App. June 21, 2016).**
This case is discussed under the topic heading "Fraud."

VICARIOUS LIABILITY

***Johnson v. Seagle Pizza, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,825, 2016 WL 4410705 (Ky. Ct. App. Aug. 19, 2016)**
In deciding a motion for summary judgment, the Kentucky Court of Appeals held that several entities affiliated with the Domino's Pizza franchisor (together, Domino's Pizza) could not be held vicariously liable for a fatal shooting that occurred outside of a franchised Domino's Pizza restaurant. The victim was killed when he approached a robber he observed fleeing the franchised restaurant after the apparent robbery (presumably in an attempt to apprehend him). The claim was brought by the son of the victim, who observed the shooting, on his own behalf and that of his deceased father.

Plaintiff claimed that Domino's Pizza controlled the security procedures, procedures for handling of cash, and the late night operating hours of the franchised restaurant, allegedly creating conditions that facilitated the robbery. The court acknowledged that Domino's Pizza's operations manual provided minimum standards related to these instrumentalities that lead to the harm. However, the court also observed that the franchisee—which had executed the agreement for the premises, set prices for the restaurant, maintained its own security, and was responsible for hiring and firing the employees who interacted directly with the robber—controlled the physical details of the implementation of the safety and security responsibilities of the store. Indeed, the court noted, "[t]he seminal question is not whether Domino's Pizza established ubiquitous franchise standards, but whether Domino's Pizza retained control over the implementation of those standards." It concluded that Domino's Pizza did not control the day-to-day operations of the store and therefore could not be held vicariously liable. Hence, the court granted Domino's Pizza's motion for summary judgment.

The court remanded for discovery the question of whether the franchisee could be held liable under theories of *respondeat superior*, negligent supervision, and negligent maintenance of premises security. The court noted unresolved questions regarding the franchisee's duty to the decedent and the foreseeability of the harm. It concluded that the lower court prematurely ruled on the summary judgment motion and therefore remanded the case for discovery.

***Salazar v. McDonald's Corp.*, Bus. Franchise Guide (CCH) ¶ 15,818, 2016 WL 4394165 (N.D. Cal. Aug. 16, 2016)**

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