Franchising (& Distribution) Currents

Daniel J. Oates, Maral Kilejian, and Emily Bridges

ANTITRUST

Mr. Oates

Ms. Kilejian

Ms. Bridges

***Mahaska Bottling Co. v. PepsiCo, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,040, 271 F. Supp. 3d 1054 (S.D. Iowa 2017)**

The U.S. District Court for the Southern District of Iowa granted a motion to dismiss in favor of PepsiCo, Inc., finding that Mahaska Bottling Co. failed to set forth claims based on monopolization, predatory pricing, antitrust, business defamation, and the Lanham Act. Mahaska is an independent bottler of carbonated beverages that purchases concentrate inputs from suppliers such as PepsiCo. Mahaska accused PepsiCo of engaging in various unlawful actions to harm Mahaska. First, Mahaska claimed PepsiCo executed a "prize squeeze," or predatory pricing, which occurs when a vertically integrated firm "squeezes" its competitors' profit margins by raising the price of an essential input while also lowering prices in the end market in which the vertically integrated firm competes with the "squeezed" firm. Second, Mahaska alleged that PepsiCo engaged in exclusionary pricing and predatory pricing. Finally, Mahaska alleged violations of the Lanham Act.

The district court found that antitrust laws do not prohibit prices squeezes as alleged by Mahaska. Additionally, the court found that PepsiCo's price increases did not have the characteristics of an anticompetitive refusal to deal, PepsiCo did not engage in predatory pricing, and there was no danger of monopolization. The district court also dismissed the business defamation and Lanham Act claims.

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BUSINESS OPPORTUNITY LAWS

***Zounds Hearing Franchising, LLC v. Edward Bower*, Bus. Franchise Guide (CCH) ¶ 16,042, No. CV-16-01462-PHX-NVW, 2017 WL 4399487 (D. Ariz. Sept. 19, 2017)**
This case is discussed under the topic heading "Choice of Law."

CHOICE OF FORUM

***Zounds Hearing Franchising, LLC v. Edward Bower*, Bus. Franchise Guide (CCH) ¶ 16,042, No. CV-16-01462-PHX-NVW, 2017 WL 4399487 (D. Ariz. Sept. 19, 2017)**
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CHOICE OF LAW

***Zounds Hearing Franchising, LLC v. Edward Bower*, Bus. Franchise Guide (CCH) ¶ 16,042, No. CV-16-01462-PHX-NVW, 2017 WL 4399487 (D. Ariz. Sept. 19, 2017)**
The U.S. District Court for the District of Arizona found that Ohio-based franchisees of hearing aid centers were not bound by the choice of law and venue provisions in their franchise agreements because such provisions are barred by the Ohio Business Opportunity Purchasers Protection Act. The franchise agreements included a provision requiring pre-suit mediation in Arizona, and Arizona law and venue for all litigation. In 2016, the franchisees brought suit in Ohio state court, alleging the franchisor (Zounds) had violated various provisions of the Act by failing to include a five-day cancellation right in the franchise agreements, making false and misleading representations in connection with the sale of the franchises, and presenting unsubstantiated monthly financial information not included in the mandatory disclosure documents. After the Ohio suit was filed, Zounds filed an action in Arizona seeking a declaratory judgment against the franchisees.

The Arizona court found that Ohio had the most significant relationship to the transactions and to the parties because all of the franchisees resided and operated their franchises in Ohio. The court further found that the statutory protections for franchisees, the foundation of the franchisees' claims, reflected the fundamental public policy of Ohio. The court also held that Ohio had a materially greater interest than Arizona in the determination of the issues, and a contractual choice of law for the less protective Arizona law was contrary to fundamental Ohio public policy. Because substantive Ohio law bound the parties, the court held that the choice-of-law and venue provisions in the franchise agreements were invalid.

CONTRACT ISSUES

***Buffalo Wild Wings, Inc. v. BW-3 of Akron, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,081, Case No. 5:16-cv-1183, 2017 WL 5467156 (N.D. Ohio Nov. 14, 2017)**
This case is discussed under the topic heading "Termination and Nonrenewal."

***Haigh v. Superior Ins. Mgmt. Grp., Inc.*, Bus. Franchise Guide (CCH) ¶ 16,072, 2017 WL 4848154 (N.C. Super. Ct. Oct. 24, 2017)**
The North Carolina Superior Court granted in part and denied in part the franchisor's (Superior) motion to dismiss. Several franchisees filed suit against Superior for various contract, statutory, and tort claims related to alleged "hidden" commissions Superior negotiated and received, but did not disclose to the franchisees.

The amended complaint asserted six claims: (1) unfair and deceptive trade practices; (2) breach of contract; (3) breach of the covenant of good faith and fair dealing; (4) fraud and negligent misrepresentation; (5) breach of fiduciary duty; and (6) declaratory judgment. The claims were based on allegations that Superior improperly negotiated direct commissions with insurance carriers for its benefit and to the plaintiffs' detriment. The franchisor moved to dismiss all claims.

The court dismissed the unfair and deceptive trade practices claim to the extent it was based on the allegation that Superior failed to disclose certain commissions in violation of the Federal Trade Commission Franchise Rule because those claims were barred by the four-year statute of limitations. All of the franchisees had received the FDD omitting the disclosures more than six years before the lawsuit was filed. The court denied the motion to dismiss the unfair and deceptive trade practices claims to the extent the claims were based on the allegation that Superior violated the statute by "negotiating and failing to disclose" the hidden commission arrangement because it arose out of the same allegations underlying plaintiffs' fraud and breach of contract claims, both of which were validly stated. Specifically, the court refused to dismiss the franchisees' breach of contract/covenant of good faith and fair dealing claim because, in part, a factual dispute existed over the terms of the agreement. The court also refused to dismiss the fraud and negligent misrepresentation claims because the allegations in the complaint, although extremely vague, were sufficient to pass muster at the early stage of the litigation. The court rejected Superior's argument that the three-year statute of limitations barred any contract claim because the franchisees had first learned of the breach by Superior two years before filing suit. The court dismissed the breach of fiduciary duty claim because Superior was not acting as the franchisees' agent when negotiating commissions with insurance carriers. Finally, the court refused to dismiss the declaratory judgment claim to the

extent the franchisees sought a declaration invalidating all or part of the franchise agreements, but the court did dismiss the request to the extent it related to the noncompete provisions because no genuine controversy existed.

***Howell v. Advantage Payroll Servs., Inc.*, Bus. Franchise Guide (CCH) ¶ 16,100, Docket No. 2:16-cv-438-NT, 2017 WL 6327832 (D. Me. Dec. 11, 2017)**
This case is discussed under the topic heading "Termination and Nonrenewal."

***Picktown Foods, LLC v. Tim Hortons USA, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,080 (S.D. Fla. Nov. 8, 2017)**
This case is discussed under the topic heading "FTC Franchising Rule."

DAMAGES

***Sun Aviation, Inc. v. L-3 Commc'ns Avionics Sys., Inc.*, Bus. Franchise Guide (CCH) ¶ 16,062, 533 S.W.3d 720 (Mo. 2017)**
This case is discussed under the topic heading "Termination and Nonrenewal."

FRAUD

***Lomeli v. Jackson Hewitt, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,076, Case No. 2-17-CV-02899-ODW (KSx), 2017 WL 4773099 (C.D. Cal. Oct. 19, 2017)**
This cause is discussed under the topic heading "Vicarious Liability."

FTC FRANCHISING RULE

***Picktown Foods, LLC v. Tim Hortons USA, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,080 (S.D. Fla. Nov. 8, 2017)**
Several Ohio-based Tim Hortons USA, Inc. franchisees brought suit against Tim Hortons when it refused to approve their proposals to transfer their franchised businesses to third parties. The franchisees alleged that the refusals by Tim Hortons violated Ohio's Business Opportunity Plans Act and Deceptive Trade Practices Act because Tim Hortons failed to disclose in its Franchise Disclosure Document (FDD) that it retained the right to withhold consent to proposed transfers of franchises to third parties. The franchisees also alleged that Tim Hortons breached the franchise agreement, as well as the duty of good faith and fair dealing, by withholding consent. Finally, the franchisees contended that Tim Hortons made negligent or intentional misrepresentations by omitting information on transfer restrictions from the FDD.

Tim Hortons filed a motion to dismiss the claims in the U.S. District Court for the Southern District of Florida. The franchisees argued that the failure to disclose the transfer restrictions as required by the FTC Franchise Rule constituted a violation of the Ohio Deceptive Trade Practices Act. Addressing the issue of the statutory violations, the court noted that the FDDs did not include any notice that Tim Hortons could withhold consent to a transfer if the purchase price for the franchise exceeded the value of used equipment on the premises. Instead, the FDD merely stated that Tim Hortons retained the right to withhold consent to franchise transfers. The franchisees had received offers to purchase their franchised businesses for $4.4 million, far in excess of the $550,000 value of the equipment. As a result, Tim Hortons withheld consent to the transfers.

Although the details of Tim Horton's right to restrict transfers were not expressly set out in the FDD, it was described at length in the franchise agreements, which were attached as an exhibit to the FDD and provided to franchisees before they purchased their franchises. Accordingly, the court held that the FDD satisfied the requirements of the FTC Rule because the transfer restrictions were disclosed in the franchise agreements, which were included with the FDD. Moreover, the court noted that the applicable statute of limitations under the Ohio statutes for any claim was only two years. The plaintiffs had filed their lawsuit nearly three years after the last FDD had been provided; thus all potential disclosure claims were barred by Ohio's two-year statute of limitations. The court declined to apply the discovery rule to save the claims from the statute of limitations, noting that all of the material information for the claims was set forth in the text of the franchise agreements. The franchisees had acknowledged, in writing, that they had read the franchise agreements, and had them reviewed by independent counsel, before they signed the agreements. For these reasons, the plaintiffs' statutory claims were dismissed.

Conversely, the court declined to dismiss the breach of contract claims. The evidence showed that the franchisor had failed to undertake any due diligence into the proposed sale transaction and had withheld consent solely on the basis of the purchase price. The limitation on the purchase price contained in the franchise agreement applied only to franchises operated less than five years, however, and at least four of the five franchises had been in operation for more than five years. Although the contract on its face permitted Tim Hortons to arbitrarily withhold consent to a transfer, the language of the agreement was not without limits. As such, there remained a factual question whether Tim Hortons had failed in its contractual obligation to review and consent to transfers. But the court dismissed the plaintiffs' claims for violations of the duty of good faith and fair dealing. Under Ohio law, as in many jurisdictions, the duty of good faith does not give rise to claims independent from the contract. As such, the plaintiffs' claims were limited to those for breach of contract, and the court dismissed the duty of good faith claims.

Finally, the court also dismissed the negligent and intentional misrepresentation claims. Tim Hortons argued that because the FDD complied with the FTC Rule disclosure requirements, there were no negligent or intentional misrepresentations. The franchisee raised no contrary argument, and the court therefore deemed the claims conceded.

GOOD FAITH AND FAIR DEALING

***Picktown Foods, LLC v. Tim Hortons USA, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,080 (S.D. Fla. Nov. 8, 2017)**

This case is discussed under the topic heading "FTC Franchising Rule."

INJUNCTIVE RELIEF

***Stockade Companies, LLC v. Kelly Rest. Grp., LLC*, Bus. Franchise Guide (CCH) ¶ 16,078, 1:17-CV-143-RP, 2017 WL 4640443 (W.D. Tex. Oct. 16, 2017)**

This case is discussed under the topic heading "Trademark Infringement."

***World of Beer Franchising, Inc. v. MWB Dev., LLC*, Bus. Franchise Guide (CCH) ¶ 16,056, 2017 WL 4618565, 711 F. App'x 561 (11th Cir. 2017)**

The Eleventh Circuit issued a per curiam opinion affirming the U.S. District Court for the Middle District of Florida's denial of the franchisor's motion for a preliminary injunction. World of Beer Franchising, Inc. (WOBF) sought to enjoin three of its former franchisees and their principal from using WOBF's confidential information, marks, and trade dress, and from violating noncompetition provisions in their franchise agreements. The franchise agreements, however, included a provision stating that, although both parties had the right to obtain temporary restraining orders and temporary or preliminary injunctive relief, the parties must immediately and contemporaneously submit any dispute to non-binding mediation.

The court concluded that WOBF failed to submit its dispute to mediation immediately and contemporaneously with its request for injunctive relief. Because of this failure, the court held that the district court correctly denied WOBF's motion for a preliminary injunction.

JURISDICTION

***Dollar Rent a Car, Inc. v. Westover Car Rental, LLC*, Bus. Franchise Guide (CCH) ¶ 16,083, (M.D. Fla. Nov. 16, 2017)**

Three franchisors of car rental businesses, Dollar Rent a Car, Inc., Thrifty Rent-a-Car System, Inc., and the Hertz Corporation (franchisors) sued joint franchisee Westover Car Rental, LLC and several other individuals

in the U.S. District Court for the Middle District of Florida, claiming breach of contract and seeking a declaratory judgment on Westover's obligation to comply with the post-termination noncompete provision in the franchise agreements. The franchisors alleged that the court had personal jurisdiction over all of the defendants based upon the consent to jurisdiction provisions in the franchise agreements. Westover, which was based in upstate New York, moved to dismiss, arguing that Florida law did not apply and the court lacked personal jurisdiction over the defendants.

The court initially noted that Florida law historically did not permit the exercise of personal jurisdiction based upon consent alone. Although the law now permits such exercise of jurisdiction, the consenting agreement must comply with Florida law. In order for such a consent to be valid, the contract must: (1) include a choice of law provision designating Florida law as the governing law; (2) include a provision whereby the non-resident agrees to submit to the jurisdiction of the courts of Florida; (3) involve consideration of not less than $250,000; (4) not violate the U.S. Constitution; and (5) either bear a substantial or reasonable relation to Florida or have at least one of the parties be a resident of Florida or incorporated under its laws. Applying those factors, the court noted that none of the franchise agreements contained a provision in which Westover expressly agreed to submit to the jurisdiction of the courts of Florida. Instead, the agreements contained floating forum selection clauses, which granted jurisdiction in any venue in which the franchisors currently operated their principal places of business. The court doubted this was sufficient, but declined to resolve the issue, instead noting that the courts lacked jurisdiction because the agreements did not include a Florida choice of law clause.

The court also rejected the franchisors' contention that the court could exercise specific personal jurisdiction, notwithstanding the inapplicability of the contractual consent to jurisdiction. Westover's business consisted of renting cars and parking cars in Western New York, and Westover had never solicited business in Florida or maintained an office there. The court found it insufficient that Westover sent a representative to Florida for a three-day training seminar, sent a franchise termination letter to Florida, and originally executed the contract by sending it to Florida. These contacts were merely incidental and initiated by the franchisors in Florida to their ultimate benefit.

Finally, the court rejected the franchisors' contention that Westover breached a contractual obligation to perform specified acts in Florida: (1) pay franchise fees and (2) provide notice of termination. With respect to the franchise fees, Westover actually remitted payments to Tulsa, Oklahoma, not Florida. The same was true for the notice of termination, which was also sent to Tulsa. Because no actual contractual obligations were required to be performed in Florida, the court could not exercise personal jurisdiction over Westover and therefore granted the motion to dismiss.

LABOR AND EMPLOYMENT

***Harris v. Midas*, Bus. Franchise Guide (CCH) ¶ 16,058, Civil Action No. 17-95, 2017 WL 5177668 (W.D. Pa. Nov. 8, 2017)**

This case is discussed under the topic heading "Vicarious Liability."

***In re Hy-Brand Indus. Contractors, Ltd.*, Bus. Franchise Guide (CCH) ¶ 16,101 (Nat'l Labor Relations Bd. Dec. 14, 2017)**

The National Labor Relations Act (NLRA) does not define who is an employer. Rather, the NLRA states only that an employer includes "any person acting as an agent of an employer, directly or indirectly." Since the early 1980s, the National Labor Relations Board (NLRB) and the courts uniformly have held that under the NLRA, an employer includes not only an employee's direct employer, but also any third-party company that retains sufficient control over the terms and conditions of the employee's employment. Thus, under long-standing precedent, a finding of joint employer required proof that the putative joint employer exercised joint control over the essential employment terms of the employee, and that the control was direct and immediate, and not merely limited and routine.

In 2016, in *Browning-Ferris Industries of California, Inc.*, the NLRB articulated a new standard for deciding what entities qualify as "joint employers" under the NLRA. The Board characterized the new standard as a means of addressing perceived policy concerns about an imbalance of leverage in commercial dealings between undisputed employers and third-party entities that prevented meaningful bargaining over the terms and conditions of employment. In other words, the Board perceived that changes in the economy resulted in an unfair bargaining position for employees who are limited to bargaining with their direct employers, even when the fruits of their labor benefited third-party entities. Under the new *Browning-Ferris* test, a third-party entity could be deemed a joint employer, even if it has never exercised joint control over essential terms and conditions of employment, and even if the joint control is neither direct nor immediate, provided the third party "reserves" control over the terms and conditions of employment, or merely exercises indirect control or limited and routine control. The *Browning-Ferris* decision greatly expanded the reach of the joint employer obligation to third-party independent contractors, as it was intended to, in order to ensure that third parties with deep pockets become participants in existing or newly bargained employment relationships.

Following *Browning-Ferris*, five employees of Hy-Brand Industrial Contractors Ltd. and two employees of Brandt Construction Co. were discharged after engaging in work stoppages based upon complaints over wages, benefits, and workplace safety. At the time, Terence Brandt served as corporate secretary for both companies. He was directly involved in the decision at both companies to discharge the employees, and he identified himself as an official of Brandt when he terminated the two employees of

Hy-Brand. He was also the primary individual for hiring at Brandt, and he hired the general manager of Hy-Brand. Employees of both companies participated in the same 401(k) and health benefit plans and were covered by the same workers compensation policies. The employees attended the same mandatory training sessions and annual corporate meetings where common employment policies were regularly reviewed. Following the termination, the employees brought their complaints to the NLRB, asserting that the work stoppages were protected concerted activity under the NLRA, and that Hy-Brand and Brandt were equally liable for these violations as joint employers.

In analyzing the case, the NLRB first began by assessing which standard should apply to determining whether Hy-Brand and Brandt were joint employers. In so doing, the NLRB rejected the *Browning-Ferris* standard for several non-exclusive reasons. First, the NLRB held that *Browning-Ferris* exceeded the prior panel's statutory authority. The NLRB concluded that it is bound by the common law definitions of "employer" and "employee," definitions that have existed for hundreds of years. In expanding the common law definition of employment to extend to incidental relationships that have some bearing on employment conditions, the *Browning-Ferris* standard impermissibly changed the definition of employment to include relationships that existed at the time that Congress passed the NLRA, yet were excluded from the definitions. Indeed, the standard articulated by the board in *Browning-Ferris* was similar to the "economic realities" test adopted by the Supreme Court in 1944 and subsequently rejected and replaced by Congress in 1947. Because only Congress has the ability to change the definition, the NLRB exceeded the scope of its authority in *Browning-Ferris.*

Second, the NLRB held that *Browning-Ferris* distorted past precedent by implying or suggesting it was returning to the applicable pre-1980 joint employment standard. The *Browning-Ferris* decision cherry-picked past precedent that found joint employment relationships in situations where the third party exercised indirect control over the terms and conditions of the employee's employment. In those cases, the determining factor was not the indirect control over the terms and conditions of employment, but rather that the indirect control evidenced direct and immediate control. Specifically, in many of the prior cases relied upon by the *Browning-Ferris* board, the retained indirect control was actually exercised by the third party. Moreover, none of the post-1980 cases had been criticized or rejected for requiring immediate and direct control, rather than mere retained or indirect control. As a result of these perceived distorted citations to the record, the *Browning-Ferris* standard had to be rejected.

Third, the NLRB concluded that the vague and overly broad test in *Browning-Ferris* would necessarily result in labor instability and uncertainty. The multi-factor analysis would result in extreme unpredictability in results because every proposed joint-employment situation would require a fact-intensive review. One of the purposes of the NLRA is to promote stable

bargaining relationships, so as to allow employers to reach employment decisions without fear that those decisions will later be deemed an unfair labor practice, and to allow unions to discern the limits of their reach. Under *Browning-Ferris*, neither employers nor unions will be able to discern who the proper bargaining units are, how various joint employment relationships will allow for bargaining (when there are multiple bargaining parties at every table), or how many labor contracts must be bargained if employees are subject to multiple joint employment relationships. In short, there are a multitude of practical problems that make the *Browning-Ferris* standard unworkable, thereby undermining a central purpose of the NLRA.

Fourth, related to the issue of uncertainty, the *Browning-Ferris* rule put thousands of business relationships, chief among them franchises, at risk of being recharacterized as joint employment. These business relationships were formed with the understanding and expectation that they would not qualify as joint employment relationships, and they accounted for hundreds of billions of dollars of annual economic activity, and 3.4 percent of gross domestic product. Moreover, many of the indirect indicia of control are always present in franchise relationships because franchisors need to control and police the use of their trademarks, a requirement of the Lanham Act. The ruling would be highly disruptive to a large slice of the U.S. economy and subject franchise relationships to joint employment for mere trademark licensing, a result Congress did not intend.

Finally, the NLRA includes protections for businesses from secondary economic protest activity, such as strikes, boycotts, and picketing. These protections prohibit unions from using secondary protests as a way of coercing their employer to comply with their labor demands. These prohibitions do not apply to the primary employer or to a joint employer. The expansive definition in *Browning-Ferris* for joint employer would eviscerate these secondary economic protest protections by sweeping related entities into the primary employer definition. Taken to its extreme, individual homeowners could be labeled joint employers under a residential renovation contract and face pickets when leaving their homes. These potentially absurd results are not a reasonable or proper reading of the NLRA.

Notwithstanding the complete repudiation of the *Browning-Ferris* standard, the NLRB found that Brandt and Hy-Brand were joint employers under the prior standard. As a result of Terence Brandt's direct involvement in hiring and setting company policies at both businesses and the shared employment policies and benefit plans, the NLRB found that both companies exercised direct and immediate control over the terms and conditions of employment. As the control was actually exercised, and not merely reserved, the NLRB held that the judge's joint employment determination was proper, notwithstanding that it rejected the *Browning-Ferris* standard.

As an editorial post-script to this decision, on February 26, 2018, the Board vacated its decision in *Hy-Brand* after the NLRB's Designated Agency

Ethics Official issued a report concluding that NLRB board member William Emanuel should have recused himself from participating in the decision. Emanuel's former management-side law firm, Littler Mendelson, had represented one of the clients in the overturned *Browning-Ferris* decision, thereby creating a conflict of interest for Emanuel that should have triggered his recusal. By vacating the decision, the NLRB reinstated the *Browning-Ferris* standard, at least for the time being.

***Nat'l Maintenance Contractors, LLC v. Emp't Dep't*, Bus. Franchise Guide (CCH) ¶ 16,073, 406 P.3d 133 (Or. Ct. App. 2017)**

The Oregon Court of Appeals held that the franchisor did not meet its burden of showing that its franchisees were independent contractors and, thus, the franchisor was responsible for assessments of unemployment insurance taxes by the Oregon Employment Department. The court held that the franchisor could specify results, but could not direct and control the means and manner of providing services without losing the franchisees' status as an independent contractor. The principal factors that establish the right of control for determining an independent contractor are: (1) direct evidence of the right to or the exercise of control; (2) the method of payment; (3) the furnishing of equipment; and (4) the right to fire.

Here, the franchisor negotiated the services to be provided, as well as the frequency and time period of services. The franchisor also controlled the tools of the trade, requiring certain equipment and supplies of certain brands and types. The franchisor required training for all levels and provided materials and manuals on approved techniques. The franchisees had to take tests to show that they succeeded in applying the techniques and their adoption of the techniques was an implied prerequisite to work. Thus, the franchisor failed to establish that the franchisees were independent contractors because the franchisees were not free from direction and control over the means and manner of performing services.

NONCOMPETE AGREEMENTS

***Homewatch Int'l, Inc. v. Navin*, Bus. Franchise Guide (CCH) ¶ 16,045, Civil Action No. 16-cv-02143-KLM, 2017 WL 4163358 (D. Colo. Sept. 20, 2017)**

The U.S. District Court for the District of Colorado denied the defendant franchisee's Federal Rule of Civil Procedure 12(b)(6) motion to dismiss, finding that the franchisor of an in-home care business had sufficiently pleaded a claim for breach of a noncompete covenant. The owner of the franchisee (Navin) had executed a personal guaranty of the franchise agreement in which she agreed to be bound by the noncompete provisions contained in the agreement. Navin then started Prominent Home Care, Inc.,

which signed the franchise agreement and a nondisclosure/noncompetition agreement with the franchisor. Notwithstanding, after the franchise agreement expired, Navin started a company that directly competed with Homewatch in the in-home care industry.

Navin argued that she was not personally bound by the noncompetition provisions because she signed in her official capacity as sole shareholder and officer of Prominent Home Care. The court rejected this argument because Navin had signed a guaranty in which she agreed to be personally bound by all provisions in the agreement, including the noncompetition provision. The court found that this language was clear and unambiguous. The court also found that the franchisor had sufficiently alleged that, although there is a general prohibition on noncompetition covenants, the franchise agreements were exempt because they arose out of a business purchase or sale.

***Little Caesar Enters., Inc. v. Creative Rest., Inc.*, Bus. Franchise Guide (CCH) ¶ 16,074, Case No. 2:16-cv-14263, 2017 WL 4778721 (E.D. Mich. Oct. 23, 2017)**
This case is discussed under the topic heading "Termination and Nonrenewal."

STATUTE OF LIMITATIONS

***Buffalo Wild Wings, Inc. v. BW-3 of Akron, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,081, Case No. 5:16-cv-1183, 2017 WL 5467156 (N.D. Ohio Nov. 14, 2017)**
This case is discussed under the topic heading "Termination and Nonrenewal."

***Haigh v. Superior Ins. Mgmt. Grp., Inc.*, Bus. Franchise Guide (CCH) ¶ 16,072, 17 cvs 2582, 2017 WL 4848154 (N.C. Super. Ct. Oct. 24, 2017)**
This case is discussed under the topic heading "Contract Issues."

***Picktown Foods, LLC v. Tim Hortons USA, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,080 (S.D. Fla. Nov. 8, 2017)**
This case is discussed under the topic heading "FTC Franchising Rule."

STATUTORY CLAIMS

***Sun Aviation, Inc. v. L-3 Commc'ns Avionics Sys., Inc.*, Bus. Franchise Guide (CCH) ¶ 16,062, 533 S.W.3d 720 (Mo. 2017)**
This case is discussed under the topic heading "Termination and Nonrenewal."

***Zounds Hearing Franchising, LLC v. Edward Bower*, Bus. Franchise Guide (CCH) ¶ 16,042, No. CV-01462-PHX-NVW, 2017 WL 4399487 (D. Ariz. Sept. 19, 2017)**
This case is discussed under the topic heading "Choice of Law."

TERMINATION AND NONRENEWAL

***Am. Dairy Queen Corp. v. Universal Investment Corp.*, Bus. Franchise Guide (CCH) ¶ 16,043, 16-cv-323-wmc, 2017 WL 4083595 (W.D. Wis. Sept. 15, 2017)**
Franchisor American Dairy Queen Corporation (ADQ) filed a motion in limine seeking to exclude evidence of franchisee noncompliance with its brand standards. Specifically, ADQ wanted to preclude a franchisee located in Wisconsin (Universal) from arguing that it could not be bound by certain brand standards because ADQ did not regularly enforce its standards with other franchisees at approximately forty other locations in various states. ADQ argued that the other franchisees were not similarly situated to Universal because the other franchisees did not have the same level of noncompliance, the other franchisees did not have the same contract or licensing agreement with ADQ, and some of the franchisees were not located in Wisconsin.

The U.S. District Court for the Western District of Wisconsin agreed with Universal that the evidence of the franchisor's tolerance of various types of noncompliance was material to the determination of whether these requirements would be considered reasonable and essential under the Wisconsin Fair Dealership Law. The court further found that the evidence of noncompliance by franchisees both in and outside of Wisconsin was relevant to a jury's determination of whether the termination of Universal was for good cause. The district court did, however, reserve judgment as to whether Universal could rely on this evidence to establish its termination was discriminatory.

***Buffalo Wild Wings, Inc. v. BW-3 of Akron, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,081, 2017 WL 5467156 (N.D. Ohio Nov. 14, 2017)**
Buffalo Wild Wings (BWW) filed several claims in the U.S District Court for the Northern District of Ohio against the defendant, owners of the only restaurant in BWW's franchise system that operated as a licensee of the franchisor rather than as a franchisee or being directly owned by the franchisor. Instead of waiting for a judicial determination on these claims, the defendant abandoned the license agreement and de-branded its store, remodeled it, and opened under a different name. Both parties then asserted a litany of claims. Both sought a declaratory judgment that the trademark license agreement could be terminated and alleged claims for trademark infringement and unfair competition. The defendant counterclaimed, alleging wrongful termination of the license agreement and breach of contract on the ground BWW had failed to offer it a right of first refusal before opening BWW restaurants in surrounding counties.

The court refused to rule *sua sponte* on BWW's claim seeking declaratory judgment that the trademark license agreement could be terminated. In its claim, BWW sought a declaratory judgment that the license agreement was valid and enforceable. BWW contended that the defendant materially breached the agreement because it refused to remodel its restaurant and was insolvent and therefore BWW was entitled to terminate the agreement. Although the court conceded that BWW would likely prevail on this claim, neither party asked the court to construe the contract and/or to grant summary judgment.

The court granted summary judgment in favor of BWW on the defendant's wrongful termination claim because BWW had not terminated the agreement. Rather, the defendant chose to voluntarily abandon the agreement in light of the potential for Lanham Act damages; this did not mean that BWW was responsible for the termination.

The court also refused to grant summary judgment on BWW's claim for trademark infringement because there was a question of fact regarding whether the defendant's use of the trademark was without BWW's consent and whether the unauthorized use likely caused confusion as to the origin or sponsorship of the product.

The court granted summary judgment in favor of BWW on the defendant's counterclaim that BWW had failed to offer it the right of first refusal because the court found that most of the defendant's claims were time-barred by the fifteen-year statute of limitations for claims for a breach of right of first refusal. As to the claims concerning the two restaurants that did fall within the statute of limitations, the court found that the defendant had no admissible evidence showing that the plaintiff failed to offer it an ownership interest in specific stores.

***Charter Practices Int'l, LLC v. Robb*, Bus. Franchise Guide (CCH) ¶ 16,052, Case No. 3:12-cv-1768 (RNC), 2017 WL 4366717 (D. Conn. Sept. 30, 2017)**

The U.S. District Court for the District of Connecticut granted the franchisor of veterinarian clinics summary judgment on its claim that the defendant franchisee (Robb) violated the franchise agreement; the franchise agreement could be immediately terminated due to his violation of the Connecticut Unfair Trade Practices Act (CUTPA). The Connecticut Board of Veterinary Medicine found that Robb had violated state law by administering half-doses of rabies vaccines to animals. The state board issued its final decision on February 1, 2017, and placed Robb's license to practice veterinary medicine on probation for twenty-five years.

The franchisor sought to terminate Robb's franchise, arguing that the finding by the state board was a violation of CUTPA. The franchisor asserted that issue preemption prevented Robb from re-litigating the Board's determination in the franchise context. The district court noted that issue preclusion applies when an issue has been fully and fairly litigated, was actually decided, and the decision was necessary to the judgment. The district

court found that all of these criteria were met and therefore granted the franchisor's motion for summary judgment.

***Howell v. Advantage Payroll Servs., Inc.*, Bus. Franchise Guide (CCH) ¶ 16,100, Docket No. 2:16-cv-438-NT, 2017 WL 6327832 (D. Me. Dec. 11, 2017)**

This case concerned five franchisees operating under agreements with the franchisor Advantage Payroll Services, Inc. Each of the franchisees signed a franchise agreement with a ten-year initial term and an option for an additional ten-year extension at the end of the initial term. All of the franchisees exercised their options and extended their agreements for the full ten-year period provided by the option. At the expiration of the option term, the franchisees sought to renew their franchise agreements for an additional ten-year term. When the franchisor refused on the ground there was no contractual right to renew the agreements, the franchisees brought an action seeking a declaratory judgment that that they were entitled to another renewal of their respective franchise agreements. The franchisor filed a motion for partial summary judgment, seeking dismissal of the franchisees' claims for declaratory judgment.

The U.S. District Court for the District of Maine granted the franchisor's motion. The court held that the contract terms unambiguously provided for only a single ten-year extension to the initial term. The renewal addenda to the contracts and the initial franchise agreements both contained specific expiration dates. Moreover, although the initial term expiration noted that expiration was contingent on other terms of the contract (e.g., the option), the renewal addenda did not contain any conditional language, clearly indicating that the franchise agreement would expire by its natural terms. The court rejected the franchisees' request to imply a renewal option in the agreement because that would be contrary to the express language of the contract. Moreover, to do so would create a perpetual franchise with an infinite right to renew the franchise agreement, which the court concluded was an unreasonable interpretation of the agreement.

***Little Caesar Enters., Inc. v. Creative Rest., Inc.*, Bus. Franchise Guide (CCH) ¶ 16,074, 2017 WL 4778721 (E.D. Mich. Oct. 23, 2017)**

After the termination of its franchise agreement, a franchisee brought suit against its franchisor alleging that the post-termination noncompete provision of the franchise agreement was unreasonable and unenforceable. The court applied the "rule of reason" test to determine if the noncompete clause would suppress or even destroy competition, rather than promote competition. Under the rule of reason test, the party challenging a noncompete must show that the contract "produced adverse anticompetitive effects within relevant product and geographic markets."

The court emphasized that even assuming the franchisee showed that it suffered an individualized injury as a result of the noncompete, the relevant

inquiry for the rule of is reason is the protection of competition, not competitors. Accordingly, the court denied the franchisee's motion for partial summary judgment, finding that the franchisee had failed to show the covenant produced adverse anticompetitive effects within the relevant product and geographic markets. Instead, the franchisee's evidence tended to show healthy competition among pizza restaurants in the relevant geographic area.

***Sun Aviation, Inc. v. L-3 Commc'ns Avionics Sys., Inc.*, Bus. Franchise Guide (CCH) ¶ 16,062, 533 S.W.3d 720 (Mo. Oct. 31, 2017)**

This case arose from a manufacturer's (L-3) termination of a distributorship relationship without ninety days' notice to the distributor (Sun) as required by the Missouri Franchise Law. Sun also alleged that L-3 terminated the agreement without good cause in violation of the Missouri Industrial Maintenance and Construction Power Equipment Act and that L-3 improperly refused to repurchase excess inventory following the termination. The circuit court agreed with Sun and granted partial summary judgment on the issue of liability on all three claims. The case proceeded to trial on the issue of damages and on a fourth claim for fraud. On the fraud claim, Sun contended that L-3 had a duty to disclose that it had plans to consolidate with a parent corporation. After trial, the court entered judgment in favor of Sun on all counts. L-3 appealed, and the case was taken up by the Missouri Supreme Court.

On appeal, L-3 argued that it did not provide industrial equipment, and thus neither of the laws regarding industrial equipment and repurchase was applicable. The court agreed, reversing the judgment and finding that the gyros and power supplies the franchisee distributed did not fall under the phrase "industrial, maintenance and construction power equipment" for purposes of claims under the Industrial Maintenance and Construction Power Equipment Act and Inventory Repurchase Act.

The court also reversed the fraud judgment, holding that there was no duty to disclose parent consolidation plans on the part of L-3. The mere acknowledgment of "trust and confidence" between the parties in an ordinary, arm's-length business relationship was insufficient to give rise to the duty to disclose a material fact that accompanies a fiduciary relationship.

Finally, the court held that the plain language of the notice statute suggested a required causal connection between "the failure to give notice" and "damages sustained" such that damages arise only during the notice period when notice is not given. Thus, the award of eighteen months lost profits to the franchisee was reversed. Ultimately, the court remanded to consider the damages during the ninety-day notice period.

***Tim Hortons USA, Inc. v. Singh*, Bus. Franchise Guide (CCH) ¶ 16,067, Case No. 16-23041-CIV-GOODMAN, 2017 WL 4837552 (S.D. Fla. Oct. 25, 2017)**

Plaintiff franchisor Tim Hortons USA, Inc. alleged that the defendant franchisee breached the franchise agreement by failing to timely pay money

owed under the agreement. The U.S. District Court for the Southern District of Florida held that the franchisee's failure to pay was a material breach because Florida law provides that failure to make a timely payment constitutes a material breach when time is of the essence. Time is of the essence when, among other things, the agreement so specifies and when notice has been given to the defaulting party requesting performance within a reasonable time. In this case, both conditions had been satisfied because the agreement contained the relevant language and the franchisor had requested performance. Because failure to pay constituted a material breach of the franchise agreement, the franchisor was entitled to terminate the franchise agreement pursuant to its terms.

The franchisee offered several arguments in its attempt to sway the court. First, the franchisee argued that the franchisor could not terminate the franchise agreement because the franchisee made an offer to pay the past-due sums owed. The court rejected this argument because the franchisee did not make a legitimate offer to pay; thus, there was no legal tender. In Florida, legal tender means the actual production of the sum due, not a mere offer to pay. In addition, the franchisee's offer to pay happened after the time to cure passed.

Next, the franchisee argued that the notice of default was defective because it allegedly included an incorrect default amount. The court held that the even if the notice of default amount was incorrect, the franchisee was still required to substantially comply with the notice of default. Moreover, the court held that the amount in the default notice was not incorrect.

The franchisee also argued that the franchisor waived its right to declare a default because the franchisor withdrew a payment from the franchisee following default. However, the court held that the non-waiver provision in the contract, which permitted the franchisor to accept payment after default without waiving its rights, was valid and enforceable. Thus, waiver and estoppel did not apply as a matter of law. In addition, the payment that the franchisor accepted was a payment for current royalties and current advertising, not the past due amounts.

The franchisee was also unable to show that a course of conduct argument prevented the franchisor from declaring default because the franchisee had express payment obligations in the contract. In Florida, the course of dealing argument applies only to an ambiguous contract.

TRADEMARK INFRINGEMENT

***Buffalo Wild Wings, Inc. v. BW-3 of Akron, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,081, 2017 WL 5467156 (N.D. Ohio Nov. 14, 2017)**

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

***Proteinhouse Franchising, LLC v. Gutman*, Bus. Franchise Guide (CCH) ¶ 16,057 (D. Nev. Nov. 8, 2017)**

The U.S. District Court for the District of Nevada granted the plaintiffs' emergency ex parte motion for a temporary restraining order without notice to prevent the improper use of the plaintiffs' trademark and the misappropriation of their trade secrets. The plaintiffs alleged that former consultants improperly obtained confidential information from the plaintiffs' computers and fraudulently seized control of a domain name containing the plaintiffs' trademark in order to prevent the use of the plaintiffs' website. They also alleged the consultants had sent a defamatory email under a fake email address. Based on these facts, the court found the plaintiffs were likely to succeed on their claims for cybersquatting and misappropriation of trade secrets. The court held the defendants' actions would irreparably harm the plaintiffs without the issuance of a TRO. Additionally, the court found the balance of harms and public interest favored the plaintiffs because it would maintain the status quo and promote the protection of trademark rights and trade secrets. The court issued the order without notice to prevent the destruction of evidence or retaliation from the consultants. However, the court declined to grant a TRO as to the plaintiffs' defamation claim because the plaintiffs failed to prove the named defendants sent the allegedly defamatory email.

The court's order also addressed two expedited discovery requests. As to the first, it allowed the plaintiffs to subpoena Google to identify the person who created the email address that sent the allegedly defamatory email. As to the second, the court denied the request to subpoena GoDaddy.com regarding the defendants' seizure of the plaintiffs' website because the plaintiffs failed to show why expedited discovery was necessary on this matter. Finally, the court found it did not have personal jurisdiction over one of the named defendants because the plaintiffs failed to show he had sufficient contact with Nevada.

***Stockade Companies, LLC v. Kelly Rest. Grp., LLC*, Bus. Franchise Guide (CCH) ¶ 16,078, 2017 WL 4640443 (W.D. Tex. Oct. 16, 2017)**

The U.S. District Court for the Western District of Texas denied a motion for a preliminary injunction by Stockade Companies, LLC against one of its former franchisees. Stockade owns and licenses trademarks for a group of restaurants. In an earlier, related case, the court granted in part Stockade's motion for preliminary injunction against the defendant, seeking an order directing defendant to de-brand its "Sirloin Stockade," "Coyote Canyon," and "Montana Mike's" franchise restaurants within twenty-one days. After entry of the order, the defendant rebranded the restaurants as "Kansas Buffets."

In this case, Stockade sought an order enjoining the defendant from operating "family-style buffets" at former Stockade restaurants and to specifically enjoin defendant from (1) using Stockade's confidential information

in violation of the parties' franchise agreements, (2) misappropriating Stockade's trade secrets in violation of the Texas Uniform Trade Secrets Act, and (3) infringing on Stockade's trade dress in violation of the Lanham Act.

The court denied the motion for preliminary injunction on the first claim because Stockade's allegation that the defendant's restaurants were serving food based on Stockade's recipes was based on speculative assertions. For example, Stockade employees asserted in conclusory fashion that the recipes were the same because the food tasted the same as food served at Stockade-branded restaurants. The court also rejected the contention that the defendant was improperly using Stockade's confidential information simply because defendant's restaurants ran similar promotions, such as "specialty nights," and had layout and décor similar to Stockade's restaurants. Stockade had no direct evidence that the defendant used confidential information.

In its second claim, Stockade alleged that its "buffet system" constitutes "protectable trade secrets under Texas Law." The court denied the motion for preliminary injunction as to this claim because, even if the laundry list of buffet system elements constituted a "trade secret," Stockade must still show that defendant acquired the trade secret through a breach of confidential relationship or discovered it by improper means. The court held that Stockade failed to meet this burden.

Finally, the court denied the motion for preliminary injunction on the third claim because Stockade failed to establish that the mark or trade dress qualified for protection and that the defendant's use of the trade dress created a likelihood of confusion in the minds of potential customers as to the source of the goods or affiliation or sponsorship with Stockade's businesses, because Stockade failed to submit sufficient evidence of defendant's décor and operations to prove this.

TRADE SECRETS

***Proteinhouse Franchising, LLC v. Gutman*, Bus. Franchise Guide (CCH) ¶ 16,057 (D. Nev. Nov. 8, 2017)**

This case is discussed under the topic heading "Trademark Infringement."

***Stockade Companies, LLC v. Kelly Rest. Grp., LLC*, Bus. Franchise Guide (CCH) ¶ 16,078, 2017 WL 4640443 (W.D. Tex. Oct. 16, 2017)**

This case is discussed under the topic heading "Trademark Infringement."

TRANSFERS

***Picktown Foods, LLC v. Tim Hortons USA, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,080 (S.D. Fla. Nov. 8, 2017)**

This case is discussed under the topic heading "FTC Franchising Rule."

UNFAIR COMPETITION/UNFAIR AND DECEPTIVE PRACTICES

***Haigh v. Superior Ins. Mgmt. Grp., Inc.*, Bus. Franchise Guide (CCH) ¶ 16,072, 2017 WL 4848154 (N.C. Super. Ct. Oct. 24, 2017)**
This case is discussed under the topic heading "Contract Issues."

VICARIOUS LIABILITY

***Harris v. Midas*, Bus. Franchise Guide (CCH) ¶ 16,058, Civil Action No. 17-95, 2017 WL 5177668 (W.D. Pa. Nov. 8, 2017)**
The U.S. District Court for the Western District of Pennsylvania denied a motion to dismiss filed by Midas International Corporation, Midas, Inc., and TBC Corporation (Midas), finding that the plaintiff, an employee of a franchised Midas location, had pleaded a plausible theory of liability for sexual harassment, discrimination, and retaliation under a joint employer liability theory. When examining the plaintiff's claims for joint employer liability, the court considered three factors: (1) the alleged employer's authority to hire and fire employees, promulgate work rules and assignments, and set conditions of employment; (2) the alleged employer's day-to-day supervision of employees, including employee discipline; and (3) the alleged employer's control of employee records.

Regarding the first factor, the court found Midas had the authority to and did promulgate work rules for its franchisees by requiring franchisees to comply with Midas's policies on sexual harassment. As to the second factor, the court found the franchisor had the authority to exercise daily control over franchisee employees based on broad language in the franchise agreement, including provisions requiring training and inspections to ensure compliance with the franchisor's policies. Thus, the court concluded the plaintiff had made at least a weak showing for this factor. For the third factor, the court found Midas had the ability to access employee records based on a provision in the franchise agreement allowing Midas to examine the franchisee's books and records. Although acknowledging that the case was a close call, the court concluded the plaintiff had pled sufficient facts to survive the motion to dismiss.

The court further found the plaintiff had pleaded sufficient facts to allege vicarious liability based upon broad language in the franchise agreement suggesting Midas had the general power to control the franchisee's employees and require them to attend discrimination training. Finally, the court rejected the defendants' argument that they were not liable because they were not signatories to the franchise agreement. The court reasoned that the defendants' influence over the training of franchisee employees was sufficient to allow the plaintiff's claims to survive at this stage of the proceeding. Thus, the court denied the motion to dismiss.

***Lomeli v. Jackson Hewitt, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,076, 2017 WL 4773099 (C.D. Cal. Oct. 19, 2017)**

In this putative class action, the U.S. District Court for the Central District of California granted a motion to dismiss filed by Jackson Hewitt, Inc. and Tax Services of America, holding that the plaintiff's pleadings failed to allege either vicarious or direct liability against the defendants as franchisors. This case arose from a dispute in which the plaintiff alleged that franchisors Jackson Hewitt and Tax Services of America, along with their franchisees, engaged in fraud by manipulating tax returns, secretly opening bank accounts in their customers' names, and charging undisclosed fees associated with the bank accounts. The plaintiff alleged the franchisors were liable for the fraudulent conduct of their franchisees and their employees.

The court held the plaintiff failed to allege vicarious liability because the pleadings did not allege the required degree of control. Specifically, the court found the plaintiff failed to allege control over the hiring, firing, or fraudulent conduct of the employee who was the alleged bad actor. Instead, the plaintiff's allegations were limited to control of marketing and other forms of control over the franchisees' business plans that are typical of a franchise relationship. Because the plaintiff failed to allege that the franchisors had any control over the franchisees' employees, the court dismissed the vicarious liability claims.

Likewise, the court dismissed the plaintiff's claims of direct liability. Because the plaintiff failed to plead that the franchisors had any knowledge of the alleged fraud or otherwise engaged in fraud outside of the fraud allegedly committed by their franchisees, the court held the plaintiff impermissibly grouped both the franchisors and the franchisees together. Thus, the court granted the defendants' motion to dismiss. But the court also granted the plaintiff leave to amend his pleadings.