Franchising (& Distribution) Currents

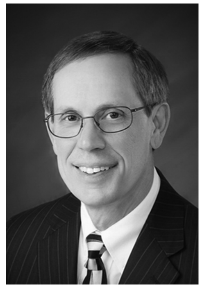
Gary R. Batenhorst, Daniel J. Oates, and Jason M. Murray

ARBITRATION

***Aston Martin Lagonda of N. Am., Inc. v. Lotus Motorsports, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,259, 13-cv-11213, 2014 WL 1092864 (D. Mass. Mar. 18, 2014)**
This case is discussed under the topic heading "Statutory Claims."

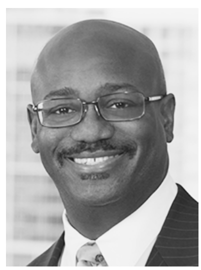
***Butler v. Lyons & Wolivar, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,251, G047766, 2014 WL 1328004 (Cal. Ct. App. Apr. 3, 2014) (unpublished), *reh'g denied* (Apr. 22, 2014)**
After a contractual arbitration proceeding, judgment was entered in favor of plaintiff, Steven Butler (Butler), against Lyons & Wolivar, Inc., doing business as Lyons & Wolivar Investigations (Lyons). Butler moved to amend the judgment to add LWI, Inc. (LWI) as an additional party against whom the judgment was entered. Both Lyons and LWI appealed, but the California Court of Appeal agreed with the findings of the Superior Court of Orange County that LWI was a successor corporation and affirmed the judgment. Then, LWI was appropriately added to the judgment as an additional judgment debtor.

In August 2005, Lyons, a franchisor of private investigation services, entered into a franchise agreement with Butler. This agreement terminated in May 2009 because of Butler's failure to pay royalties. Both Lyons and Butler brought various lawsuits over alleged misrepresentations and breaches of the franchise agreement. Lyons ultimately compelled arbitration pursuant to the franchise agreement to collect the unpaid royalties and costs. In



Mr. Batenhorst

Mr. Oates



Mr. Murray

Gary R. Batenhorst (gbatenhorst@clinewilliams.com) is a partner in the Omaha office of Cline Williams Wright Johnson & Oldfather, L.L.P. Daniel J. Oates (doates@grahamdunn.com) is a partner with Graham & Dunn in Seattle. Jason M. Murray (jmurray@murraylawpa.com) is a partner with the Miami firm of Murray Law, P.A.

September 2011, the arbitrator issued a final award, awarding $512,244 to Butler from Lyons. Butler filed a petition to confirm the award against both Lyons and LWI; however, the trial court refused to confirm against LWI because the arbitration award did not mention that separate entity. Butler then moved for clarification, but the arbitrator denied the request. The motion was filed November 9, 2011, following the September award and was therefore late under the applicable arbitration rule. As a result, the arbitrator lost any power to modify the final award. The trial court granted Butler's subsequent motion to amend the judgment, and both Lyons and LWI appealed.

Butler's motion argued that LWI was a successor corporation of Lyons, and LWI was the alter ego of Lyons. Under the successor theory, the court considered factors such as the commingling of funds and assets, use of the same offices and employees, disregard of corporate formalities, and listing of identical directors and officers. Coupling Lyons' own admissions with the corporate filings that showed Lyons and LWI shared officers and directors, Butler convinced the court under the successor theory of liability. As a result, the court then added LWI as a judgment debtor in the amended judgment. The appellate court also stated that there was substantial evidence in the record to support the addition of LWI as an additional judgment debtor under the alter ego theory as well.

***Miller v. CareMinders Home Care, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,288, 13-CV-5678 JAP, 2014 WL 1779362 (D.N.J. Apr. 30, 2014)**
Plaintiff Donna Miller sued defendant CareMinders Home Care, Inc. (CareMinders) in a state court action removed to the U.S. District Court for the District of New Jersey, alleging misrepresentations regarding the purchase of two CareMinders franchises. CareMinders moved pursuant to 28 U.S.C. § 1404(a) to transfer the action to the U.S. District Court for the Northern District of Georgia where CareMinders had previously instituted an action for breach of the franchise agreements against Eric Miller (plaintiff's husband) and Platinum Home Care (the franchisee). In an opinion designated as not for publication, the U.S. District Court for the District of New Jersey granted the motion and transferred the case to the Northern District of Georgia.

In 2009, Eric Miller, acting on behalf of Platinum, which was owned by his wife Donna, entered into two franchise agreements with CareMinders to operate two CareMinders franchises in New Jersey. From 2009 to 2013, Platinum operated under the franchise agreements with CareMinders. According to defendant, on May 16, 2013, Platinum abruptly ceased operating as a CareMinders franchisee and allegedly sent emails to several other CareMinders franchisees defaming the franchisor. On July 17, 2013, CareMinders sued Platinum and Eric Miller in Georgia, seeking injunctive relief and monetary damages relating to the alleged breaches of the franchise and guaranty agreements, defamation, and tortious interference with business relations, among other claims (the Georgia action).

On July 29, 2013, Eric Miller instituted arbitration before the American Arbitration Association (AAA) seeking $750,000 for his claims against CareMinders, which included breach of the franchise agreements and fraudulent inducement, among others. In his demand for arbitration, Eric Miller requested that the arbitration take place in New Jersey. However, the AAA rejected this request because the franchise agreements contained arbitration clauses requiring disputes to be handled in Georgia unless the parties agreed otherwise. On August 28, 2013, Platinum and Eric Miller moved to dismiss CareMinders' complaint in the Georgia action and requested that the court compel arbitration of the parties' entire dispute. The court denied the motion as to CareMinders' claims seeking equitable and injunctive relief, but granted the motion to compel arbitration of the remaining claims and stayed the matter pending arbitration in Georgia.

Thereafter, Donna Miller filed suit on September 9, 2013, against CareMinders in the Superior Court of New Jersey, asserting claims for false representation regarding financial projections, revenue sources of the business, and the maximum initial investment surrounding the purchase of the franchise. CareMinders removed the case to the U.S. District Court for the District of New Jersey and argued that, pursuant to 28 U.S.C. § 1404(a), the action should be transferred to the U.S. District Court for the Northern District of Georgia or otherwise dismissed based on the pending arbitration and the previously filed Georgia action. Donna Miller opposed the transfer and argued that the first-filed rule did not apply. Under the first-filed rule, which is intended to encourage sound judicial administration and to promote comity among the courts, the court that first has possession of the subject matter must decide the case.

The touchstone of a first-filed rule analysis is whether there is overlapping subject matter between the two claims. Donna Miller argued that the subject matter did not overlap because her claims were based on misrepresentations that occurred before her husband entered into the franchise agreements. However, several counts in Donna Miller's complaint mirrored those asserted by Eric Miller and Platinum in the arbitration, such as claims concerning CareMinders' alleged deceptive commercial practices and fraudulent misrepresentations related to the execution of the franchise agreements. Consequently, the court found that the subject matter of Donna Miller's lawsuit substantially overlapped that of the first-filed Georgia action. Donna Miller also opposed the transfer of her action on other grounds, arguing that, although the misrepresentations were made to her in Georgia, the effects of those misrepresentations took place in New Jersey. Additionally, she claimed that Platinum's employees, all of whom may be witnesses, reside in New Jersey, and requiring them to travel to Georgia would be inappropriate and inefficient.

Courts must examine both private and public factors when considering a motion to transfer. Here, the court found that the private factors weighed in favor of a transfer, as the alleged misrepresentations were made to Donna

Miller in Georgia by executives of CareMinders; Platinum and Eric Miller were already engaged in litigation concerning the franchise agreements in Georgia; and Donna Miller failed to argue that she lacked the resources to litigate her claims in Georgia. The court found that the public factors also weighed in favor of transferring the case. Transfer would serve the interests of justice because it would eliminate the possibility of inconsistent results with two overlapping cases, avoid duplicative litigation, and would serve the policy of judicial comity. As result, the court granted CareMinders' motion for transfer and transferred the action to the U.S. District Court for the Northern District of Georgia.

***STS Refills, LLC v. Rivers Printing Solutions, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,260, Civ. 3:10-43, 2014 WL 1278124 (W.D. Pa. Mar. 27, 2014)**

A print-shop franchisor moved to compel arbitration of a dispute over a franchisee's compliance with various terms of the franchise agreement in the U.S. District Court for the Western District of Pennsylvania. After the district court granted the franchisor's request, the parties arbitrated their dispute before the Franchise Arbitration and Mediation Services (FAMS). The arbitration was conducted on March 26, 2013, and the parties submitted their final briefing on April 25, 2013. FAMS invoiced the parties for its services on April 23, 2013. Under FAMS guidelines, the arbitrator must make the arbitration award no later than twenty days after conclusion of the arbitration unless the parties have failed timely to pay the invoice for the arbitrator's services.

Although the parties had paid the arbitrator's fees within the required five-day period, the arbitrator did not transmit the award within the twenty-day period set forth in the guidelines. Accordingly, on June 18, 2013, the franchisee sent written objections to FAMS over the delay. The arbitrator responded to the franchisee's objections, noting that the delay in issuing the arbitration award was necessary to conduct further research and analysis. Thereafter, the arbitrator entered an award in favor of the franchisor on June 24, 2013, some seven weeks late.

On July 14, 2013, the franchisee filed a motion in the district court to vacate the arbitration award on the grounds that the arbitrator's delay in issuing the award violated Section 10(a)(4) of the Federal Arbitration Act, which provides that "[a]n arbitration award must be made within the time fixed by the agreement between the parties. . . ."

The district court noted that, although the FAMS guidelines contained clear timetables for the issuance of awards, the language setting forth those deadlines was merely directory (i.e., suggestive), not mandatory. Noting that the FAMS guidelines also granted the arbitrator considerable discretion in controlling the proceedings, including any continuance, the district court held that the arbitrator acted within his discretion when he delayed issuance of the arbitration award to conduct further research and analysis. Accordingly, the district court denied the franchisee's motion to vacate and instead confirmed the arbitration award.

***SW Acquisition Co. v. Akzo Nobel Paints, LLC*, Bus. Franchise Guide (CCH) ¶ 15,280, No. 1:13-cv-785, 2014 WL 1670084 (S.D. Ohio Apr. 23, 2014)**

Plaintiff entered into an authorized dealer agreement (ADA) with franchisor Akzo Nobel Paints, LLC (Akzo) to operate four paint dealerships. The ADA contained a broad arbitration provision providing that "any controversy or claim arising out of or relating to this Agreement or breach of this Agreement shall be finally settled by binding arbitration." At the same time they executed the ADA, the parties executed a separate asset purchase agreement (ASA), pursuant to which plaintiff purchased certain assets necessary to operate the four franchised dealerships. Unlike the ADA, the ASA contained no arbitration provision.

Several years later, plaintiff sued Akzo in the U.S. District Court for the Southern District of Ohio, alleging that Akzo fraudulently induced plaintiff to enter into the ASA by providing false information about gross profits at the four dealerships. Plaintiff also alleged claims against Akzo for punitive damages and breaches of the ADA.

Akzo moved to compel arbitration of the dispute pursuant to the arbitration provision of the ADA. Plaintiff conceded that the breach of contract and punitive damages claims were arbitrable, but argued that the fraud claim was not because it was predicated on the ASA, which contained no arbitration provision. The court rejected plaintiff's argument, noting that plaintiff's fraud claim was predicated on alleged misrepresentations regarding the profitability of the dealerships operated under the ADA. Because the ADA's arbitration provision broadly encompassed all claims relating to the ADA, the court held that the fraud claim was arbitrable as well and compelled arbitration of the entire dispute. Having compelled the parties to arbitrate all of their claims, the court also concluded that dismissal of the complaint was proper, rather than a stay pending resolution of the arbitration.

***Wetzel's Pretzels, LLC v. Johnson*, Bus. Franchise Guide (CCH) ¶ 15,252, No. 12-56716, 2014 WL 1318344 (9th Cir. Apr. 3, 2014)**

Tito Johnson and Tariq Johnson appealed the U.S. District Court for the Central District of California's order denying their motion to vacate an arbitration award in favor of Wetzel's Pretzels, LLC. The Johnsons argued that the arbitrator exceeded his powers by enforcing certain provisions in the franchise agreement that required the Johnsons to assign their lease and property interests to Wetzel's after the agreement was terminated.

In order to have the order vacated, the Johnsons would have had to show that it was completely irrational or exhibited a manifest disregard of the law. An award is irrational only if it is not derived from the agreement. The franchise agreement in this case expressly provided for the assignment of the

Johnsons' lease and property interests to Wetzel's once the agreement was terminated. Thus, the Johnsons were not deprived of their rights under the agreement when the arbitrator enforced those provisions.

Additionally, the appellate court determined that the Johnsons failed to demonstrate how the arbitrator's ruling exhibited a manifest disregard for the law. To vacate an arbitration award on this ground, it must be clear from the record that the arbitrator recognized the applicable law and then ignored it. The appellate court found nothing in the record indicating that the arbitrator recognized yet ignored applicable law. Accordingly, the arbitrator did not exceed his powers, and the lower court correctly affirmed the award upon Wetzel's motion.

ATTORNEY FEES

Accor Franchising N. Am., LLC v. HR & F Hotel Group, LLC, Bus. Franchise Guide (CCH) ¶ 15,266, No. 0:12-cv-02129, 2014 WL 1705402 (D.S.C. Apr. 28, 2014)

After a franchisor received a summary judgment for $99,491.84 in an action against a franchisee in the U.S. District Court for the District of South Carolina, the franchisor sought attorney fees and costs of $56,972.60 under the terms of the franchise agreement. The submission of heavily redacted billing summaries and a supporting affidavit from a partner of the law firm seeking the award led to a substantial reduction in the fees awarded to the franchisor.

The court began its analysis by stating that the calculation of attorney fees involves a three-step process. The court first must determine a lodestar figure by multiplying the reasonable hours expended by a reasonable rate. After determining the lodestar figure, the court reduces the amount by "hours spent on unsuccessful claims unrelated to successful ones." Finally, the court awards a percentage of the amount determined based on the degree of plaintiff's success.

The court described the twelve-factor test used by the Fourth Circuit to determine a reasonable number of hours and reasonable hourly rate. A partial list of these factors includes the time spent, novelty and difficulty of the issues, the skills required, customary fees for this type of work, the amount in controversy, and the results obtained. The court observed that determination of the hourly rate generally is "the critical inquiry in setting the reasonable fee" with the burden of establishing the reasonableness of the rate on the applicant.

In reviewing the evidence submitted, the court noted that the fee statements provided by the applicant showed the total hours worked by each lawyer but no description of the work each performed. The firm contended that redaction was necessary to protect privileged information. Although conceding that certain matters could be redacted in the submitted fee statements to protect privileged information, the court determined that the law firm had taken an overly broad approach. The court determined that the "omission of any description of services performed" left the court unable to determine if any of the hours submitted were unnecessary. As a result, the court said it had to either deny the application or reduce the number of hours. The court expressed some concern about the fact that plaintiff's attorneys spent 230 hours on the case when defendants defaulted, no depositions were taken, and the case did not contain novel issues. Upon reviewing the history of the case and the twelve-factor test, the court found that half the hours submitted would be reasonable.

The court also had issues with the affidavits submitted by the law firm in support of the hourly rates sought by the firm. The franchisor submitted an affidavit from its pro hac vice counsel in the case calculating the fees and analyzing the twelve-factor test. The franchisor also submitted an affidavit from a partner in plaintiff's local counsel firm, who had not participated in representing the franchisor in this matter. The partner stated in his affidavit that he had reviewed pro hac vice counsel's affidavit and found the rates charged, ranging from $225 to $375 per hour, to be reasonable and in accord with fees submitted in the area. The court found that "a law partner's affidavit is not satisfactory evidence to establish the prevailing market rate." As a result, the court reduced the hourly rates to $126 an hour for lawyers and $35 an hour for paralegals, the rates permitted for paying lawyers and paralegals under the federal Criminal Justice Act.

Although plaintiff sought over $56,000 in attorney fees, the court awarded $14,907.90, approximately 25 percent of the amount sought. This result highlights the importance of balancing the need to protect privileged information with the need to provide the court with adequate information to determine the reasonableness of the hours spent on a case. In addition, it is important that law firms seek support from outside the firm when attempting to establish the reasonableness of their hourly rates.

***HLT Existing Franchise Holding, LLC v. Worcester Hosp. Group, LLC*, Bus. Franchise Guide (CCH) ¶ 15,285, 12 CIV. 8295 PAE, 2014 WL 1813748 (S.D.N.Y. May 7, 2014)**

On January 28, 2014, the U.S. District Court for the Southern District of New York granted summary judgment for contract damages to the plaintiff HLT Existing Franchise Holding (HLT), a franchisor of Hampton Inn hotels against the defendant, Worcester Hospitality Group LLC (WHG). On February 11, 2014, HLT moved for attorney fees and interest and filed a memorandum of law and a declaration in support. On February 25, 2014, WHG filed a memorandum of law in opposition.

In its opposition, WHG did not contest that it owed attorney fees to HLT, but instead argued that the amount of the fees should be reduced. The court agreed with WHG's contention that the proposed hourly rate of $195 for senior paralegal work was excessive; however, WHG's suggestion of $75 per hour was too low. Ultimately, the court decided on the typical paralegal rate for courts in the district of $125 per hour.

Further, WHG argued that HLT's motion for fees was excessive in both time spent (33.2 hours) and the use of a partner's time for research and drafting the motion. The court disagreed. The court recognized that the firm was a boutique, specialized franchise firm that staffed the case leanly with two partners, a contract attorney, and a paralegal. Moreover, given that the firm's only associate was not staffed on this case, the court found it entirely reasonable that the attorney fee motion papers were drafted by the partners and the paralegal.

Next, WHG argued that the fee request should be reduced by 10 percent because of the number of attorneys involved and because the excessive amount of review, editing, and redrafting of the papers submitted by counsel for HLT was inherently inefficient. The court disagreed, finding that WHG failed to show how the volume of work reflected anything other than careful lawyering and a justified level of collaboration among colleagues.

HLT also sought pre-judgment interest, in the amount of $89,550.31 and post-judgment interest from the date of judgment until the date of payment. WHG offered no opposition. The court ruled in favor of HLT on this issue because New York statutory law provides for pre-judgment interest in breach of contract cases at 9 percent per year, and 28 U.S.C. § 1961 accordingly provides for post-judgment interest in the manner requested by HLT.

Ultimately, HLT's motion for attorney fees and interest was granted, except that the time billed by the senior paralegal was to be reimbursed at $125 per hour, not $195 per hour. HLT was directed to revise its calculation of fees accordingly and to submit a proposed order for the court's approval.

BANKRUPTCY

A&D Auto Sales, Inc. v. United States, Bus. Franchise Guide (CCH) ¶ 15,250, 748 F.3d 1142 (Fed. Cir. Apr. 7, 2014)

Former automobile dealerships brought two actions against the United States, claiming uncompensated taking of their property rights by way of the Troubled Asset Relief Program (TARP). This matter came before the Federal Circuit for de novo review following an interlocutory appeal from the U.S. Court of Federal Claims. The Court of Federal Claims denied the government's motions to dismiss for failure to state a claim, and the government appealed.

The dispute arose following the 2008–09 financial crisis and recession. Both General Motors Corporation (GM) and Chrysler LLC (Chrysler) were in serious financial difficulty as loans to automobile dealers had halted and their sales plummeted. As part of TARP, the government provided financial assistance to GM and Chrysler pending approval of a viability plan. The government did not approve of the initial viability plans and specifically suggested certain changes to meet its expectations. Among those were significant reductions in the number of dealers within their franchise network, which could be achieved by rejecting franchise agreements in bankruptcy proceedings. According to the complaint, these recommendations were mandatory in order to receive financial assistance. Both GM and Chrysler complied with these conditions, terminating the franchises by either the bankruptcy estate or having the dealers sign deferred termination agreements. In either case, the dealers were inadequately compensated through unsecured claims against the estates or in some instances not compensated at all. Consequently, groups of Chrysler and GM dealers brought suit alleging a regulatory taking without compensation.

In this interlocutory appeal, the court recognized the uniqueness of the issues and decided to address only the questions the court found pertinent to this appeal. The court specifically refused to determine at this stage of the litigation whether the categorical takings test applied to takings of intangible property, such as contract rights, because the parties had not briefed the issue. Instead, the court began its analysis with whether plaintiffs' franchise agreements constituted compensable property interests for purposes of the Takings Clause. The court stated that plaintiffs' valid franchise agreements were unequivocally property under a Takings analysis, but considered argument as to whether the franchise agreements were compensable property interests. The government put forth that plaintiffs' franchise agreements were not compensable property interests in this context, arguing that the law of bankruptcy had always allowed a trustee or debtor-in-possession to reject executory contracts as GM and Chrysler did here. Therefore, because the principle of bankruptcy law inhered in the franchise agreements, the termination of those agreements did not concern a compensable property interest of the plaintiffs.

The court rejected this analysis and sided with plaintiffs, agreeing that the franchise agreements were in fact compensable property interests. The court explained that if a challenged government restriction was enacted before a complainant's property interest was acquired, the restriction may be said to inhere in the title of the complainant's property. However, where a challenged government restriction was enacted after a complainant's property interest was acquired, it cannot be said to inhere in the complainant's title. Here, the alleged governmental restriction that plaintiffs challenged was not the bankruptcy court's approval of the dealer terminations based upon long standing bankruptcy law; rather, plaintiffs challenged the government's decision to require dealer terminations—through cancellation of plaintiffs' franchise agreements—as a condition of financial assistance to the automakers. These governmental restrictions, unlike those present in the bankruptcy context, were enacted well after plaintiffs had acquired their property interests in the franchise agreements. Therefore, plaintiffs' franchise agreements constitute compensable property interests under a Takings analysis.

Next, the government argued that there was no government action sufficient to invoke a Takings analysis under the relevant case law. There is no a per se rule governing this situation, so the court declared that liability could be attributed depending on the circumstances. For such a determination, there are two guiding principles. First, government action does not give rise to a taking if its effects on plaintiff are merely unintended or collateral. Second, if the government's actions are direct and intended, then the influence over plaintiff is coercive rather than merely persuasive. The court held that because the financing was expressly conditioned on the franchise terminations, it was a direct and intended result. The court then declined to address the second issue of whether the government's actions were coercive due to the lack of information regarding the circumstances surrounding the government's financial assistance to the automakers.

Lastly, the court considered the alleged economic impact of the government's actions. In order to show a regulatory taking, a plaintiff must show that its property has suffered a diminution in value or a deprivation of economically beneficial use. In this case, the court agreed with the government that plaintiff failed to sufficiently allege the economic loss of the franchises. Absent an allegation that GM and Chrysler would have avoided bankruptcy but for the government's intervention or that bankruptcy would have preserved some value for plaintiffs' franchises, they failed to satisfy the pleading standards necessary to survive a motion to dismiss. The court remanded the case to the Court of Federal Claims for enactment of the proper remedy; plaintiffs were granted leave to amend their complaints to include allegations of economic loss, rather than outright dismissal of the complaint at this preliminary stage.

***FasTax, Inc. v. Jackson Hewitt, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,268, No. 13-3078, 2014 WL 1117951 (D.N.J. Mar. 20, 2014)**

The validity of a release signed by FasTax, Inc. (FasTax), a Jackson Hewitt franchisee in territories in California, Idaho and Oregon, was at the center of this case filed by FasTax against Jackson Hewitt, Inc. (JHI), an income tax preparation franchisor. Disputes arose between FasTax and JHI in 2009 over the parties' rights and responsibilities in certain Idaho territories. While the disputes remained unresolved, JHI filed Chapter 11 bankruptcy on May 24, 2011. JHI listed FasTax as a creditor on its bankruptcy schedules. JHI's plan of reorganization originally provided no recovery for unsecured creditors. FasTax did not object to the bankruptcy plan, which the bankruptcy court approved and which became effective on August 16, 2011. JHI and its secured creditors then modified the bankruptcy plan to provide for some recovery to unsecured creditors. All of FasTax's claims arose before the bankruptcy plan became effective.

Also in August 2011, JHI sent FasTax a new franchise agreement to replace an agreement that had expired in 2009. JHI gave FasTax a release for signature that would release all of FasTax's claims against JHI independent of the bankruptcy. FasTax and its owners signed this release with the notation "ONLY PERTAINS TO OREGON BASED TERRITORIES." JHI informed FasTax that the notations on the release were unacceptable to JHI and sought FasTax's authorization by email to remove the handwritten notations on the release. Importantly for the outcome of this case, FasTax's president replied by email: "So just say ok? Or are you going to fax me something to sign?" JHI responded by email: "Your consent via e-mail is sufficient, as we already have the signature pages you previously submitted."

While the parties' dispute continued, the bankruptcy court established a bar date of February 26, 2012, for filing claims in the JHI bankruptcy and ordered JHI to notify creditors of this bar date. On February 6, 2012, FasTax's counsel sent a letter accusing JHI "of illegally taking FasTax's business assets in the Idaho Territories as of summer 2010." JHI did not send FasTax a notice of the bar date despite the letter received from FasTax's counsel and the bankruptcy court order requiring notice to creditors. FasTax did not file a claim in the bankruptcy.

On May 14, 2013, FasTax filed suit against JHI in the U.S. District Court for the District of New Jersey seeking a declaration that its release was invalid, asserting claims under the New Jersey Franchise Practices Act and asserting seven common law causes of action seeking damages. JHI filed a motion to dismiss. FasTax sought a declaratory judgment under Federal Rule of Civil Procedure 57 that the release was invalid, which the court treated as a motion for partial summary judgment. In support of its motion to dismiss, JHI argued that its bankruptcy discharged FasTax's claim. The court rejected this argument, finding that "as a known creditor, FasTax was entitled to actual notice of the bar date."

The court then considered JHI's alternative argument that the release barred FasTax's claim and argument that the release was invalid and denied both motions. The court stated that under New Jersey law an enforceable contract requires unequivocal assent by the offeree and found that there was no such unequivocal assent here for four reasons. First, FasTax's handwritten notation on the release demonstrated its intent to limit the scope of the release to certain territories. Second, FasTax never sent an unequivocal consent agreeing to the removal of the limiting notations. Third, FasTax claimed that it promptly notified JHI of its objection to removal of the pages of the release containing the notations. Fourth, the letter from FasTax's counsel to JHI in February 2012 asserting disputes regarding certain territories appeared inconsistent with the notion that FasTax consented to the use of the clean pages JHI sought to include in the release. Although denying JHI's motion to dismiss, the court also refused to grant summary judgment to FasTax. The court noted that a rational jury could conclude that the "just say ok" email from FasTax's president could be construed as consent. The court determined that further discovery was required before the court could finally determine these issues.

***Los Felix Ford, Inc. v. Chrysler Grp., LLC*, Bus. Franchise Guide (CCH) ¶ 15,279, No. 12-56082, 2014 WL 1623697 (9th Cir. Apr. 24, 2014)**
This case is discussed under the topic heading "Statutory Claims."

***Maaco Franchising Inc. v. Gaarder*, Bus. Franchise Guide (CCH) ¶ 15,262, No. 11-3087, 2014 WL 1123117 (E.D. Pa. Mar. 21, 2014)**
A former Maaco Auto Painting and Bodyworks Center franchisee failed in an attempt to open a default entered against the franchisee following termination of the franchise. James Gaarder entered into a franchise agreement with Maaco on July 18, 2006, transferred the franchise to MCC Humble Auto Paint, Inc. (MCC), and guaranteed MCC's performance. MCC failed to pay the royalties and advertising fees required by the franchise agreement, and Maaco issued a notice of default on June 17, 2010. Maaco's efforts to work with Gaarder to correct the deficiencies did not succeed, and Maaco served a second notice of default on January 13, 2011, followed by a notice of termination on March 11, 2011.

Gaarder continued to operate his business after termination, and Maaco filed this action in the U.S. District Court for the Eastern District of Pennsylvania seeking injunctive relief and damages. Gaarder's response was to file a series of five bankruptcy actions in bankruptcy court in Houston, three individual bankruptcies and two by MCC. Each action was dismissed, primarily for failure to file schedules or plans in a timely manner.

The Pennsylvania court entered an order on January 8, 2013, directing defendants to file an answer by January 25, 2013. Defendants did not answer by that date. Maaco moved for default on January 28, 2013, which was entered on that date. Gaarder then hired counsel and moved to open the default.

The court noted that in deciding whether to set aside a default under Federal Rule of Civil Procedure 55(c) a court must consider: (1) prejudice to plaintiff, (2) whether defendant has a meritorious defense, and (3) whether the default resulted from defendant's culpable conduct. In considering whether defendants had a meritorious defense, the court noted that defendants alleged that Maaco failed to comply with various terms of the franchise agreement, including the provision of training. Defendants in effect argued that these alleged violations entitled them to some kind of self-help rescission. Maaco countered that the alleged failures to train occurred over five years previously and that defendants continued to operate as a Maaco franchisee for a year after ceasing to pay Maaco. The court stated that even if defendants had a meritorious defense they could not excuse their continued operation of the franchise without paying the amounts owed to Maaco. For that reason, the court determined that defendants lacked a meritorious defense.

In response to Maaco's contention that the default resulted from defendants' culpable conduct, defendants in effect argued that being broke was not culpable conduct. The court had little difficulty rejecting this argument. The court noted that although five trips to bankruptcy court may be an indication of financial problems, the repeated dismissals of these bankruptcy cases for a variety of reasons suggested the use of the bankruptcy filings as a delaying tactic. The court noted that defendants' financial condition should not have prevented the filing of a pro se answer in the Maaco litigation. Noting the speed with which defendants obtained counsel with funds from Gaarder's parents after the entry of the default, the court characterized defendants' efforts to delay the Maaco case to be culpable conduct.

Maaco argued that years of delay in obtaining relief, the amount it spent in legal fees in this case and the fact that defendants continued to operate a competing business supported the argument that Maaco had been prejudiced by defendants' conduct. The court said the factors described by Maaco normally would not support a finding of prejudice. However, when viewed in light of defendants' lack of a meritorious defense and what the court characterized as defendants' "willful conduct aimed at delaying these proceedings," Maaco's showing of prejudice would suffice and the court denied defendants' motion to set aside the default.

CHOICE OF FORUM

***Allegra Holdings, LLC v. Davis*, Bus. Franchise Guide (CCH) ¶ 15,278, No. 13-CV-13498, 2014 WL 1652221 (E.D. Mich. Apr. 24, 2014)**

Plaintiff Allegra Holdings, LLC (Allegra), a Michigan-based franchisor, entered into a franchise agreement with defendant Fox Tracks, Inc. (Fox), a Minnesota-based franchisee, for the operation of a print and imaging center located in Minnesota. As a condition of Allegra's agreement to grant the franchise, Fox's principal owners, defendants Lawrence and Joan Davis, agreed to guarantee Fox's performance of the franchise agreement. Fox and Davis also agreed that for the two-year period following termination or expiration of Fox's franchise agreement, they would not engage in the same or similar business within ten miles of the former franchise location or within five miles of any other Allegra franchised location. Fox also agreed that upon termination or expiration of the franchise agreement, it would cease using Allegra's marks, return all manuals and training materials, and assign all telephone numbers used in the operation of the franchised business to Allegra.

Fox's franchise agreement expired on June 13, 2013. Nonetheless, Fox and Davis continued to operate a print and imaging center at the formerly franchised location, continued to utilize Allegra's marks and intellectual property, and failed to assign their telephone numbers to Allegra.

In August, Allegra sued Fox and Davis in the U.S. District Court for the Eastern District of Michigan alleging trademark infringement, unfair competition, breach of contract, and breach of guaranty. Shortly thereafter, defendants filed a motion pursuant to Federal Rule of Civil Procedure 12(b)(3) requesting a change of venue to the U.S. District Court for the District of Minnesota based on the language of the franchise agreement.

As an initial matter, the court noted that a recent decision by the U.S. Supreme Court clarified that when the motion for change of venue is predicated on a contractual forum selection clause, courts should apply the standards for motions to transfer venue under 28 U.S.C. § 1404(a), not the standard applied to motions to dismiss under Federal Rule of Civil Procedure 12(b)(3). Having made the proper distinction, the court noted that the existence of a valid forum selection clause typically warrants transfer under § 1404(a) to the parties' contractually agreed upon forum.

The franchise agreement contained a forum selection clause identifying the state or federal court of general jurisdiction in or nearest to Troy, Michigan, as the forum for all disputes between the parties arising under or as a result of the franchise agreement. However, the provision also contained language noting the contractually agreed upon forum was not intended to abrogate or reduce rights that defendants would otherwise have under the Minnesota Franchise Act (MFA). Citing the MFA and the qualifying language in the forum selection clause, defendants argued that a Minnesota court was the only proper forum for resolution of the parties' dispute.

The court rejected defendants' argument, noting that the franchise agreement did not purport to require that all litigation be conducted outside of Minnesota and further that nothing in the statute precluded parties to a franchise agreement from selecting an alternative forum. The court also rejected defendants' contention that the forum selection clause violated the MFA's anti-waiver provision. Specifically, the court held that the MFA does not expressly prohibit franchisors from requiring franchisees to litigate outside of Minnesota, and therefore the anti-waiver provision (which precludes only waiver of statutorily protected rights) did not apply. The court also concluded that there was nothing inherently unfair or inequitable about Allegra's decision to commence litigation outside of Minnesota.

Similarly, the court rejected defendants' contention that the Minnesota regulations prohibiting franchisors from requiring franchisees to waive their rights granted under the MFA applied to invalidate the forum selection clause, noting that nothing in the contract prevented defendants from availing themselves of the protections afforded by Minnesota law.

Having concluded that the forum selection clause was a validly bargained-for provision of the franchise agreement, the court presumed that many of the factors ordinarily considered on a motion to transfer, such as convenience of the parties and witnesses, weighed against transfer. Defendants' only other argument proffered in support of transfer was that judges located in Minnesota would be more familiar with the claims and the parties. The court rejected this hypothetical as unfounded, particularly given that Allegra's claims were primarily based on federal law. Accordingly, the court denied defendants' motion to transfer venue.

***Charles Mach. Works, Inc. v. Valley Ditch Witch, Inc.*, Bus. Franchise Guide ¶ 15,287, CIV-13-651-M, 2014 WL 1745059 (W.D. Okla. May 1, 2014)**
This case is discussed under the topic heading "Termination and Nonrenewal."

***Miller v. CareMinders Home Care, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,288, 13-CV-5678 JAP, 2014 WL 1779362 (D.N.J. Apr. 30, 2014)**
This case is discussed under the topic heading "Arbitration."

CLASS ACTIONS

***Auto. Leasing Corp. v. Mahindra & Mahindra, Ltd.*, Bus. Franchise Guide (CCH) ¶ 15,265, No. 1:12-CV-2048, 2014 WL 988871 (N.D. Ga. Mar. 14, 2014)**
The U.S. District Court for the Northern District of Georgia rejected plaintiffs' attempt to certify a class action in a case seeking recovery of fees paid to a vehicle manufacturer and its distributor for the rights to distribute the manufacturer's vehicles in the United States. The manufacturer, Mahindra & Mahindra, allegedly promised to begin delivery of vehicles in the United States in 2009, but in June 2010 announced it would not enter the U.S. market. When Mahindra and its distributor, Global Vehicles, Inc., did not refund the fees they collected from potential dealers, this action followed.

Plaintiffs sought to certify a class made up of all individuals and entities that paid Mahindra or Global for the rights to distribute Mahindra products in the United States. The court noted that to obtain class certification a party must show it complied with all requirements of Federal Rule of Civil Procedure 23(a) and at least one requirement of Rule 23(b). The court identified the Rule 23(a) requirements by their common references "as (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation." The court then denied plaintiffs' efforts to certify a class based on their failure to satisfy the Rule 23(a) commonality requirement.

Plaintiffs sought class certification for claims under the Georgia Motor Vehicle Franchise Practices Act, the federal Automobile Dealers Day in Court Act, unjust enrichment, and promissory estoppel. The court said that the claims under the Georgia statute and for unjust enrichment and promissory estoppel anticipated the application of Georgia law, but that plaintiffs had not shown that Georgia law would apply to all state law claims of the putative class members. Plaintiffs argued that a letter of intent allegedly provided to all prospective dealers and a later dealer sales and service agreement (DSSA) both contained provisions purporting to apply Georgia law. However, the court determined that there was no indication in the letter of intent language that it would extend to litigation between the dealers and Mahindra. Similarly, although the DSSA provided that Georgia law applied, the language in the DSSA recognized that it may need to be modified if it contravened the laws of another state in which the DSSA was to be performed. In addition, the language in the DSSA provided only that Georgia law would govern the DSSA itself, and not any disputes over the payment of fees by dealers.

The court further determined that it would be required to make an individualized choice of law analysis with regard to each plaintiff's unjust enrichment and promissory estoppel claims, noting that seven of the eight named plaintiffs testified that they had not operated and did not plan to operate in Georgia. The prospect of approximately 340 separate choice of law due process analyses also led the court to conclude that plaintiffs failed to satisfy the commonality requirements of Rule 23(a)(2). The court noted that, even if plaintiffs established that all class members could bring actions under the Georgia vehicle dealers statute, the number of different forms of agreements signed by the dealers would itself defeat commonality as well.

The court went on to state that even if plaintiffs had established commonality, their claim for class certification would flounder for failure to satisfy the predominance and superiority requirements of Federal Rule of Civil Procedure 23(b)(3). The court determined that plaintiffs failed to satisfy the predominance requirement for many of the same reasons as discussed in the court's Rule 23(a) analysis. The court noted that predominance will not be found when after adjudicating the class wide issues, plaintiffs must still provide "a great deal of individualized proof or argue a number of individualized legal points."

The court said that the unjust enrichment and promissory estoppel claims would require individual determinations, and this was sufficient to show common issues of law do not predominate. The court also referred to the factual issues that would require individual determinations. Finally, the court pointed out that plaintiffs sought to recover varying amounts of damages, paid at different times, to distribute different kinds of vehicles, which undermined the court's ability to make damage determinations on a class basis. In rejecting plaintiffs' Rule 23(b)(3) claim, the court noted that plaintiffs had not sought certification under Rule 23(b)(1) or 23(b)(2).

***Wilson v. GoWaiter Franchise Holdings, LLC*, Bus. Franchise Guide (CCH) ¶ 15,270, No. 1:13-CV-01054, 2014 WL 1092307 (N.D. Ga. Mar. 18, 2014)**

Two independent contractors of a food delivery service franchisee brought this action in the U.S. District Court for the Northern District of Georgia against the franchisee, alleging that how they were paid violated the federal Fair Labor Standards Act (FLSA). In ruling on plaintiffs' Motion for Conditional Certification of Collective Action, a motion to amend its complaint and the franchisee's motion to dismiss, motion to stay the proceedings, and motion for sanctions, the court was required to review the issue of whether the franchisee, GoWaiter Franchise Holdings, LLC (GFH), and its franchisor, GoWaiter Business Holdings, LLC (GoWaiter), constituted a common enterprise for purposes of the FLSA.

The franchisee had an unusual business model, functioning as an interim franchisee. If a GoWaiter business franchisee wanted to sell its business, GFH would purchase and operate the business until a new franchisee acquired it. In this capacity, GFH operated a franchise in Gwinnett County, Georgia, from October 1, 2012, through March 11, 2013, and a franchise in Alpharetta, Georgia, from January 1, 2013 to March 22, 2013.

The court noted that "the GoWaiter model facilitates the delivery of food from a variety of local restaurants to customers through a common website." The franchisee texts orders it receives to the drivers who pick up and deliver the food to customers. Drivers receive a fee for each delivery and tips but allegedly are not informed that tips are wages. The delivery fee is less than the federal minimum wage and drivers usually can make only one delivery an hour, so plaintiffs claimed that GFH violated the FLSA minimum wage standards. GFH sought dismissal of the case, asserting that it was not subject to the FLSA because it did not have gross revenues of $500,000 per year. Plaintiffs alleged that GoWaiter and GFH constituted a joint enterprise for FLSA purposes. In opposing plaintiffs' motion to amend, GFH argued that franchised businesses cannot be joint enterprises under FLSA but, even if they could, plaintiffs did not establish the existence of a joint enterprise here.

In denying GFH's motion to dismiss, the court noted that franchised businesses are not categorically excluded from being joint enterprises under FLSA. The court noted that the existence of a joint enterprise depends on the facts of each case and that where the franchise gives the franchisor control over a dealer's operations, the dealer is part of a larger enterprise with the franchisor. The court distinguished the three cases on which GFH relied to support its argument that a franchise relationship cannot be a joint enterprise under FLSA. The court then turned to the three elements plaintiffs had to prove to show there was a joint enterprise: "(1) related activities, (2) unified operation or common control, and (3) a common business purpose."

Plaintiffs' related activities argument was based on the allegation that GFH provided continuity of service when there was a "lapse in ownership," thereby sharing with GoWaiter the business purpose of selling franchises. They also argued that GoWaiter and GFH shared offices and operated with many of the same people and that GFH enhanced GoWaiter's public image by "preventing gaps in service." The court found these arguments sufficient to find that GoWaiter and GFH performed related activities. The court said that unified operations or common control depends on "whether a common entity has the power to control the related business operations." The fact that two entities shared a number of principal executives outweighed what the court described as superficial indications of separate identity. Acknowledging that the common business purpose element was the most difficult element to determine, the court said the regulations under FLSA point toward defining a common business purpose as activities directed to the same or similar business objectives. Here again the court noted that although it used different means to accomplish the objective, GFH's objective was the same as that of GoWaiter—the sale of GoWaiter franchises.

After determining that a common enterprise could exist in this case for FLSA purposes, the court then reviewed plaintiffs' motion to conditionally certify plaintiffs to act on behalf of similarly situated employees. The court noted that unlike class actions, where potential class members may opt out, the FLSA collective action procedures required potential group members to opt in. Plaintiffs sought to certify a class consisting of drivers classified as independent contractors at businesses owned and operated by GFH. The court partially granted plaintiffs' motion for certification, but required them to narrow the proposed certification to limited geographic locations and a narrower time frame than they had asserted.

The court's willingness to allow this case to proceed under a joint enterprise theory largely may be due to its unusual facts. Nonetheless, franchisors need to be aware that excessive controls in the franchise relationship can increase the risk of potential liability of franchisors under the FLSA.

CONTRACT ISSUES

Agar Truck Sales, Inc. v. Daimler Trucks N.A., LLC, Bus. Franchise Guide (CCH) ¶ 15,253, No. 13-CV-5471 NSR, 2014 WL 1318383 (S.D.N.Y. Apr. 1, 2014)

Agar Truck Sales (Agar) sued Daimler Trucks North America (DTNA) and its subsidiary Detroit Diesel Corporation (DDC) seeking monetary damages (claim one), declarative and injunctive relief (claim two), and declarative relief and specific performance of a contract (claim three). In its complaint, Agar asserted claim one against DTNA and claim two against DDC for attempting to terminate a franchise without due cause or good faith. Agar asserted claim three against DDC for a declaration that the franchise contract was in full force and effect and for specific performance. DDC responded with a motion to dismiss for failure to state a claim upon which relief may be granted. Agar countered by cross-moving for leave to file an amended complaint to supplement the allegations of claim two for unlawful termination of the DDC franchise and to add DTNA as a defendant within claim two.

On December 29, 2009, Agar , a tractor trailer dealer, renewed its Freightliner franchise with DTNA for a period continuing until December 31, 2014. Simultaneously, Agar renewed its 2009 contract with DDC to extend its Detroit Diesel franchise until December 31, 2012 (2012 DDC contract). Both contracts were signed with the stipulation that further renewals must be executed by written agreement by both parties prior to the applicable expiration date. DDC sent Agar an unsigned renewal contract on November 15, 2012 (DDC renewal contract), which purported to extend plaintiff's Detroit Diesel franchise to December 31, 2016. Agar signed the DDC renewal contract on November 19, 2012. DDC, however, never signed the DDC renewal contract. DDC continued to sell products to Agar after the expiration of the 2012 DDC contract without an effective new contract in place.

From 2009 through 2012, while Agar was under a franchise agreement with DTNA, Agar failed to meet its sales objectives per the agreement. On April 27, 2012, DTNA sent a letter notifying Agar that it had breached the sales performance requirements and had six months to cure beginning on April 30, 2012. On June 7, 2013, DTNA notified Agar by letter that Agar had failed to correct the sales performance deficiencies, and that DTNA was going to terminate Agar's franchise ninety days after receipt of the letter. Also on June 7, 2013, DDC notified Agar that it would no longer conduct business with Agar as of September 3, 2013, asserting that the parties were on a day-to-day contract since the 2012 DDC contract expired on December 31, 2012. Agar responded by filing a lawsuit in the U.S. District Court for the Southern District of New York.

DDC moved to dismiss Agar's claims, asserting that the provisions of the New York Franchised Motor Vehicle Dealer Act (Dealer Act) cited in the complaint do not apply to DDC because it is not a franchisor. The Dealer Act protects investments of motor vehicle franchisees and the general public by making certain behavior by motor vehicle franchisors unlawful. Agar conceded that DDC is not a franchisor, but argued that DDC should still be liable because the DDC franchise is part and parcel to the DTNA franchise. The court rejected this argument and granted DDC's motion to dismiss as related to that claim. However, the court found that DTNA may be held liable for DDC's actions under certain relevant sections of the Dealer Act and therefore granted Agar's motion to amend its complaint to allege supporting facts.

Additionally, Agar argued that the DDC renewal contract was valid and enforceable even though DDC had not signed the agreement. Agar cited case law to support that a signature is not always essential to the binding force of an agreement. The court rejected Agar's arguments on the grounds that the terms of the previous contract explicitly and unambiguously precluded an unsigned renewal. As a result, the court granted DDC's motion to dismiss Agar's claim seeking specific performance of the franchise agreement.

***Allegra Holdings, LLC v. Davis*, Bus. Franchise Guide (CCH) ¶ 15,278, No. 13-CV-13498, 2014 WL 1652221 (E.D. Mich. Apr. 24, 2014)**

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

***Bright v. Sandstone Hosp., LLC*, Bus. Franchise Guide (CCH) ¶ 15,258, 755 S.E.2d 899 (Ga. Ct. App. Mar. 26, 2014)**

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

***Cornelis v. B&J Smith Assocs., LLC*, Bus. Franchise Guide (CCH) ¶ 15,283, 2014 WL 1828891 (D. Ariz. May 8, 2014)**

This case is discussed under the topic heading "Corporate Veil Piercing."

***Janko Enters., Inc. v. Long John Silver's, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,263 (W.D. Ky. Apr. 2, 2014)**

Franchise trial lawyers are well acquainted with the use of depositions under Federal Rule of Civil Procedure 30(b)(6), where a corporate party designates a representative to testify on behalf of the entity. Whether the corporate treasurer of Yum Brands, Inc., William Gathof, was adequately prepared to testify in a 30(b)(6) deposition was the subject of a dispute between Long John Silver's, Inc. (LJS) and a former LJS franchisee in the U.S. District Court for the Western District of Kentucky. The franchisee, Janko Enterprises, Inc. (Janko), sought to develop a combined Long John Silver's and A&W (LAW) franchise unit. Janko filed this action against Yum and related entities, alleging that Yum and LJS encouraged Janko to develop the LAW unit even though Yum had decided not to support any new LAW franchises. Janko's suit included claims for breach of contract, tortious interference, fraud, breach of the covenant of good faith and fair dealing, and various statutory claims under Florida law.

Janko alleged that in Gathof's 30(b)(6) deposition he was not adequately prepared to address Yum's decision to divest itself of the LJS brand and any decision by Yum not to franchise additional A&W or combined LAW units. Janko contended that Yum's alleged failure to provide an adequately prepared witness was tantamount to a failure to appear. Janko sought to continue the deposition with Yum providing an adequately prepared witness and sought sanctions for Yum's alleged failure to provide an adequately prepared witness. Yum responded that Gathof was adequately prepared to testify and that any issues in the deposition arose from efforts by Janko's counsel to inquire into matters not included in the deposition notice.

Extensively reviewing a corporation's duties in connection with a 30(b)(6) deposition, the court determined that a corporation must produce a witness or witnesses knowledgeable about the subjects of the deposition notice. The person produced to testify must be prepared to testify not only as to his or her personal knowledge but that of the corporation as well. The court noted that the witness must gain the requested information to the extent it is reasonably available to the corporation. The court cited cases providing that witnesses can obtain this information from corporate documents, current or former employees, and other sources reasonably available to the corporation.

The court further noted that a corporation must produce a witness who is prepared to testify in a manner that will bind the corporation and must provide additional witnesses to the extent the original witness cannot adequately respond. The court also stated that a corporation cannot claim lack of knowledge at the 30(b)(6) deposition and later change its response by introducing evidence at trial. The court observed that the rule is intended to prevent a 30(b)(6) witness from disclaiming knowledge of material facts known to the corporation. The court said a party's 30(b)(6) obligations cease only "if a corporation genuinely is unable to provide an appropriate designee because it does not have the requested information, cannot reasonably obtain it and lacks sufficient knowledge after a good faith, thorough review of all available information."

The court then considered the parties' arguments in view of the principles it discussed. Yum's primary argument was that Gathof was well qualified and testified in good faith, but that his efforts to testify were impaired by Janko's failure "to adequately describe with reasonable particularity the matters for examination" as the rule requires. Yum cited cases that the party noticing the deposition must describe the subject matter with "painstaking specificity." The court rejected this painstaking specificity standard and determined that the deposition topics in the amended notice of deposition were sufficient to enable Yum to adequately prepare its witness. The court observed that Yum could have provided Gathof with information regarding actions by its leadership team concerning the issues covered in the deposition notice because many of these individuals were still Yum employees. The court said these employees could have provided Gathof with specific information regarding the actions leading to the divestiture of the LJS brand, but he did not speak to them. In ruling for Janko, the court also referred to an earlier dispute in the case, decided in Janko's favor, regarding the scope of Yum's response to certain discovery requests.

The court then granted Janko's motion to continue the deposition and ordered Yum to adequately prepare its witness to answer questions concerning the LJS divestiture. In addition, the court awarded Janko attorney fees incurred in continuing the deposition because of Yum's failure "without substantial justification to adequately prepare its representative."

***Pooniwala v. Wyndham Worldwide, Corp.*, Bus. Franchise Guide ¶ 15,286, CIV. 14-778 DWF/LIB, 2014 WL 1772323 (D. Minn. May 2, 2014)**

Dinaz and Percy Pooniwala (plaintiffs) sought to enjoin Wyndham Worldwide Corp. (Wyndham) and other affiliated companies (defendants) from terminating two franchise agreements and compel defendants to accept their application for an additional franchise. Plaintiffs alleged that as a result of a separate lawsuit between plaintiffs and Ramada Worldwide, another Wyndham affiliate, defendants retaliated against plaintiffs through their actions at plaintiffs' franchised locations. After considering the arguments presented in the record, the court determined that the facts weighed slightly in favor of denying the extraordinary remedy of a preliminary injunction and denied plaintiffs' request.

In September 2013, plaintiffs received ninety-day notices of termination at their Super 8 Roseville (Super 8) and Travelodge Burnsville (Travelodge) franchises for failure to meet quality assurance (QA) standards. Super 8 had failed six QA inspections beginning in January 2012, and Travelodge failed eight inspections dating back to November 2010. Following each failed inspection, defendants provided plaintiffs sixty days to cure the defaults. Defendants alleged that plaintiffs never cured these defaults. Meanwhile, plaintiffs repeatedly disputed the QA inspection results by attacking the credibility of the inspection scoring process, its methodology, and their final scores.

Additionally, plaintiffs alleged that Wyndham routinely blocked franchisees from its hotel reservation systems when franchisee accounts were in arrears due to nonpayment of fees. Plaintiffs claimed that this practice resulted in lost business at Super 8, including large, longtime clients, after defendants permanently blocked Super 8 from using the hotel reservations system on December 29, 2013. Plaintiffs also alleged that Travelodge had its reservation system blocked a number of times over the last few years.

In August 2013, plaintiffs purchased a former Days Inn hotel from the immediate past owner and franchisee weeks after it terminated its Days Inn franchise agreement. Plaintiffs submitted an application to defendants for a license to reconvert the hotel into a Days Inn franchise. Plaintiffs' Days Inn application was rejected. Plaintiffs alleged that Wyndham refused to license the Days Inn marks to plaintiffs until they paid the separate, unrelated debt that it owed to Ramada Worldwide. Further, plaintiffs alleged that defendants improperly removed the Days Inn property from its hotel reservation systems and search engines, resulting in an estimated loss of 20 percent to 25 percent of their guests.

In their complaint, plaintiffs sought to enjoin defendants from taking further action to enforce termination of the Super 8 and Travelodge franchise agreements and to order defendants to grant plaintiffs a license to operate the Days Inn hotel. The court considered four primary factors in determining whether a preliminary injunction should be granted: (1) the likelihood of the moving party's success on the merits, (2) the threat of irreparable harm absent injunctive relief, (3) the balance of harm between the parties if an injunction is granted, and (4) the public interest.

The U. S. District Court for the District of Minnesota analyzed plaintiffs' request for injunctive relief as it related to defendants' alleged violations under the Minnesota Franchise Act (MFA). Pursuant to the MFA, a franchisor can terminate a franchise relationship for good cause as defined by the Act. When considering the long history of failed QA inspections by Super 8 and Travelodge and the fact that plaintiffs were given multiple periods to cure various defaults, the court concluded that defendants had good cause under the MFA to terminate plaintiffs' franchises for repeated violations of the QA standards. The court further concluded that plaintiffs failed to sufficiently demonstrate a likelihood of success on the merits as was required for the issuance of a preliminary injunction. The court also found that plaintiffs failed to demonstrate a likelihood of success on their claims of retaliation because, although the Days Inn application was rejected, plaintiffs were allowed to continue operating the Days Inn; defendants provided plaintiffs the opportunity to remedy the QA failures at the Days Inn;

and plaintiffs were simultaneously operating a separate, unrelated Wyndham hotel that was free of any QA concerns or alleged harassment from defendants.

The court next considered whether the harm to plaintiffs in absence of injunctive relief outweighed the potential harm that granting injunctive relief may have caused to defendants. The court determined that plaintiffs' alleged loss of goodwill, significant loss of customers, and lost customer relationships were sufficient to constitute irreparable harm. However, defendants argued that if they were enjoined from terminating the franchise agreements with plaintiffs, they would suffer harm due to the ongoing trademark infringement caused by plaintiffs' continued use of the marks at properties of poor quality and repute. The court agreed that this also constituted harm. The court concluded that both parties were being significantly harmed by the conduct alleged by the opposing party. Nevertheless, the court held that although plaintiffs showed irreparable harm, the balance of harms weighed slightly against granting the plaintiffs' request for a preliminary injunction.

Finally, the court examined whether injunctive relief was in the public interest. The court determined that the public interest factor did not weigh in favor of either party because it was in the interest of both parties to present a good image to the public. Ultimately, the court held that the facts of this case weighed in favor of denying plaintiffs' request for a preliminary injunction. However, the court noted that both parties are being harmed by the conduct at issue in this case and ordered the parties to participate in a mandatory settlement conference.

***Smith v. Chrysler Grp. LLC*, Bus. Franchise Guide (CCH) ¶ 15,281, No. CV-13-01732-PHX-NVW, 2014 WL 1577515 (D. Ariz. Apr. 18, 2014)**

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

COPYRIGHTS

***Monterey Bay Homes, LLC v. Chambers*, Bus. Franchise Guide (CCH) ¶ 15,256, 4:12-cv-00891, 2014 WL 1314241 (D.S.C. Mar. 31, 2014)**

Plaintiff Monterey Bay Homes, LLC (MBH), a design-build construction franchisee, brought an action against a home buyer and several contractors retained by the Chambers for copyright infringement. MBH alleged that defendants had infringed on registered copyrights for architectural designs owned by MBH's franchisor and licensed to MBH under its franchise agreement. Chambers had initially approached MBH about building a home using MBH's copyrighted architectural designs, but decided to use the other contractor defendants for the project when they offered to build the home for less money.

Defendants moved for summary judgment, arguing that MBH did not have standing to pursue a claim for copyright infringement because it did not own the copyrights at issue and further that summary judgment was appropriate because MBH could not make out a prima facie case of copyright infringement. One of the contractors also moved independently for summary judgment, arguing that there was no evidence that it had knowledge that the architectural plans infringed on a copyright.

MBH responded to the standing issue by arguing that it met the definition of an "owner" under the Copyright Act because the franchisor had granted it an exclusive license to use the copyrighted architectural designs in the franchise agreement for any construction within its territory. Defendants did not dispute that the franchise agreement granted MBH territorial exclusivity, but they did dispute that the language of the franchise agreement granted MBH an exclusive license to use the copyrighted designs. The U.S. District Court for the District of South Carolina agreed that the salient question on summary judgment was the character of the license, noting that section 101 of the Copyright Act authorizes the holder of an exclusive license to a copyrighted work to bring a claim for infringement. After carefully reviewing the language of the franchise agreement, the court agreed that the language of the license provision appeared to provide only a nonexclusive license to use the copyrights. Nonetheless, the court held that MBH had standing to pursue a claim because although the license, standing alone, was nonexclusive, the combination of the license grant and the exclusive territory was sufficient to confer standing under the Copyright Act. Although not necessary for its decision, the court went on to state in a footnote that MBH's exclusive license amounted to a transfer of the copyright for purposes of the Copyright Act, and therefore, the franchisor would not have standing to bring a claim for copyright infringement in MBH's franchise territory. The court's broad pronouncement was most likely nonbinding dicta, but it is nonetheless a potentially significant holding for franchisors and should be taken into consideration when drafting future franchise agreements.

After finding that MBH had standing to bring a claim under the Copyright Act, the court rejected defendants' argument that MBH had failed to make out a prima facie case of copyright infringement. The court held that defendants had access to the architectural plans, giving rise to a presumption of copying and further that the allegedly infringing plans were so similar that a reasonably jury could conclude that defendants had infringed on the copyright.

The court also rejected the argument raised by one of the contractors that there was no evidence that tended to show that the builder had any reason to know that the architectural plans it received from Chambers were anything but an original work. The court concluded that a claim for copyright infringement requires no showing of intent to infringe and therefore denied the motion.

CORPORATE VEIL PIERCING

***Cornelis v. B&J Smith Assocs., LLC,* Bus. Franchise Guide (CCH) ¶ 15,283, No. CV-13-0645, 2014 WL 1828891 (D. Ariz. May 8, 2014)**
In 2006, plaintiffs entered into a franchise agreement with Eatza Pizza, Inc. (EA) for the operation of a pizza restaurant. At the time of the franchise agreement, EA was a wholly owned subsidiary of B&J Smith Associates, LLC. In April 2007, B&J sold EA to International Franchise Associates, Inc. (IFA) pursuant to an asset sale agreement (ASA). Plaintiffs were unaware of the ASA until June 2008 when they received a copy of the document from another franchisee. In August 2008, IFA filed for bankruptcy protection.

Several years later, in 2013, plaintiffs brought suit against IFA, B&J, a B&J affiliate, and several of B&J's individual corporate officers in the U.S. District Court for the District of Arizona. Following several motions on the pleadings, plaintiffs filed a second amended complaint (SAC) alleging claims for (1) violation of the Federal Trade Commission Act (FTCA), (2) common law fraud, (3) statutory fraud under the Arizona Consumer Fraud Act (ACFA), and (4) breach of contract. The SAC alleged that the court had diversity jurisdiction to hear that dispute.

As an initial matter, the court noted that plaintiffs' SAC alleged claims against a limited partnership but failed to identify the citizenship of the partners comprising the limited partnership. The SAC also failed to allege the citizenship of the individual defendants. Accordingly, the court concluded that plaintiffs had failed to allege sufficient facts to establish that there was diversity of citizenship between plaintiffs and defendants and dismissed the case for lack of subject matter jurisdiction. Nonetheless, the court went on to analyze whether plaintiffs had stated claims for relief, ostensibly for the purpose of establishing that leave to amend the jurisdictional defects was not warranted because any amendment would be substantively futile.

The court dismissed plaintiffs' claims under the FTCA, citing a long line of cases holding that the statute does not create a private right of action.

In support of their common law and statutory fraud claims, plaintiffs alleged that defendants' 2006 offering circular omitted material facts and contained a host of misrepresentations pertaining to the quality of the franchise offering generally; the franchisor's ongoing support for franchisees; the franchisor's commitment to the system, including the omission of its intentions to sell the business; and the costs associated with opening new franchised locations and operating new restaurants. The court held that all of the fraud claims were barred by Arizona's three-year statute of limitations. The court held that the discovery rule did not apply to toll the statute of limitations because the evidence in the record demonstrated that plaintiffs knew or should have known the facts giving rise to their claims in June 2008 when they received a copy of the ASA from another franchisee. The court dismissed plaintiffs' ACFA claim for the same reason, applying the AFCA's one-year limitations period.

The court declined to dismiss plaintiffs' breach of contract claims based on the statute of limitations, noting that if it construed the complaint liberally to conclude that plaintiffs did not discover the facts giving rise to their claim until June 2008, their complaint was timely within the six-year limitations period in Arizona law. But the court noted that a breach of contract claim is only proper if brought against a party to the agreement, and none of the named defendants were parties to the franchise agreement between plaintiffs and EA. Plaintiffs argued that the court should pierce the corporate veil and conclude that defendants were merely an alter ego of EA. Applying Arizona law, the court held that to bring a claim against the corporate defendants as alter egos of EA, plaintiffs must plead facts establishing that defendants exercised substantial total control over EA's management and activities. Following a close examination of the SAC, the court concluded that it contained only conclusory assertions of collective control by the corporate defendants without the specific factual contentions establishing each defendant's exercise of control over EA's management and activities. The court held that EA had also failed to allege any facts suggesting that the companies shared common officers or directors or commingled funds or that EA had failed to comply with corporate formalities. Accordingly, the court dismissed plaintiffs' breach of contract claim as to B&J and its corporate affiliate.

The court dismissed plaintiffs' breach of contract claims against the individual defendants for the same reasons. The individual defendants were not parties to the franchise agreement between plaintiffs and EA, and the SAC contained no allegations suggesting that the individual defendants were officers, shareholders, or directors of EA, they commingled their assets with EA, or they otherwise exercised control over EA's management and activities. Rather, the court held that the SAC contained only conclusory allegations of control.

DAMAGES

A&D Auto Sales, Inc. v. United States, Bus. Franchise Guide (CCH) ¶ 15,250, 748 F.3d 1142 (Fed. Cir. Apr. 7, 2014)

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

DEFINITION OF FRANCHISE

DeLuca v. Allstate N.J. Ins. Co., Bus. Franchise Guide (CCH) ¶ 15,276, 2014 WL 1884403 (D.N.J. May 13, 2014)

In this unpublished opinion, the Appellate Division of the Superior Court of New Jersey affirmed a summary judgment granted to Allstate in an action involving the termination of certain exclusive agency agreements (EAs) under which plaintiffs were independent insurance agents for Allstate. Plaintiffs alleged wrongful termination and breach of the implied covenant of good faith and fair dealing.

The court first rejected plaintiffs' claim that the New Jersey Franchise Practices Act (the Act) applied to the EAs, relying heavily on "conflicts between the Act and the highly regulated insurance industry." The court stated that there was an implied legislative intent not to subject parties to multiple regulations where these regulations "work at cross-purposes." The court noted that such conflicts must be clear and there must be more than "a mere possibility of incompatibility." The court reviewed the differing notice requirements found in the two statutes and determined that the requirements found in the insurance statutes and the Act were one source of conflict between these laws. The court also noted that the lower court had discussed how the good cause requirement of the Act could conflict with certain provisions in the insurance statutes that permitted an insurance company to terminate agents in specified circumstances. The court concluded that these conflicts and others discussed by the trial court demonstrated that the differences between the Act and the insurance laws led to a finding that the Act was inapplicable to the EAs.

The court then determined that even if conflicts between the Act and the insurance laws did not exist, the EAs did not satisfy the community of interest and place of business requirements necessary to find the existence of a franchise under the Act. The court observed that the community of interest element required "a substantial investment in goods or skill that will be of minimal utility outside the franchise." The court explained that this investment normally required "tangible capital investments" that could include a building specifically designed for the franchise or specialized equipment. Plaintiffs argued that they had satisfied the community of interest requirement by their investment in promoting the Allstate name. The court said it did not need to determine if such intangible investments could constitute a community of interest because plaintiffs did not satisfy the place of business requirement of the Act.

The court then reviewed the definition of place of business under the Act, emphasizing that it required a place to sell goods or services. The court noted that under New Jersey law, it is Allstate and not the agents that actually sell the insurance. As a result, the plaintiffs did not meet the place of business requirement under the Act.

The court then examined the argument that Allstate breached the implied covenant of good faith and fair dealing. The court said that under New Jersey law, the plaintiffs had to show "that the party alleged to have acted in bad faith has engaged in some conduct that denied the benefit of the bargain originally intended by the parties." Under the EAs, either party could terminate without cause on ninety days' notice, and plaintiffs argued that Allstate terminated the EAs "in an unreasonable and arbitrary manner." Plaintiffs argued that Allstate concealed from them the consequences of failing to meet certain objectives known as "Expected Results" and the conditions under which Allstate would terminate the EAs.

The court rejected these contentions, finding evidence that Allstate had explained the consequences of failing to meet the Expected Results several times over a period of several years. The court characterized Allstate's warnings on these issues as "patent, timely, and unmistakable." The court also rejected the notion that Allstate had deprived the plaintiffs of the benefit of their bargain, noting that under the EAs Allstate paid the plaintiffs considerable sums for their interest in the agencies even though Allstate "essentially gave these interests to plaintiffs at no charge when the agencies were formed."

***Smith v. Chrysler Grp. LLC*, Bus. Franchise Guide (CCH) ¶ 15,281, No. CV-13-01732-PHX, 2014 WL 1577515 (D. Ariz. Apr. 18, 2014)**
This case is discussed under the topic heading "Statutory Claims."

ENCROACHMENT

***Aston Martin Lagonda of N. Am., Inc. v. Lotus Motorsports, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,259, 13-cv-11213, 2014 WL 1092864 (D. Mass. Mar. 18, 2014)**
This case is discussed under the topic heading "Statutory Claims."

***W & D Imports, Inc. v. Lia*, Bus. Franchise Guide (CCH) ¶ 15,271, No. 13-1983-CV, 2014 WL 1465383 (2d Cir. Apr. 16, 2014)**
In a not-for-publication summary order, the Second Circuit affirmed a decision by the U.S. District Court for the Eastern District of New York rejecting claims made by a Honda motor vehicle dealer. The dealer, referred to in the opinion as Willis, sought to prevent Honda from approving an additional dealer within his relevant market area.

Willis filed a protest with the New Jersey Motor Vehicles Franchise Committee under the New Jersey Franchise Practices Act, arguing that the presence of a new dealer "would seriously endanger the profitability and viability" of the Willis dealership. In addition, Willis argued that Don Lia rather than Jesse Armstead was the de facto owner of the proposed new dealership, Hamilton Honda. This issue was potentially relevant because Armstead is African American, and certain presumptions of injury given dealers in this type of protest do "not apply when the proposed franchisee is a minority applicant."

A twelve-day administrative hearing followed an extensive discovery process; ten witnesses testified and over 200 exhibits were received. The administrative law judge ruled that American Honda had followed proper procedures in its decision regarding a new dealer and that establishing the new "dealership was not injurious to Willis or to the public interest." The administrative law judge also determined that although a protesting dealer is some-times entitled to a presumption of injury when a new dealer is to be approved, Willis did not qualify for the presumption in this case. Importantly for the outcome of this case, Willis did not appeal the finding on this presumption. The New Jersey Motor Vehicle Franchise Committee adopted the administrative law judge's findings and the appellate division of the New Jersey Superior Court upheld this decision.

In July 2011, Lia sued Armstead and Michael Saparito, the alleged owners of Hamilton Honda. Lia contended that contrary to his deposition given in the administrative proceeding, Lia owned majority ownership in Hamilton Honda. The district court rejected this claim, finding that Lia was judicially estopped from making it based on his previous testimony.

Willis then sued American Honda, asserting various common law claims, and sued Lia, Armstead, Saparito, and various entities, referred to in the opinion as the "RICO defendants." Willis's allegations against the RICO defendants included federal and state Racketeer Influence and Corrupt Organization Act claims, tortious interference, and equitable estoppel. The court rejected each of Willis's claims against American Honda and his RICO claims and Willis appealed. Willis argued that the district court erred in dismissing claims against American Honda on collateral estoppel grounds and in rejecting the claims against the RICO defendants for failure to allege a pattern of racketeering activity.

Willis contended that the court should not have rejected his claims against American Honda because the administrative hearing "lacked adequate procedural and substantive safeguards," the material facts in the two proceedings were not the same because Lia allegedly perjured himself in the administrative proceeding, and the theories of recovery were different in the two proceedings. In rejecting Willis's arguments against American Honda, the Second Circuit agreed with the district court that the factual allegations for each of his claims were fully litigated in the administrative hearing. The court rejected the notion that Lia's alleged perjury made a collateral estoppel finding inappropriate, noting that Hamilton Honda's minority ownership was not necessary in determining that Willis's claims against American Honda failed. The Second Circuit said that for perjured testimony to disturb a final judgment it must be "material to the issue tried," which was not the case here.

In reviewing the claims against the RICO defendants, the Second Circuit stated that the continuing activity required to show a pattern of racketeering under RICO can be shown by "a close-ended pattern . . . of related predicate acts extending over a substantial period of time, or an open-ended pattern of racketeering activity that poses a threat of continuing criminal conduct beyond the period during which the predicate acts were performed." The appeals court agreed there was no open-ended activity because all of the alleged predicate acts had the goal of gaining approval of a new dealership, which did not "imply a threat of continued criminal activity" in operating the new dealership. Willis's efforts to show a closed-ended pattern also failed because the required substantial period of time necessary for such a pattern must extend over at least two years, which was not the case here.

FRAUD

***Cornelis v. B&J Smith Assocs., LLC,* Bus. Franchise Guide (CCH) ¶ 15,283, 2014 WL 1828891 (D. Ariz. May 8, 2014)**
This case is discussed under the topic heading "Corporate Veil Piercing."

***FTC v. Wyndham Worldwide Corp.*, Bus. Franchise Guide (CCH) ¶ 15,249, CIV.A. 13-1887 ES, 2014 WL 1349019 (D.N.J. Apr. 7, 2014)**
The Federal Trade Commission brought action under Section 5 of the Federal Trade Commission Act against Wyndham Worldwide and its subsidiaries, alleging they engaged in unfair and deceptive trade practices by failing to maintain reasonable and appropriate data security for consumers' sensitive personal information. Wyndham unsuccessfully disputed the allegations resulting in the denial of its motion to dismiss.

In disputing the claim, Wyndham challenged the FTC in three ways. First, it challenged the FTC's authority to assert an unfairness claim in the data security context. Second, it argued that the FTC must communicate formal regulations before bringing unfairness claims in order to comply with fair notice principles. And lastly, it argued that the FTC's allegations were not pleaded sufficiently to support its claims. The U.S. District Court for the District of New Jersey rejected all three arguments.

Under franchise and management agreements, Wyndham licensed its name to approximately ninety independently owned hotels, all of which used property management systems that were linked to Wyndham's corporate network. This network included all of the hotels' back end systems, as well as the front-facing systems, such as the hotel websites and the reservation systems. The complaint was largely based on Wyndham's failure to implement reasonable and appropriate security measures, leading to substantial consumer injury following three data security breaches. The three data breaches compromised over 619,000 consumer payment card account numbers, the exportation of some numbers to registered domains in Russia followed, and fraudulent charges amounted to more than $10.6 million.

Wyndham relied on *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), to claim that Congress has passed narrowly tailored data security legislation to particularly exclude data security standards from the FTC's purview. Wyndham likened this to a similar exclusion, specifically, the exclusion of tobacco regulation from the FDA's control. However, Congress explicitly precluded tobacco regulation from the FDA while, conversely, was silent as to data security under Section 5 of the FTC Act. Consequently, the court declined Wyndham's invitation to carve out a data security exception to the FTC's unfairness authority, especially given that Wyndham failed to explain how such a result would be incompatible with recent legislation and contradict congressional policy.

Next, Wyndham contended that the FTC necessarily had to promulgate rules and regulations in order to satisfy fair notice principles. It argued that the FTC's failure to publish any interpretive guidance, prior to bringing an unfairness claim, violated fair notice principles. Wyndham asserted that a regulatory agency must make available ascertainable standards before expecting private parties to obey. The FTC retorted by indicating that the standard in the data security context is reasonableness and that anything less is unfair to consumers. The FTC then put forth an industry-specific, case-by-case standard for reasonableness. It also cited another agency, the National Labor Relations Board, which brings actions without first issuing regulations. Having to first issue regulations would undermine 100 years of FTC precedent, because the FTC could never protect consumers from unfair practices. The court also was unpersuaded that these regulations were the only means of providing sufficient fair notice.

In spite of the opposition from Wyndham, the court concluded that the FTC sufficiently pled the unfairness claim in accordance with the FTC Act and Federal Rule of Civil Procedure 8(a). The FTC successfully put forth claims related to the amount of customers injured and to what extent, which satisfied the "substantial injury" and causation elements for an unfairness claim. Citing the 619,000 compromised consumer payment cards, along with the unreimbursed fraudulent charges, the court was inclined to accept these alleged facts as true in spite of the counterarguments by Wyndham. Additionally, these alleged facts helped the court determine that there was a sufficient showing of the causation element of the claim. The FTC alleged that Wyndham failed to employ a complex passwords system to require users to enter passwords that are not as susceptible to a brute force cyberattack. The FTC also alleged that Wyndham failed to adequately inventory computers connected to its network and failed to use common security measures, such as firewalls, to limit access between each respective hotel management system.

As for the FTC's deception claim against Wyndham, there was considerable discussion about the necessary pleading standard. Wyndham argued for a heightened fraud standard under Federal Rule of Civil Procedure 9(b); however, the court was not convinced that such a standard was appropriate for this action although the court noted that the FTC had pled its claim well enough to meet that standard nonetheless. The deception in question was found in the privacy policy on the websites, which in pertinent part certified the following: "[w]e safeguard our Customers' personally identifiable information by using industry standard practices" and, among other things, "[w]e take commercially reasonable efforts to create and maintain firewalls and other appropriate safeguards to ensure that to the extent we control the information, the information is used only as authorized." The court found that those affirmations, viewed in light of the allegations made by the FTC, were sufficient to carry the FTC's deception claim.

***Jennings v. Bonus Bldg. Care, Inc.*, Bus. Franchise Guide ¶ 15,284, 4:13-CV-663-W-DGK, 2014 WL 1806776 (W.D. Mo. May 7, 2014)**

This action was brought by individuals who purchased franchises from participants in Bonus Building Care, Inc., a nationwide cleaning franchising business. The purchasers (plaintiffs) alleged that the participants acted in concert to defraud and overcharge plaintiffs for the franchises and contend that this conduct constitutes racketeering punishable under the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO). Fifty-five defendants (movants) moved to dismiss all counts under Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction and failure to state a claim pursuant to Rule 12(b)(6) upon which relief can be granted. Ultimately, the U.S. District Court for the Western District of Missouri found that it had jurisdiction over the movants, but that the complaint failed to establish a claim upon which relief could be granted. Consequently, the court granted movants' motions to dismiss.

Movants were comprised of the franchisor, Bonus Building Care, Inc. and its successor Bonus of America, Inc. (Bonus), master franchisees, and various individuals employed by both. According to their affidavits, all movants operated in the United States, and at least one, Bonus, operated in Kansas City, Missouri. The four plaintiffs were unit franchisees. They alleged that movants misrepresented the franchises' prospects for financial success as well as the degree of control that the unit franchisees would have over their franchises. The movants allegedly did so by distributing misleading franchise disclosure documents to plaintiffs when they were prospective buyers. After plaintiffs purchased Bonus franchises, movants then allegedly oversaturated the market with Bonus franchises, underpriced plaintiffs' service work, and capriciously charged various inflated fees.

Plaintiffs filed a two-count complaint on July 3, 2013, alleging that defendants conducted a RICO enterprise through a pattern of racketeering activity in violation of 18 U.S.C.§ 1962(c) and that defendants violated 18 U.S.C. § 1962(d) when they conspired to violate 18 U.S.C. § 1962(c). Movants then filed a motion to dismiss, wherein forty-three defendants challenged whether the court had personal jurisdiction over them and all fifty-five defendants challenged that the complaint failed to state a claim upon which relief may be granted.

The court first addressed whether it had personal jurisdiction over the forty-three movants who challenged that point. The complaint asserted two claims under the federal RICO, which provides for nationwide service of process and thus serves as a statutory basis for personal jurisdiction. The court relied on a subsection of the RICO statute, 18 U.S.C. § 1965 (a), which states that once a RICO action has been instituted § 1965 authorizes plaintiffs to effect service on all other defendants, even those over whom the court would not otherwise have statutory personal jurisdiction. Bonus operated its cleaning franchise in Kansas City, Missouri, which subjected it to the jurisdiction of the U.S. District Court for the Western District of Missouri. Therefore, because plaintiffs permissibly instituted a RICO action against Bonus in the district court, plaintiffs could serve process on all other movants as well. As such, the court found that there was statutory authorization for its exercise of personal jurisdiction over all movants.

To complete its jurisdictional analysis, the court next considered whether its exercise of personal jurisdiction would offend the Due Process Clause of the Fifth Amendment. Because the court found that general jurisdiction existed over all movants, it was not required to examine whether specific jurisdiction was warranted under the Constitution. A federal court may exercise general personal jurisdiction over a defendant in two ways that are relevant in this case. First, a defendant is subject to general jurisdiction if served process while within the forum, which in federal court is the federal system of government. This means that due process of law requires only that the defendant has sufficient contacts with the United States, not the specific state in which the district court sits. Second, a court may acquire general jurisdiction over a defendant whose affiliations with the forum are so continuous and systematic as to render them essentially at home in the forum.

The court found that general jurisdiction existed over all movants because twenty-nine movants were served while physically present in the United States; eleven movants were individuals who indicated through affidavit that they reside and work in the United States; and three movants were corporate entities, each formed and having its principal place of business in the United States. Therefore, the court denied movants' motion to dismiss on jurisdictional grounds because all movants had submitted to the jurisdiction of the court.

Next, the court analyzed whether plaintiffs pled sufficient facts to establish a violation of RICO under 18 U.S.C. § 1962(c). To state a claim under this subsection, plaintiffs were required to establish: (1) the existence of an enterprise, (2) conduct by movants in association with the enterprise, (3) movants' participation in at least two predicate acts of racketeering, and (4) conduct by movants that constituted a pattern of racketeering activity. First, the court found that plaintiffs failed to establish that a RICO enterprise existed with regard to any movant. For RICO to apply, the enterprise's normal business operations must be distinct from the alleged pattern of racketeering. While plaintiffs were able to sufficiently allege that the purported enterprise had a common purpose and that it existed for a sufficient duration of time, they were unable to show how the purported enterprise existed outside of the alleged activity that is unlawful under RICO.

Second, the court found that plaintiffs could not establish that any movant committed conduct in association with a RICO enterprise, mainly because the court found that no RICO enterprise existed. Next, the court concluded that plaintiffs did not properly plead that any movant participated in predicate acts of racketeering because plaintiffs' generalized allegations of fraud did not meet the more exacting standard of Federal Rule of Civil Procedure 9(b). Consequently, the court determined that plaintiffs failed to establish a pattern of racketeering activity for each movant because the complaint did not establish that any movant committed a predicate act under RICO.

Accordingly, the court granted movants' motion to dismiss plaintiffs' RICO claims under 18 U.S.C. § 1962(c) because the complaint failed to state a claim upon which relief could be granted. Moreover, because the complaint did not state a claim against any movant under 18 U.S.C. § 1962(c), it necessarily did not state a claim under 18 U.S.C. § 1962(d) for conspiracy. As such, the court granted movants' motion to dismiss Count 2 of the complaint.

***Massey, Inc. v. Moe's Sw. Grill, LLC*, Bus. Franchise Guide (CCH) ¶ 15,277, No. 13-12611, 2014 WL 1856758 (11th Cir. May 9, 2014)**
This case is discussed under the topic heading "Statute of Limitations."

***SW Acquisition Co. v. Akzo Nobel Paints, LLC*, Bus. Franchise Guide (CCH) ¶ 15,280, No. 1:13-cv-785, 2014 WL 1670084 (S.D. Ohio Apr. 23, 2014)**
This case is discussed under the topic heading "Arbitration."

GOOD FAITH AND FAIR DEALING

***Aston Martin Lagonda of N. Am., Inc. v. Lotus Motorsports, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,259, 13-cv-11213, 2014 WL 1092864 (D. Mass. Mar. 18, 2014)**
This case is discussed under the topic heading "Statutory Claims."

***DeLuca v. Allstate N.J. Ins. Co.*, Bus. Franchise Guide (CCH) ¶ 15,276, 2014 WL 1884403 (D.N.J. May 13, 2014)**
This case is discussed under the topic heading "Definition of Franchise."

***Smith v. Chrysler Grp. LLC*, Bus. Franchise Guide (CCH) ¶ 15,281, No. CV-13-01732-PHX-NVW, 2014 WL 1577515 (D. Ariz. Apr. 18, 2014)**
This case is discussed under the topic heading "Statutory Claims."

INJUNCTIVE RELIEF

***Am. Dairy Queen Corp. v. YS&J Enters., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,254, No. 5:14-CV-151-BR, 2014 WL 1327017 (E.D.N.C. Apr. 2, 2014)**
On March 13, 2014, Dairy Queen (plaintiff) filed suit in the U. S. District Court for the Eastern District of North Carolina against YS&J Enterprises

and John A. Ribet III (defendants) for trademark infringement, false designation of origin, breach of contract, and unjust enrichment. Plaintiff sought an injunction against defendants that would prohibit them from using or displaying Dairy Queen trademarks, selling or distributing Dairy Queen products, and associating with the Dairy Queen franchise systems. Additionally, it sought to enjoin defendants from operating their store or any competing store at that location.

Defendants entered into a franchise agreement with plaintiff in 2004. In 2012, plaintiff issued a notice of default based on defendants' failure to correct certain deficiencies identified in plaintiff's earlier visits to the location. Following defendants' failure to cure the default, plaintiff issued a notice of termination of franchise on May 3, 2013. However, rather than shut down the store, plaintiff and defendants entered into a mutual cancellation and release agreement. Pursuant to that agreement, plaintiffs allowed defendants the opportunity to sell the store's assets in lieu of termination so the defendants could recoup some of their investment in the store. If they did not sell the store's assets by January 19, 2014, any rights under the original franchise agreement would terminate, and they would be required to remove all trademarked materials, proprietary products, and ingredients from the premises. In addition, they would not be allowed to continue operating a business at that location under a similar name as the plaintiff's or operate a competing store.

On January 21, 2014, plaintiff notified defendants that it was terminating the franchise for failure to transfer the assets of the store and that defendants needed to close the store immediately. Defendants ignored that notice as well as two cease and desist letters. They continued operating the store, and on March 13, 2014, plaintiff filed this suit for trademark infringement, false designation of origin, breach of contract, and unjust enrichment. The court denied plaintiff's motion for a temporary restraining order so defendants might be heard on the preliminary injunction motion slated for April 2, 2014. Defendants were served with the complaint, all motions, all supporting documents, and the order setting the hearing, but did not file a response or appear at the hearing.

The court ultimately granted plaintiff's motion for preliminary injunction. Plaintiff satisfied the standard for preliminary injunction by showing (1) a likelihood of success on the merits, (2) an irreparable harm absent preliminary relief, (3) a favorable balance of the equities, and (4) an injunction is in the public interest.

Plaintiff sufficiently showed the requisite likelihood of success by producing photographs and sworn declarations from its business consultant as evidence of defendants' continued use and operation of the store. Additionally, plaintiff showed defendants' continued usage of its trademarks, signage, and materials. Plaintiff successfully argued that such unauthorized use would cause irreparable harm absent preliminary relief. In balancing the harms of an injunction to both parties, the court recognized that defendants would suffer some financial loss; however, much of their harm would be largely self-inflicted. Lastly, the court mentioned the public interest is best served when consumers are not confused or defrauded by delinquent licensees, such as the defendants. Viewing all things together, the court agreed that plaintiff had shown a likelihood to succeed on its trademark infringement and breach of contract claims, irreparable harm absent a preliminary injunction, favorable equities as balanced against defendants, and having the public interest served in favor of preliminary injunction. As such, the court granted plaintiff's motion and enjoined defendants.

***Anytime Fitness, LLC v. Edinburgh Fitness LLC*, Bus. Franchise Guide (CCH) ¶ 15,272, Civil No. 14-348, 2014 WL 1415081 (D. Minn. Apr. 11, 2014)**

The interpretation of an addendum to a franchise agreement became a critical factor when the franchisor of Anytime Fitness sought a preliminary injunction against a former franchisee for breaches of the franchise agreement and trademark infringement.

Edinburgh entered into a franchise agreement with Anytime Fitness in October 2008 for a location in Brooklyn Park, Minnesota. The franchise agreement included a two-year post-term noncompete precluding the franchisee from being involved in a business engaged in a fitness center within twenty miles of another Anytime Fitness location or within a five-mile radius in cities with a population of more than 50,000. Mark Ravich, the principal owner of Edinburgh, personally guaranteed the franchise agreement. In the fall of 2013, a fitness center opened in Minnetonka, Minnesota, under the name Fit 12-24 Hour Health and Fitness. The business was located approximately 100 yards from an Anytime Fitness location. Anytime Fitness alleged that Ravich and Harlen Mork, a fitness center consultant and co-defendant of Ravich, were involved in the Fit 12-24 location.

Ravich also informed Anytime Fitness in the fall of 2013 that Edinburgh would not renew its Brooklyn Park franchise agreement when it expired on October 8, 2013. After the franchise agreement expired, Ravich opened a Fit 12-24 center in the former Brooklyn Park Anytime Fitness location and sought to convert the Anytime Fitness members in Brooklyn Park into Fit 12-24 members. This was despite the noncompete provision of the franchise agreement and another franchise agreement provision stating that information obtained by Anytime Fitness from the franchisee regarding the franchisee's fitness center and its customers was the property of Anytime Fitness.

Ravich argued that his involvement with the 12-24 Fit locations was permitted under an addendum to his franchise agreement that modified the post-term noncompete. That provision stated that the noncompete did not prevent the owner of the franchise "from developing, acquiring, or owning properties for the use as, or leasing as fitness centers, regardless of when and where built, acquired or leased." Ravich contended this addendum was added at his request, because as an owner and manager of shopping centers he required the ability to lease and operate fitness centers and occasionally had to take over the business of a lessee.

In seeking a preliminary injunction, Anytime Fitness argued that the involvement by Edinburgh and Ravich in the two Fit 12-24 locations violated the noncompete, that they were using "skills, knowhow and goodwill" acquired by operating an Anytime Fitness center, and that they used stolen confidential membership information and infringed on certain Anytime Fitness names and marks. The U.S. District Court for the District of Minnesota noted that courts in the Eighth Circuit review four factors in considering motions for preliminary injunction: (1) likelihood of success on the merits, (2) threat of irreparable harm to the moving party, (3) the balance between the alleged irreparable harm and the harm to the other party in granting the injunction, and (4) the public interest.

In finding a likelihood of success by Anytime Fitness, the court noted that Ravich argued that the addendum essentially nullified the franchise agreement noncompete provision. The court disagreed, determining that the covenant was reasonable and enforceable and that Ravich and Edinburgh violated the explicit language of the noncompete by operating one fitness center in their former Anytime Fitness location. The court sided with Anytime Fitness in interpreting the addendum to permit Ravich to engage in his commercial property management activity, enabling him to work with fitness center tenants or to take over their businesses, but not to engage in "precisely the type of conduct a noncompete agreement is intended to prohibit." The court went on to determine that Anytime Fitness had a likelihood of success on the merits on its counts for declaratory relief regarding Ravich's use of confidential member information and trademark infringement based on evidence of his continued use of Anytime Fitness trademarks at Fit 12-24 businesses.

In arguing it had been irreparably harmed, Anytime Fitness contended that Ravich's actions caused a loss of business and goodwill and put its franchise system at risk. The court concluded that Anytime Fitness had shown irreparable harm through unfair competition, misuse of membership, operational and development information, loss of goodwill, and misuse of Anytime Fitness marks.

In reviewing the balance of the harms, the court again cited a loss of goodwill as well as loss of proprietary information and damage to the integrity of Anytime Fitness's franchised system. The court dismissed any harm to defendants as being of their own making. In considering the public interest, the court said it was in the public interest for parties to be able to contract on franchise noncompete issues, have the other party abide by these terms, and prevent misuse of proprietary information and goodwill from a franchised system.

The court entered a preliminary injunction enjoining Edinburgh and Ravich from having any direct or indirect involvement in the two Fit 12-24 locations, but not prohibiting them from developing, acquiring, or owning properties used as fitness centers if they did not own, operate, or assist in the operation of the fitness centers in the areas covered by the noncompete.

***JTH Tax, Inc. v. Grabert*, Bus. Franchise Guide (CCH) ¶ 15,267, No. 2:13CV47, 2014 WL 1255278 (E.D. Va. Mar. 26, 2014)**

JTH, the franchisor of the Liberty Tax Service system (Liberty), terminated four franchise agreements entered into with Trisha Grabert for failure to submit required reports and pay amounts owed to Liberty, resulting in acceleration of the amounts owed under four promissory notes she signed in connection with the franchises. Liberty sought damages and injunctive relief in an action filed against Grabert on January 28, 2013, in the U.S. District Court for the Eastern District of Virginia arising from her alleged failure to make timely payments or observe her post-termination obligations under the franchise agreements. Liberty also sought damages for allegedly defamatory Internet postings she made. Liberty sought a default judgment when Grabert failed to respond to its complaint. The court granted default judgment for breach of the promissory notes and for liability on the defamation claims, but withheld ruling on Liberty's request for injunctive relief and on the amount of defamation damages.

The court had little trouble determining that Grabert had breached the promissory notes and accepted Liberty's affidavit regarding the outstanding balance of $170,814.77. Liberty sought attorney fees of $3,982.50 for enforcing the promissory notes. The court determined that the hours (17.7) and the hourly rate of $225 were reasonable. However, the court noted that Liberty asserted two other claims in its complaint in addition to enforcing the promissory notes. Because plaintiff did not differentiate the time spent in enforcing the promissory notes from the other claims, the court reduced the attorney fees awarded by 60 percent.

Liberty sought injunctive relief to enforce Grabert's post-termination obligations under the franchise agreements. The court noted that in making a determination regarding injunctive relief it needed to consider whether: (1) plaintiff suffered an irreparable injury, (2) remedies at law were inadequate, (3) a balancing of the hardships favored plaintiff or defendant, and (4) a permanent injunction would not disserve the public interest. The court determined that Liberty's complaint and supporting materials "included limited facts" and were "somewhat conclusory," making them insufficient to support an injunction. The court noted that Grabert's failure to defend caused well-pleaded allegations of fact to be accepted but that "for the purposes of default judgment, a party's failure to defend does not constitute admission of conclusions of law." The court observed that Liberty contended that Grabert had failed to turn over certain materials to Liberty after termination, but that Liberty did not assert how Grabert had improperly used any of these materials to compete with Liberty. The court determined that an evidentiary hearing was necessary to more fully develop the facts relevant to injunctive relief.

Turning to Liberty's defamation claim, the court noted that corporations as well as individuals "can be defamed per se by statements that cast aspersions on the target's credit, efficiency or its prestige or standing in its field of business." The court also noted that under Virginia law damages are presumed once a party establishes defamation per se so the defamed party need not present proof of damages and that punitive damages are also available without proof of actual damages.

The court found that Liberty had shown sufficient facts to prove that parts of Grabert's Internet postings constituted defamation per se. Among other things, Grabert asserted that "Liberty's quarterly results were 'lies' and 'deceptive' "; Liberty "engaged in 'unlawful actions' that interfered with [her] success"; Liberty encouraged franchisees to falsify business records; and that "Liberty's system is a 'scam, a scheme, a con.' " In view of her failure to defend the accuracy of these and other statements described in the opinion, the court found the statements constituted defamation per se.

The court discussed whether Grabert made these statements with actual malice. The court found that Liberty had demonstrated that Grabert made these statements knowing they were false or "with reckless disregard for the truth," showing that Grabert acted with actual malice. Liberty sought compensatory damages of $40,000, which it stated was equal to the loss of one franchise sale, and punitive damages of $80,000, the equivalent of the loss of two franchise sales. The court decided that rather than accepting these amounts it would hold an evidentiary hearing to have Liberty explain why the damage amounts Liberty sought were appropriate. For that reason, it deferred a determination of the amount of defamation damages to which Liberty was entitled.

***Pooniwala v. Wyndham Worldwide, Corp.*, Bus. Franchise Guide ¶ 15,286, CIV. 14-778 DWF/LIB, 2014 WL 1772323 (D. Minn. May 2, 2014)**

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

***Sunni, LLC v. Edible Arrangements, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,261, No. 14 Civ. 461 (KPF), 2014 WL 1226210 (S.D.N.Y. Mar. 25, 2014)**

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

JURISDICTION

***Charles Mach. Works, Inc. v. Valley Ditch Witch, Inc.*, Bus. Franchise Guide ¶ 15,287, CIV-13-651-M, 2014 WL 1745059 (W.D. Okla. May 1, 2014)**

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

***Cornelis v. B&J Smith Assocs., LLC*, Bus. Franchise Guide (CCH) ¶ 15,283, 2014 WL 1828891 (D. Ariz. May 8, 2014)**
This case is discussed under the topic heading "Corporate Veil Piercing."

***Jennings v. Bonus Bldg. Care, Inc.*, Bus. Franchise Guide ¶ 15,284, 4:13-CV-663-W-DGK, 2014 WL 1806776 (W.D. Mo. May 7, 2014)**
This case is discussed under the topic heading "Fraud."

LABOR AND EMPLOYMENT

***Wilson v. GoWaiter Franchise Holdings, LLC*, Bus. Franchise Guide (CCH) ¶ 15,270, No. 1:13-CV-01054, 2014 WL 1092307 (N.D. Ga. Mar. 18, 2014)**
This case is discussed under the topic heading "Class Actions."

NONCOMPETE AGREEMENTS

***Allegra Holdings, LLC v. Davis*, Bus. Franchise Guide (CCH) ¶ 15,278, No. 13-CV-13498, 2014 WL 1652221 (E.D. Mich. Apr. 24, 2014)**
This case is discussed under the topic heading "Choice of Forum."

RELEASES

***Am. Dairy Queen Corp. v. YS&J Enters., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,254, No. 5:14-CV-151-BR, 2014 WL 1327017 (E.D.N.C. Apr. 2, 2014)**
This case is discussed under the topic heading "Injunctive Relief."

***FasTax, Inc. v. Jackson Hewitt, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,268, No. 13-3078, 2014 WL 1117951 (D.N.J. Mar. 20, 2014)**
This case is discussed under the topic heading "Bankruptcy."

STATE DISCLOSURE/REGISTRATION LAWS

***Agar Truck Sales, Inc. v. Daimler Trucks N.A., LLC*, Bus. Franchise Guide (CCH) ¶ 15,253, No. 13-CV-5471 NSR, 2014 WL 1318383 (S.D.N.Y. Apr. 1, 2014)**
This case is discussed under the topic heading "Contract Issues."

***Pooniwala v. Wyndham Worldwide Corp.*, Bus. Franchise Guide ¶ 15,286, CIV. 14-778 DWF/LIB, 2014 WL 1772323 (D. Minn. May 2, 2014)**
This case is discussed under the topic heading "Contract Issues."

STATUTE OF LIMITATIONS

***Cornelis v. B&J Smith Assocs., LLC*, Bus. Franchise Guide (CCH) ¶ 15,283, 2014 WL 1828891 (D. Ariz. May 8, 2014)**
This case is discussed under the topic heading "Corporate Veil Piercing."

***Massey, Inc. v. Moe's Sw. Grill, LLC*, Bus. Franchise Guide (CCH) ¶ 15,277, No. 13-12611, 2014 WL 1856758 (11th Cir. May 9, 2014)**
This case involved a dispute between thirty-eight franchisees and their franchisor, Moe's Southwest Grill, LLC. Each of the plaintiffs entered into franchise agreements with Moe's in 2002 or 2003. The franchise agreements contained contractual limitations provisions requiring franchisees to bring any claim or action arising out of or related to the franchise agreement within one year of discovery of the facts giving rise to the claim; otherwise the claims would be barred.

Before they entered into their franchise agreements, Moe's provided each of the plaintiffs a Uniform Franchise Offering Circular (UFOC) that contained detailed information about the proposed franchise. Among other things, the 2002–2003 UFOCs informed plaintiffs that they would be required to purchase certain products from Moe's approved suppliers. The UFOCs also stated that Moe's suppliers were not affiliated with Moe's and that neither Moe's nor its affiliates derived any income from franchisee's purchases from suppliers. In 2005, after plaintiffs had entered into their franchise agreements, Moe's sent plaintiffs new UFOCs, stating that that Moe's was "indirectly related" to one of its suppliers because its CEO had an ownership interest in the related company. The 2005 UFOC also deleted the language stating that none of Moe's affiliates derived income from franchisee's purchases from suppliers.

Plaintiffs sued Moe's and its CEO alleging claims for (1) common law fraud, (2) negligent misrepresentation, and (3) violations of Georgia's civil Racketeer Influence and Corrupt Organization (RICO) statute. Plaintiffs' claims were predicated on their allegation that Moe's CEO had received undisclosed kickbacks from designated suppliers on franchisee purchases.

Moe's moved for summary judgment, arguing that plaintiffs' claims were barred by the one-year contractual limitations period. Moe's argued that plaintiffs discovered or should have discovered the facts giving rise to their claims when they received the original UFOC in 2002–2003 or at a minimum when they received the amended UFOC in 2005, more than one year before they filed suit in 2007. The trial court agreed and dismissed those claims. However, the Eleventh Circuit reversed on appeal, agreeing that the contractual limitations period applied, but only from the time when plaintiffs discovered the facts giving rise to their claims.

The court appeared to reject Moe's contention that plaintiffs discovered the facts giving rise to their claims when they received the earlier UFOCs, noting that those documents affirmatively disclaimed that neither Moe's nor its affiliates derived income from franchisee purchases. With respect to the 2005 UFOC, the court noted that there were disputed factual questions about whether plaintiffs had in fact read the revised provisions at issue. The court rejected the argument that receipt of the 2005 UFOC gave plaintiffs constructive knowledge of the facts giving rise to their claims because although they received the documents, plaintiffs had no reason to read them in 2005 because they had already purchased their franchises. In any event, the court's discussion appears to be dicta because it ultimately concluded that plaintiffs could not have discovered all of the facts giving rise to their claims solely by reading the altered language in the 2005 UFOC. By way of example, the court noted that although the 2005 UFOC may have notified franchisees about the possible payment of kickbacks, it would not have allowed plaintiffs to discover other essential facts for establishing their claims, such as whether Moe's had intent to defraud, acted negligently, or was engaged in an unlawful enterprise, when it stated in its 2002–2003 UFOC that neither it nor its affiliates derived income from franchisee supplier purchases. Because the record was devoid of evidence identifying when plaintiffs discovered the facts giving rise to each essential element of their claims, the court reversed the trial court's entry of summary judgment in favor of defendants.

Finally, in addition to the fraud and statutory claims, the court addressed a single plaintiff's independent appeal of the trial court's dismissal of a claim for intentional infliction of emotional distress. The claim arose out of the allegation that Moe's and its CEO intentionally sought to tarnish the reputation of one franchisee in order to drive it out of business. The court affirmed the dismissal of the emotional distress claim, noting that plaintiff provided no evidence for the trial court to consider on summary judgment and therefore was precluded from doing so for the first time on appeal.

***Mitchell Enters., Inc. v. Mr. Elec. Corp.*, Bus. Franchise Guide (CCH) ¶ 15,275, No. CV 11-0537, 2014 WL 1365903 (D. Idaho Apr. 7, 2014)**
This case is discussed under the topic heading "Trade Secrets."

STATUTORY CLAIMS

***Aston Martin Lagonda of N. Am., Inc. v. Lotus Motorsports, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,259, 13-cv-11213, 2014 WL 1092864 (D. Mass. Mar. 18, 2014)**
Beginning in 1996, plaintiff Lotus Motorsports, Inc. (Lotus) operated as the sole authorized dealer of Aston Martin vehicles in New England under a franchise agreement with manufacturer Aston Martin Lagonda of North America, Inc. (Aston Martin). In 2003, Aston Martin advised Lotus that the vehicle showroom space at its facility was too small for an anticipated rollout of a new higher volume vehicle. As a result, Lotus moved to a different, larger facility

at a purported cost of $700,000. After moving to the larger facility, Lotus learned that Aston Martin was contemplating granting a franchise to a competing dealership located 8.7 miles away from the new location. Aston Martin responded that it had the right to grant competing dealerships, so long as it complied with Massachusetts law, which prohibits franchisors from granting competing locations within eight miles of an existing franchise.

When Lotus refused to consent to the competing dealership, Aston Martin filed suit in the U.S. District Court for the District of Massachusetts, seeking a declaratory judgment. Lotus filed counterclaims against Aston Martin alleging violations of the federal Automobile Dealers Day in Court Act (ADDCA) and Massachusetts General Laws chapter 93B, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, promissory estoppel, and breach of contract. Aston Martin then moved to dismiss the counterclaims.

The court dismissed Lotus's ADDCA counterclaim, noting that, although the ADDCA provides automobile dealers with a cause of action against manufacturers that fail to act in good faith in performing under or in terminating the franchise agreement, the First Circuit has construed the ADDCA's good faith provision narrowly to apply only to actual or threatened coercion or intimidation. The court found that the complaint contained no factual allegations identifying any threats or intimidation and further noted that the parties' agreement did not prohibit Aston Martin from opening a competing dealership or require Aston Martin to seek Lotus's permission prior to opening a competing location.

The court also dismissed Lotus's counterclaim under chapter 93B, which prohibits automobile manufacturers from granting competing dealerships within an existing dealer's relevant market. The statute defines a dealer's "relevant market" as the entire area within an eight-mile radius of the existing dealer's location. Because Aston Martin's proposed new dealership was slated to be 8.7 miles from Lotus's location, the court dismissed the state statutory claim.

The court declined to hold that Lotus's remaining common law claims were preempted by the state dealership statute and analyzed each on its respective merits. To establish a claim for breach of fiduciary duty, Lotus had to plead facts to establish that (1) the relationship was one of trust and confidence, (2) Lotus relied upon the specialized knowledge or judgment of Aston Martin, and (3) Aston Martin was aware of Lotus's reliance. The court concluded that, at least at the pleading stage of the case, Aston Martin had set forth sufficient facts in its complaint to preclude dismissal of the breach of fiduciary duty claim, because the complaint alleged that Lotus had placed substantial trust in Aston Martin by supplying it with proprietary customer information and that it had in turn relied upon Aston Martin's skill and expertise in the operation of its franchised location and the selection and build-out of its new facility.

The court also held that although promissory estoppel applies only in the absence of an express contract, Lotus could plead the claim in the alternative to its breach of contract claim. Lotus had adequately pleaded a claim for promissory estoppel because it had alleged that Aston Martin had made express and implied promises that it would not grant any competing dealerships in order to induce Lotus to move to a larger location and that it had relied on these promises to its detriment in expending substantial funds in the move. The court also cited plaintiffs' allegations relating to Aston Martin's alleged implied promise not to open any competing dealerships in New England as sufficient grounds to deny dismissal of Lotus's counterclaims for violations of the implied covenant of good faith and fair dealing.

Finally, the court did dismiss Lotus's claim against Aston Martin for breaching the arbitration provision in the parties' contract by filing the declaratory judgment action in the district court. Although Lotus first entered into a franchise agreement with Aston Martin in 1995, the agreement was subject to annual renewals. As a result, the subsequent amendments to the ADDCA in 2002 applied to nullify that provision of the parties' agreement when it was renewed in 2003.

***Cornelis v. B&J Smith Assocs., LLC,* Bus. Franchise Guide (CCH) ¶ 15,283, 2014 WL 1828891 (D. Ariz. May 8, 2014)**
This case is discussed under the topic heading "Corporate Veil Piercing."

***DeLuca v. Allstate N.J. Ins. Co.*, Bus. Franchise Guide (CCH) ¶ 15,276, 2014 WL 1884403 (D.N.J. May 13, 2014)**
This case is discussed under the topic heading "Definition of Franchise."

***Jennings v. Bonus Bldg. Care, Inc.*, Bus. Franchise Guide ¶ 15,284, 4:13-CV-663-W-DGK, 2014 WL 1806776 (W.D. Mo. May 7, 2014)**
This case is discussed under the topic heading "Fraud."

***Los Felix Ford, Inc. v. Chrysler Grp., LLC,* Bus. Franchise Guide (CCH) ¶ 15,279, No. 12-56082, 2014 WL 1623697 (9th Cir. Apr. 24, 2014)**
In 2008, when Chrysler filed for Chapter 11 bankruptcy protection, it obtained permission from the bankruptcy court to terminate hundreds of dealer agreements as part of it corporate restructuring during bankruptcy. In response to the public reaction to these terminations, Congress passed the Consolidated Appropriations Act of 2010, which provided a procedure in section 747 for franchisees to seek reinstatement or readmission to the Chrysler dealer network through binding arbitration. For those dealers that prevailed in arbitration, depending on the terms of the ruling, Chrysler was obligated either to reinstate the dealer's prior agreement or, alternatively, to readmit the dealer under the "customary and usual" terms granted to new Chrysler dealers.

Plaintiff was a terminated dealer that followed the binding arbitration procedure and received an arbitration award directing that he be readmitted to the dealer network under Chrysler's customary and usual terms. When

Chrysler sent the dealer the required letter of intent with the company's customary and usual terms, the franchisee objected on the grounds that the proposed terms were so onerous that the agreement was illusory. The franchisee then proceeded to file suit in U.S. District Court for the Central District of California, alleging that it was entitled to reinstatement of its terminated franchise agreement under section 74 or, alternatively, that Chrysler had failed to provide its actual customary and usual terms. The franchisee also brought claims against Chrysler under California's Unfair Competition Law and the California Motor Vehicle Dealer Law. The district court granted summary judgment to Chrysler on all claims, and plaintiff appealed.

The Ninth Circuit affirmed the district court's dismissal of plaintiff's claim seeking reinstatement on the grounds that the arbitrator had not ordered that plaintiff be readmitted under the terms of the prior franchise agreement, but rather readmitted under Chrysler's customary and ordinary terms.

The court reversed the trial court's dismissal of plaintiff's claim that Chrysler's letter failed to provide its "customary and usual" terms, as required by section 747(e). While Chrysler submitted evidence to the trial court that plaintiff had been provided with the terms that Chrysler customarily proposes to new dealers, plaintiff submitted evidence that those terms were usually accompanied by offsetting provisions to mitigate the dealer's burden. Moreover, the court noted that the relevant question is the terms that Chrysler's new dealers customarily agree to, not the terms that Chrysler customarily proposes to new dealers.

The court also vacated the trial court's summary disposal of the statutory state unfair competition claim because it was accompanied by no analysis. The court did affirm dismissal of the claim to the extent that plaintiff had alleged that Chrysler had entered into agreements with other dealers in the area on the grounds that those agreements had been approved by the federal bankruptcy court, which preempted any contrary state law claims.

Finally, the court affirmed the dismissal of the California Vehicle Code claims, noting that Chrysler's requirement that plaintiff execute a waiver as part of its customary and usual terms was permissible under California law.

***Red Roof Franchising, LLC v. Patel*, Bus. Franchise Guide ¶ 15,289, No. 13-2563, 2014 WL 1677604 (3d Cir. Apr. 29, 2014)**

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

***Smith v. Chrysler Grp. LLC*, Bus. Franchise Guide (CCH) ¶ 15,281, No. CV-13-01732-PHX, 2014 WL 1577515 (D. Ariz. Apr. 18, 2014)**

In 2001, the plaintiff in this case (Smith) agreed to purchase an automobile distribution franchise from Chrysler. Chrysler agreed to finance the sale of the distribution franchise and the parties entered into several contracts to document the arrangement. Smith created a company to operate the dealership under a sales and services agreement (SAS) with Chrysler and assumed the role of general manager. Smith owned 100 percent of the dealership's non-voting stock, and Chrysler owned 100 percent of the voting stock. The parties also executed a stock agreement pursuant to which Smith agreed to purchase all of Chrysler's voting stock no later than March 2013. The stock agreement provided that until Smith had purchased all of the voting stock, Chrysler retained 100 percent of the voting rights and could remove Smith as general manager. If Chrysler exercised its discretion to remove Smith as the general manager before he acquired all of Chrysler's voting stock, he agreed that he would surrender his stock to Chrysler in exchange for fair value as determined by an auditor. The parties also entered into a bonus agreement, which granted Smith the right to receive annual bonuses based on operating profits. The bonus agreement also identified him as an at-will employee, subject to termination in Chrysler's discretion.

In September 2012, Smith owned a majority of the stock in the dealership, but he had not yet acquired all of the dealership's voting stock from Chrysler. At that time, the dealership was failing to meet minimum sales requirements, and Chrysler sent a representative to the dealership to help Smith develop an action plan. One month later, seeing little improvement, a Chrysler representative wrote to Smith to express concern about his ability to complete the purchase of the voting stock by the March 2013 deadline given the stagnating sales. Smith did not respond to the inquiry, believing that it was unlikely that Chrysler would take any adverse action. Shortly thereafter, Chrysler terminated Smith as general manager and removed him from the dealership's board of directors.

Following termination, Smith sought administrative relief from the Arizona Department of Transportation. After the department denied his requests for relief, he filed a lawsuit in the U.S. District Court for the District of Arizona bringing claims against Chrysler seeking: (1) damages for violations of the federal Automobile Dealers Day in Court Act (ADDCA), (2) a declaratory judgment that he was a franchisee under the ADDCA and Arizona Revised Statute § 28-4307 (Arizona Dealer Statute), (3) a declaratory judgment that he was in a "bona fide relationship" with Chrysler under the Arizona Dealer Statute, (4) damages caused by Chrysler's ownership of part of the dealership in violation of the Arizona Dealer Statute, (5) damages under the Arizona Dealer Statute for Chrysler's alleged failure to provide notice and show good cause for terminating his dealership, (6) tortious interference with a contract and business expectancy, and (7) breach of contract and breach of the implied covenant of good faith and fair dealing. Chrysler responded by filing a motion to dismiss Smith's claims.

The district court first addressed Smith's claims under the ADDCA, which permits dealers to bring claims against manufacturers that fail to act in good faith in performing the terms of the franchise or in terminating or renewing the franchise. Chrysler argued that the claim should be dismissed because the ADDCA applies only to automobile dealers and Smith therefore did not have the right to bring a claim because the formal franchise agreement was between Chrysler and the dealership, not Smith. Citing cases in different jurisdictions, Smith argued that the complex web of agreements between himself and Chrysler amounted in substance, if not in form, to a franchise agreement with Chrysler. The court agreed, noting that since Chrysler owned all of the voting stock in the dealership, if Smith were not afforded the right to bring a claim individually, there would be no entity that could protect the dealership's rights because Chrysler would never consent to bringing a claim against itself. In so holding, the court distinguished a Ninth Circuit decision, noting that in that case, the individual pursuing a claim under the ADDCA was also the sole owner of the dealer entity, and therefore there was no impediment to the dealer bringing its own claim against the manufacturer. The court held that Smith had alleged sufficient facts to plausibly show that the parties' various agreements were sufficiently interrelated and could be read in combination as forming a franchise; as a result, Smith had standing to bring an ADDCA claim.

With respect to Smith's claims under the Arizona Dealer Statute, the court noted that there was a dearth of cases analyzing the definition of a franchisee under that law. Accordingly, the court looked to the case law interpreting the ADDCA for guidance and again held that Smith had alleged sufficient facts to show standing as a franchisee under the state law.

The court next addressed Smith's claims for declaratory relief. Chrysler argued that the claims seeking declaratory relief were moot because they were predicated on Smith's position as general manager of the dealership, a position he no longer held. The court rejected Chrysler's position and held that Smith had a right to have his status declared because Chrysler's termination may have violated his statutory rights if he met the definition of a franchisee.

The court affirmed the dismissal of Smith's tortious interference claims relating to his interests in the dealership, citing case law for the proposition that a party that is directly interested or involved in a business relationship is generally not liable for any harm resulting from the pursuit of its own interests. Because Chrysler was directly involved in the operation of the dealership, Smith had no claim for tortious interference. The court also affirmed the dismissal of his tortious interference claim relating to the bonus agreement. Although Chrysler was not a party to the bonus agreement between Smith and the dealership, it did not tortiously interfere with the agreement when it terminated Smith as general manager because it did so pursuant to a power that was expressly granted to it by the parties' contracts.

Smith's breach of contract claim relating to the stock agreement was based on the allegation that Chrysler acted in bad faith conduct and contravention of state and federal law when he was removed from his position as general manager. Chrysler argued that it acted appropriately because the parties' contracts expressly set forth his status as an at-will employee. The court noted, however, that if Smith met the definition of a franchisee under the Arizona Dealer Statute, an issue yet to be resolved, the at-will employment provision would be invalid because the statute only permits franchise terminations for good cause. Nonetheless, the court held that Smith's remedies for Chrysler's purported termination were limited to those set forth in the statutes and not the parties' contracts, which expressly granted Chrysler the authority to remove Smith from his position of general manager. Accordingly, the court affirmed the dismissal of Smith's breach of contract claim.

Finally, although the parties' contracts called for the application of Michigan law to any dispute, the court declined to address Chrysler's argument that Smith's claim for breach of the implied covenant of good faith and fair dealing must be dismissed because Michigan law does not provide for an independent cause of action for breach of the duty of good faith. Instead, the court simply cited to the general proposition that a party that is granted sole discretion to act must exercise that discretion in good faith. Because Chrysler had retained sole discretion to decide whether to terminate Smith as general manager, it had a duty to exercise that discretion in good faith. The court left open the question of the applicable state law for a future determination and reversed the trial court's dismissal of Smith's claim for breach of the duty of good faith.

***W & D Imports, Inc. v. Lia*, Bus. Franchise Guide (CCH) ¶ 15,271, No. 13-1983-CV, 2014 WL 1465383 (2d Cir. Apr. 16, 2014)**
This case is discussed under the topic heading "Encroachment."

***Wilson v. GoWaiter Franchise Holdings, LLC*, Bus. Franchise Guide (CCH) ¶ 15,270, No. 1:13-cv-01054, 2014 WL 1092307 (N.D. Ga. Mar. 18, 2014)**
This case is discussed under the topic heading "Class Actions."

TERMINATION AND NONRENEWAL

***Agar Truck Sales, Inc. v. Daimler Trucks N.A., LLC*, Bus. Franchise Guide (CCH) ¶ 15,253, No. 13-CV-5471 NSR, 2014 WL 1318383 (S.D.N.Y. Apr. 1, 2014)**
This case is discussed under the topic heading "Contract Issues."

***Am. Dairy Queen Corp. v. YS&J Enters., Inc.*, Bus. Franchise Guide (CCH) ¶15,254, No. 5:14-CV-151-BR, 2014 WL 1327017 (E.D.N.C. Apr. 2, 2014)**
This case is discussed under the topic heading "Injunctive Relief."

Charles Mach. Works, Inc. v. Valley Ditch Witch, Inc., Bus. Franchise Guide ¶ 15,287, CIV-13-651-M, 2014 WL 1745059 (W.D. Okla. May 1, 2014)

Charles Machine Works, Inc. (plaintiff) filed an action seeking declaratory relief in a matter stemming from a dispute over plaintiff's rights concerning renewal of an agreement with Valley Ditch Witch, Inc. (defendant). Plaintiff, an Oklahoma corporation, entered into a dealer agreement with defendant, a Texas corporation, under which defendant established a dealership in Texas to sell plaintiff's parts and equipment. The relationship spanned decades, including several renewal agreements, but the current dispute arose over the latest agreement, which effectively ended on June 30, 2013. The agreement referenced a separate document that determined choice of law and venue and included a provision allowing for nonrenewal without cause. On May 29, 2013, plaintiff informed defendant that it would not renew the dealer agreement. Plaintiff filed this action in the U.S. District Court for the Western District of Oklahoma seeking declaratory relief concerning whether plaintiff had the right to not renew its agreement with defendant without cause or, alternatively, whether plaintiff had justified cause to not to renew the agreement between the parties. Defendant moved to dismiss plaintiff's action based upon Federal Rules of Civil Procedure 12(b)(2), 12(b)(3), 12(b)(6), and 12(c). The court denied in part and granted in part defendant's motion to dismiss plaintiff's complaint.

Defendant first contended that the court lacked personal jurisdiction over defendant. After careful review of plaintiff's complaint and the parties' responses, the court determined that defendant had sufficient minimum contacts with the State of Oklahoma to establish specific personal jurisdiction over defendant. The court based its decision on the facts that defendant had a thirty-year business relationship with plaintiff in Oklahoma, the millions of dollars of Oklahoma manufactured products that defendant had purchased over decades, as well as the numerous trips to the state by defendant's personnel for training and conferences in furtherance of the business relationship between the parties. Accordingly, the court rejected defendant's motion to dismiss plaintiff's complaint for lack of personal jurisdiction.

Defendant also moved the court to transfer the case to Texas, alleging that venue in the Oklahoma court was improper. The court found that defendant failed to establish the three necessary elements that would warrant a transfer. The defendant failed to show that the action could have been brought in the alternate forum, the existing forum was inconvenient, and the interests of justice would have been better served in the alternate forum. The court further provided that while it was true that defendant's sales and services took place in Texas, it was also true that these products were manufactured in Oklahoma, defendant purchased them in Oklahoma, defendant's work force attended training sessions in Oklahoma, and the dealer agreement gave plaintiff some control over defendant's business decisions. Accordingly, the court denied defendant's request to transfer the action to Texas.

Next, defendant moved to dismiss plaintiff's request for declaratory relief pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(c). Plaintiff pled, in the alternative, that it elected to not renew the dealer agreement for cause, a position with which defendant vehemently disagreed. Because of this controversy, the court determined that whether plaintiff had cause to not renew the agreement was still at issue and denied defendant's motions to dismiss plaintiff's claim. However, the court noted that under the then current version of the Fair Practices of Equipment Manufacturers, Distributors, Wholesalers and Dealers Act that was in place when the parties signed their agreement, suppliers were prohibited from terminating or failing to renew dealer agreements without cause. Therefore, the language in the dealer agreement providing plaintiff the right of nonrenewal without cause is in violation of Oklahoma law and thus unenforceable. Accordingly, the court granted defendant's motion to dismiss plaintiff's request for declaratory relief that it could elect to not renew the dealer agreement without cause.

Lastly, the court denied defendant's motion in the alternative for the court to decline to exercise its remedial powers under the Declaratory Judgment Act.

***Jack in the Box, Inc. v. Mehta*, Bus. Franchise Guide (CCH) ¶ 15,274, Case No. 5:13-CV-04444, 2014 WL 2069530 (N.D. Cal. May 19, 2014)**
This action involved the efforts of the franchisor of the Jack in the Box system to proceed with a private foreclosure with GE Capital Bank (GECB), the principal lender of a terminated franchisee that breached franchise and lease agreements by not making timely payments. Deepak Mehta and certain related parties had their franchise agreements terminated in September 2013. Jack in the Box (JIB) then filed an action alleging breach of contract, claim and delivery, and violation of certain state laws.

GECB, which had loaned $9 million to defendants, sought to intervene in the action filed by JIB shortly before a hearing on a temporary restraining order. The U.S. District Court for the Northern District of California entered an order permitting JIB to take over operation of the restaurant (the turnover order). JIB and GECB then sought approval from the court to engage in a private foreclosure sale to permit JIB to purchase the assets from GECB. JIB and GECB previously had entered into an agreement in connection with the Mehta financing in which JIB subordinated its security interest in the Mehta collateral to GECB's security interest. JIB and GECB moved to modify the turnover order to permit their proposed sale. Mehta sought to prevent the foreclosure sale.

In reviewing the motion, the court noted that disposition of collateral must be done in a commercially reasonable manner. Dispositions are commercially reasonable if made: (1) "in the usual manner on any recognized market," or (2) "at the price current in any recognized market at" time of disposition, or (3) conforming "with reasonable commercial practices among dealers in the type of property that was the subject of the disposition." JIB made three arguments in support of the commercial reasonableness of the sale. First, the sale was between willing and able parties with JIB motivated to obtain the equipment and fixtures at the lowest price possible and GECB motivated to obtain the highest price possible to realize the best recovery on its collateral. Second, purchasing the property to maintain a going concern would likely bring a higher price than a public foreclosure sale or a sale to other private parties. Third, terms in the asset purchase agreement between JIB and GECB were consistent with UCC notice provisions.

Defendants opposed approval of the sale, arguing that JIB lacked standing to negotiate a sale because defendants still held title to the property and that a sale before a trial in this matter would be premature, violated defendants' due process rights, and was merely a disguised effort to obtain reconsideration of the turnover order. The court rejected the reconsideration argument, finding that JIB was requesting a modification of the turnover order to permit a contractual sale proceeding that was not in existence when it obtained the initial turnover order. In rejecting defendants' lack of title and due process arguments, the court noted that defendants had defaulted under their financing arrangements and GECB was now permitted to exercise its rights as a creditor under the credit agreement and the UCC. The court regarded title as a "technicality" because defendants had lost control of the disposition of the collateral under the UCC. Finally, the court rejected as speculation defendants' argument that they would obtain a higher price if permitted to negotiate with GECB over a sale of the collateral. The court concluded by modifying the turnover order to permit JIB and GECB to proceed with their private foreclosure sale under their asset purchase agreement.

***JTH Tax, Inc. v. Grabert*, Bus. Franchise Guide (CCH) ¶ 15,267, No. 2:13CV47, 2014 WL 1255278 (E.D. Va. Mar. 26, 2014)**

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

***Maaco Franchising Inc. v. Gaarder*, Bus. Franchise Guide (CCH) ¶ 15,262, No. 11-3087, 2014 WL 1123117 (E.D. Pa. Mar. 21, 2014)**

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

***Pooniwala v. Wyndham Worldwide, Corp.*, Bus. Franchise Guide ¶ 15,286, CIV. 14-778 DWF/LIB, 2014 WL 1772323 (D. Minn. May 2, 2014)**

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

***Red Roof Franchising, LLC v. Patel*, Bus. Franchise Guide ¶ 15,289, No. 13-2563, 2014 WL 1677604 (3d Cir. Apr. 29, 2014)**

This appeal arose from two breach of contract cases concerning franchise agreements entered into by appellants Aruna, Asvin, and Alpesh Patel;

their closely held companies; and franchisor Red Roof Inns, Inc. and its corporate successor, Red Roof Franchising, LLC (RRF). The franchisor brought actions against the franchisees alleging breach of the franchise agreements for failure to remit royalties. Franchisees filed counterclaims for unconscionable franchise and guarantee agreements, breach of contract, breach of covenant of good faith and fair dealing, violations of the New Jersey Franchise Practices Act (NJFPA), and wrongful conversion. The U.S. District Court for the District of New Jersey granted summary judgment in favor of the franchisor, and defendants filed consolidated appeals.

The Patels operated two Red Roof Inn franchises in New Jersey and Minnesota through their closely held corporations, AA Hospitality (AAH) and AA Hospitality Northshore (AAHN), respectively. In 2009, AAH fell into arrears with respect to the monthly royalty fees for the New Jersey franchise. On January 19, 2010, RRF mailed a written notice of default and notice of termination to AAH and Asvin and Aruna Patel (New Jersey appellants), who had personal guarantees in the franchise agreement. They failed to cure the default and on April 20, 2010, RRF sent a notice of termination of the franchise agreement. The notice indicated that the franchise had been terminated and that the franchisees were to stop using all Red Roof Inn signage and proprietary systems. RRF submitted evidence that even after the purported termination, AAH continued to operate the New Jersey business as a Red Roof Inn. By summer 2010, the Patel's Minnesota Red Roof Inn had fallen behind on royalty payments as well. This time, the Patels re-branded the location as an America's Best Value Inn. In July 2010, RRF sent a notice of termination to AAHN and Aruna and Alpesh Patel (Minnesota appellants) concerning the Minnesota franchise. Accordingly, RRF filed two complaints in federal court corresponding to each of the two franchised locations.

In both complaints, RRF brought claims seeking damages for breach of the franchise agreements and the corresponding personal guarantees by the Patels and also specific performance to terminate the franchisees' use of Red Roof Inn's intellectual property. The Patels raised affirmative defenses and filed counterclaims, mainly predicated on RRF's alleged prior material breaches of the franchise agreements. In October 2011, RRF sought partial summary judgment in both cases on its breach of contract claims and on all counterclaims. The district court granted RRF's motions for summary judgment, and on May 2, 2013, the court entered judgment against the Minnesota and New Jersey franchises in the amounts of $208,794.05 and $198,818.91, respectively. The franchisees appealed.

The New Jersey appellants argued before the Third Circuit that RRF's own material breaches of the franchise agreement excused their failure to pay royalties. However, the appellate court's review of the record indicated that the New Jersey appellants had not produced sufficient evidence to create a genuine dispute of material fact on this point. The essence of the New Jersey appellants' claims was that RRF had failed to perform its marketing obligation and maintenance of an electronic reservations system. The New Jersey appellants produced no evidence of this other than a vague, nonspecific affidavit from Asvin Patel. The appellate court concluded that it was impossible to discern whether RRF's alleged breaches were material or merely de minimis based upon the facts alleged within Patel's affidavit and, without more, the New Jersey appellants could not demonstrate a genuine dispute of material fact sufficient to preclude summary judgment. Accordingly, the appellate court found that RRF was entitled to summary judgment on all counts in the matter.

New Jersey appellants also challenged the grant of summary judgment as to their counterclaims for breach of contract. The appellate court reasserted its rationale from the breach of contract claims, stating that appellants had not provided sufficient evidence upon which a reasonable juror could find that RRF breached any obligations under the franchise agreement that resulted in damages. Thus, the appellate court affirmed the district court's granting of summary judgment in favor of RRF regarding the New Jersey appellants' breach of contract counterclaim.

Also among the counterclaims were alleged violations of the NJFPA. The New Jersey appellants argued there was a genuine dispute of material fact regarding the sufficiency of the notice of termination provided by RRF. The NJFPA requires franchisors to provide franchisees with sixty days written notice setting forth all reasons for termination before unilaterally terminating a franchise relationship. The appellants put forth that the letter RRF mailed in January of 2010 was merely a notice of default and that the April 2010 letter was the first proper notice of termination. Thus, RRF was not entitled to terminate the franchise agreement until June 2010. The court concluded that these arguments were meritless because RRF signaled an unambiguous intent to terminate the franchise agreement in its January 19, 2010, letter, and the termination letter on April 20, 2010, had satisfied the necessary notice obligation required by the NJFPA. The appellate court, therefore, affirmed the district court's summary judgment in favor of RRF on the New Jersey appellants' counterclaims for violations of the NJFPA.

Lastly, the appellate court considered the Minnesota appellants' challenge to the district court's summary judgment order. Inexplicably, the Minnesota appellants made no reference to the alleged breaches of the Minnesota franchise agreement by RRF, nor did they cite to Minnesota law, the Minnesota franchise agreement, the affidavit of Alpesh Patel, or any other item of evidence relating specifically to the Minnesota franchise case. The entirety of the Minnesota appellants' legal argument was found in the following statement: "In Alpesh Patel's case, the arguments are the same as presented in [the New Jersey appellants'] brief, except that arguments regarding the NJFPA do not apply." The appellate court acknowledged that in consolidated appeals there is room for incorporation by reference in the interest of efficiency; however, an appeal from summary judgment should include some discussion of, or reference to, the relevant facts, jurisprudence, or even some mention of the breaches of the franchise agreement. Considering that the Minnesota appellants argued none of the above, the appellate court affirmed the district court's summary judgment order in favor of RRF.

***Smith v. Chrysler Grp. LLC*, Bus. Franchise Guide (CCH) ¶ 15,281, No. CV-13-01732-PHX-NVW, 2014 WL 1577515 (D. Ariz. Apr. 18, 2014)**

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

***Sunni, LLC v. Edible Arrangements, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,261, No. 14 Civ. 461 (KPF), 2014 WL 1226210 (S.D.N.Y. Mar. 25, 2014)**

The plaintiff in this case operated three franchises under agreements with defendant Edible Arrangements, Inc. (EA). Each of the franchise agreements, executed in 2003, 2006, and 2009, contained a ten-year term. The franchise agreements granted EA a right to terminate the agreements before the expiration of the ten-year term if the franchisee or any of its owners "is or has been convicted of or pleads guilty to a felony."

In January 2012, plaintiff Sammy Hinnawi pleaded guilty in New York State Supreme Court to two felonies for falsifying his tax returns and stealing sales tax revenues. When EA first became aware of plaintiff's legal troubles in June 2012, one of its corporate officers requested a copy of the plea agreement. Plaintiff provided an unsigned, incomplete version of his plea agreement that omitted several pages, including his allocution, and was dated several days before his actual guilty plea. Consequently, the version plaintiff provided did not disclose, among other things, that plaintiff had stolen sales tax revenues from his franchised businesses. EA's corporate officer was unable to obtain a final version of the plea agreement so he forwarded the incomplete version to EA's finance department.

After nearly a year of inaction, EA approached plaintiff about possible renewal of his first franchise in May 2013. Plaintiff was informed that his franchise did not meet system standards and he would need to bring it into compliance in order to be eligible for renewal. As a result, plaintiff purportedly invested some capital to make the required improvements. In June 2013, the parties again discussed the issue of the criminal plea agreement, and plaintiff again promised to deliver a completed copy. Shortly thereafter, EA sent plaintiff renewal paperwork seeking to confirm his desire and intent to renew the relationship. Plaintiff returned the paperwork acknowledging his desire to renew for another ten-year term. In August 2013, EA sent plaintiff an unsigned version of a new franchise agreement, along with a letter that directed him not to sign the documents until the closing date in October 2013. EA also made several additional requests for copies of the completed plea agreement. Plaintiff finally provided a copy of the plea agreement in September 2013. Shortly after receiving the complete, signed version of the plea agreement, EA sent plaintiff notice that it would not renew his expiring franchise agreements and further that it was terminating his two other franchises.

Plaintiff attempted to sell his interests in the franchises in lieu of termination, but when the proposed purchasers requested that plaintiff be allowed to participate in the operation of the business as a consultant, EA refused to allow the sales. Plaintiff then sought to arbitrate the dispute. Before the arbitrator could render a decision, EA notified plaintiff that it planned to terminate the franchisee's access to EA's online ordering system. In response to EA's threat, plaintiff filed an action seeking injunctive relief in New York State Supreme Court and immediately moved for a preliminary injunction to prevent EA from terminating his access to the online ordering system pending completion of the arbitration. EA removed the case to the U.S. District Court for the Southern District of New York.

Plaintiff moved to remand the case to state court, arguing that the relief sought in the state court was injunctive, not monetary, and therefore EA could not satisfy the amount in controversy requirement for diversity jurisdiction. The court rejected plaintiff's argument, noting that he had argued before the state court that in the absence of his requested injunctive relief, he would suffer "hundreds of thousands" of dollars in damages. The court also noted that EA had submitted evidence demonstrating that the monthly revenue for plaintiff's stores, when calculated over the period of the requested injunctive relief, greatly exceeded the jurisdictional minimum.

In addition, the court denied plaintiff's motion for a preliminary injunction. The court held that plaintiff could not show irreparable harm because EA intended to exercise its contractual right to assume management of plaintiff's franchises during the pendency of the arbitration and therefore the stores would not lose their leases or employees. The court also held that plaintiff had failed to present any evidence of the purported irreparable harm that would result if EA cut off plaintiff's access to the online ordering system. At best, plaintiff's evidentiary submissions showed only that he would suffer financially, but financial injury that is compensable monetarily is not irreparable.

In addition to finding no evidence of irreparable harm, the court also concluded that plaintiff had failed to show two other essential elements for injunctive relief: likelihood of success on the merits and serious questions going to the merits. Plaintiff offered no evidence to show that EA had waived its right to terminate the franchise agreement when it failed to terminate immediately after it received an incomplete copy of the plea agreement in June 2012, because the agreements expressly provided that the failure to act would not be deemed a waiver of any rights; further, EA had a company policy of terminating only after receiving final copies of a plea agreement. The court also found that the parties had never reached a definitive agreement on renewal of the expiring franchise. EA had expressly instructed plaintiff not to sign the proposed renewal before the closing date in order to allow EA to complete its investigation. Accordingly, when EA finally received a copy of the plea agreement in September 2013, it was within its rights to decline to renew.

TORTIOUS INTERFERENCE

***Mitchell Enters., Inc. v. Mr. Elec. Corp.*, Bus. Franchise Guide (CCH) ¶ 15,275, No. CV 11-0537, 2014 WL 1365903 (D. Idaho Apr. 7, 2014)**
This case is discussed under the topic heading "Trade Secrets."

TRADEMARK INFRINGEMENT

***Am. Dairy Queen Corp. v. YS&J Enters., Inc.*, Bus. Franchise Guide (CCH) ¶ 15,254, No. 5:14-CV-151-BR, 2014 WL 1327017 (E.D.N.C. Apr. 2, 2014)**
This case is discussed under the topic heading "Injunctive Relief."

***Anytime Fitness, LLC v. Edinburgh Fitness LLC*, Bus. Franchise Guide (CCH) ¶ 15,272, Civil No. 14-348, 2014 WL 1415081 (D. Minn. Apr. 11, 2014)**
This case is discussed under the topic heading "Injunctive Relief."

***MPC Franchise, LLC v. Tarntino*, Bus. Franchise Guide ¶ 15,290, 11-CV-6310 CJS, 2014 WL 1920531 (W.D.N.Y. May 14, 2014)**
MPC Franchise, LLC and MP Cleary, Inc. (plaintiffs) brought an action in the U.S. District Court for the Western District of New York against Brent Tarntino (defendant) alleging infringement of the "Pudgie's" trademark, seeking a declaration that defendant had no ownership interest in the mark and had committed trademark infringement and unfair competition as well as cancellation of defendant's trademark registration on grounds of fraud. Defendant filed counterclaims for trademark infringement, unfair competition, and common law trademark infringement pertaining to the Pudgie's trademark; defendant also counterclaimed for unfair competition and injury to its business reputation under New York law. Both parties moved for summary judgment.

In the 1960s, the Cleary brothers opened three Pudgie's pizza parlors in Northside Elmira, Southside Elmira, and Elmira Heights, New York. In 1972, they formed Pudgie's Pizza Franchising Corporation (PPFC) for the purpose of licensing the Pudgie's mark. Subsequently, PPFC entered into numerous franchise agreements, allowing franchisees to use the Pudgie's name in connection with pizza parlors in New York and other states. In 1973, the Cleary brothers' sister, Bernadette Tarntino, entered into a franchise agreement with PPFC to license the Pudgie's mark and operate a Pudgie's pizza franchise in the Village of Horseheads, just outside of Elmira.

PPFC obtained a federal registration of the Pudgie's mark in 1978, only to have it canceled in 1985 by the U.S. Patent and Trademark Office (USPTO) for failure to file a required declaration. Nonetheless, PPFC continued to operate its chain of Pudgie's Pizza franchises with the unregistered Pudgie's mark. In 1990, one of the Cleary brothers died and left the ownership rights of the Southside Pudgie's to his family's company, plaintiff MP Cleary, Inc. (MP Cleary). Bernadette's franchise agreement terminated in July 1993. PPFC dissolved in September 1993. Thereafter, the former PPFC franchisees, including Bernadette, continued to operate their individual Pudgie's pizza parlors as independent businesses, not pursuant to any franchise or licensing agreement and without a federally registered trademark.

MP Cleary sought to obtain a federal registration of the Pudgie's mark in 2004, but determined that another company, TruFoods, already owned the federal registration for the mark. In July 2004, TruFoods and MP Cleary entered into a trademark license agreement that provided MP Cleary a non-exclusive, perpetual, and transferable right to use the Pudgie's mark. The license agreement also afforded MP Cleary the right to commence or defend litigation regarding the Pudgie's trademark. In 2009, MP Cleary began selling new Pudgie's pizzeria franchises through its newly formed franchising company MPC Franchise, LLC.

Meanwhile, Bernadette Tarntino died in 2007 and her three children, one of whom is defendant Brent Tarntino, inherited her stock in counter-plaintiff Pudgie's Pizza Corporation–Horseheads, Inc., which still owned and operated the Pudgie's pizzeria located in Horseheads. Tarntino, in his individual capacity, filed a federal trademark application with the USPTO for the Pudgie's mark in July 2010, which the PTO approved on February 22, 2011.

Within a month of receiving his federal registration, Tarntino contacted plaintiffs' franchisees and informed them that he was the true owner of the Pudgie's mark and that he was claiming rights to any further territories for the brand. Plaintiffs then commenced this action against Brent Tarntino, individually, and Tarntino and counter-plaintiff Pudgie's Pizza Corporation–Horseheads, Inc. filed their counter claims in-kind.

Plaintiffs asserted three claims under the Lanham Act. Plaintiffs' first claim sought a declaratory judgment setting forth the parties' respective rights, including ownership of the Pudgie's mark, in light of the concurrent registration of the marks by TruFoods and Tarntino. Plaintiffs' second claim sought to cancel Tarntino's federal registration because it was obtained by fraud and because it was confusingly similar to the TruFoods mark. Plaintiffs' final claim alleged that Tarntino was committing trademark infringement and unfair competition regarding TruFoods' Pudgie's mark, in connection with his use of his registered mark to franchise new Pudgie's restaurants. Tarntino argued that plaintiffs lacked standing to pursue any of these claims, except the allegation that Tarntino had acquired his trademark registration through fraud.

Citing recent rulings from the Second Circuit, the court held that plaintiffs, as non-exclusive licensees, lacked standing to pursue claims concerning ownership or infringement of TruFoods' registered mark and therefore also lacked standing to seek declaratory judgment of ownership of the Pudgie's mark. Moreover, the court determined that plaintiffs cannot gain statutory standing merely because TruFoods agreed, as part of the licensing agreement, that plaintiffs may pursue this action on TruFoods' behalf. Accordingly, the court held that defendant was entitled to summary judgment on plaintiffs' first cause of action for declaratory judgment and partial summary judgment on plaintiffs' third cause of action for trademark infringement.

Nonetheless, the court determined that plaintiffs' lack of standing as a licensee to sue for infringement or declaratory judgment of proper ownership did not impair their ability to seek cancellation of Tarntino's trademark registration on the grounds that it was obtained by fraud or because it is confusingly similar to the TruFoods mark. Concerning the issue of fraud, the court found that Tarntino failed to raise a triable issue of fact as to his intent or to any other element of plaintiffs' fraud claim because he failed to provide a good faith basis to claim that he either owned the Pudgie's mark or had superior rights to the mark when he filed his USPTO trademark application. However, the court denied plaintiffs' motion for summary judgment to cancel Tarntino's trademark based upon priority of use and likelihood of confusion because there was an issue of fact as to which party's predecessor could properly claim priority use of the mark. Finally, the court granted Tarntino's application for summary judgment on plaintiffs' claim for unfair competition because plaintiffs failed to establish the elements of an unfair competition claim under either state or federal law.

Lastly, the court considered Tarntino's counterclaims. Tarntino's counterclaim for trademark infringement was dismissed as moot because the court previously determined that his trademark was to be canceled due to fraud. The court also denied Tarntino's counterclaim for a declaration of non-infringement against the TruFoods mark because TruFoods was not a present party to this lawsuit. Tarntino's remaining counterclaims for federal unfair competition, common law trademark infringement, and unfair competition and injury to business reputation under state law all revolved around whether plaintiffs' or Tarntino's predecessors first began using the Pudgie's brand in Elmira Heights, New York. The court denied Tarntino's motion for summary judgment on all three counterclaims because there were triable issues of fact as to who possessed senior rights to use the Pudgie's mark in Elmira Heights.

TRADE SECRETS

***Mitchell Enters., Inc. v. Mr. Elec. Corp.*, Bus. Franchise Guide (CCH) ¶ 15,275, No. CV 11-0537, 2014 WL 1365903 (D. Idaho Apr. 7, 2014)**
Mitchell Enterprises (Mitchell) was an electrical contractor that developed a copyrighted software system to manage its business records. Mitchell then became a franchisee of the Mr. Electric system. Mitchell claimed that Mr. Electric agreed that after becoming a franchisee Mitchell could continue to develop its software system as a separate business opportunity and use this software system in its business rather than using Mr. Electric's ZWARE software system.

Problems developed in the franchise relationship with Mitchell complaining that "Mr. Electric's alleged inadequate support and pricing structure" resulted in finance problems. Despite Mitchell's contention that it could continue to use its software system after becoming a Mr. Electric franchisee, Mitchell had signed a license and maintenance agreement licensing the ZWARE software from Mr. Electric and agreeing to cooperate in installing and supporting it on Mitchell's system.

On the same day that Mitchell expressed its frustrations to Mr. Electric, when Mrs. Mitchell allegedly sought to remotely access Mitchell's computer system from her home computer, she observed what appeared to be the copying of certain files from the Mitchell system from another remote location. The Mitchells then lost access to the Mitchell Electric computer network and the Mitchell software system and found that the Mitchell's home computers, including those of their children, had crashed. Mitchell hired a computer forensics company to investigate. Mitchell claimed the expert determined that the ZWARE system had attempted to connect to thirteen hard drives on the computer network of Mitchell Electric, that the investigator found a number of link files in the server that referenced ZWARE and Mr. Electric, and that Mr. Electric had used ZWARE software to gain unauthorized access to the Mitchell computers.

Mitchell brought this action alleging violation of the Computer Fraud and Abuse Act (CFAA), violations of the Idaho Trade Secrets Act, conversion, and tortious interference. Mr. Electric sought summary judgment and argued that Mitchell had not produced evidence to establish that Mr. Electric had gained unauthorized access to the Mitchell computers or, assuming it had gained access, that it caused any damage, converted or used any data or software, or interfered with or harmed any of Mitchell's potential or actual economic relationships.

In ruling on Mr. Electric's motion for summary judgment, the court first determined that Mitchell's CFAA claim was barred by the statute of limitations. The applicable two-year statute of limitations began on "the date of the act complained of or the date of the discovery of the damage." Mitchell filed its complaint on November 4, 2011. Mr. Electric alleged that Mitchell was aware of the damage to the computers and suspected that Mr. Electric's software was the cause on either August 23 or August 24, 2009. Mitchell argued that its CFAA claim did not "accrue" until November 5, 2009, when it received the first report from its forensic expert. The court rejected Mitchell's argument, stating that a CFAA claim must be filed within two years after "discovering any impairment to the integrity or availability of data, a program, a system or information." The court found that adopting Mitchell's argument "would create a wandering line in the application of the statute of limitations."

In rejecting Mitchell's claim under the Idaho Trade Secrets Act, the court said Mitchell failed to show that Mr. Electric "either disclosed or used the alleged trade secrets." The court noted that Mitchell's arguments were based on circumstantial evidence based on the fact that it had not experienced any computer issues or unusual activity until after Mr. Electric installed ZWARE software. The court said that at first blush this might show the existence of a material issue of fact regarding Mr. Electric's acquisition of trade secrets, but upon further examination Mitchell's arguments did not hold up.

The court noted that Mitchell's arguments relied heavily on the declaration of its computer expert, Dylan Evans, but that Evans' declaration on these issues was not as conclusive as Mitchell contended. The court extensively reviewed this declaration and noted that Evans deferred on multiple occasions from finding that the ZWARE software was responsible for the damage to the Mitchell computers. In addition, Evans testified that he disagreed with Mrs. Mitchell's subjective belief that the ZWARE software accessed and damaged Mitchell's computers. Thus the court concluded that Evans' opinions did not support Mitchell's assertions that Mr. Electric had acquired or misappropriated Mitchell's trade secrets.

After finding no issues of material fact regarding the Mitchell's trade secrets claim, the court said that for the same reasons that Mitchell could not support its trade secret claim, it also could not show that Mr. Electric had converted its information. Finally, the court examined the elements of a tortious interference claim under Idaho law. Mitchell relied on the very same evidence it had used to argue against dismissal of the trade secrets and conversion claims. That approach fared no better in connection with the conversation claim than with the other claims, because the court rejected Mitchell's tortious interference claim.

TRANSFERS

***Charles Mach. Works, Inc. v. Valley Ditch Witch, Inc.*, Bus. Franchise Guide ¶ 15,287, CIV-13-651-M, 2014 WL 1745059 (W.D. Okla. May 1, 2014)**

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

***Miller v. CareMinders Home Care, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,288, 13-CV-5678 JAP, 2014 WL 1779362 (D.N.J. Apr. 30, 2014)**
This case is discussed under the topic heading "Arbitration."

UNFAIR COMPETITION/UNFAIR AND DECEPTIVE PRACTICES

***Bartholomew v. Burger King Corp.*, Bus. Franchise Guide (CCH) ¶ 15,248, CIV. 11-00613 JMS/RL, 2014 WL 1414975 (D. Haw. May 13, 2014)**
This tort action arising from an incident in which plaintiff Clark Bartholomew allegedly sustained injuries from eating a Triple Whopper sandwich imbedded with two needle-shaped metal objects at a Burger King restaurant franchised to defendant Army and Air Force Exchange Service (AAFES). Plaintiffs (Bartholomew, his wife, and son) alleged tortious conduct by defendants (Burger King Corporation; AAFES; and CTI Foods Holding Company, the hamburger patty supplier) alleging negligence, in addition to claims of strict products liability, breach of implied warranty, and failure to warn.

Plaintiffs first filed the action on October 12, 2011. On February 19, 2013, Burger King filed a third party complaint against AAFES, after which AAFES filed a cross-claim against CTI and a counterclaim against Burger King on August 9, 2013. On September 7, 2013, plaintiffs filed an amended complaint that added a claim against Burger King for unfair or deceptive practices under Hawaii Revised Statutes (HRS) Chapter 480. On February 3, 2014, Burger King filed its motion for summary judgment, and plaintiffs replied in opposition on March 3, 2014. Finding genuine issues of material fact to be determined for each of plaintiffs' claims, the U.S. District Court for the District of Hawaii ultimately denied Burger King's motion for summary judgment without a hearing.

The thrust of Burger King's motion was that a franchisor may not be held liable for injuries arising from the consumption of a sandwich produced by a franchisee. Although Hawaii recognizes tort liability for franchisors, Hawaii has very little case law that specifically addresses the issue or provides exact parameters for such liability. Nevertheless, there is jurisprudence within other jurisdictions that describes the well-accepted general principles of franchisor liability. As such, the court relied on precedent from other jurisdictions to predict how the Hawaii Supreme Court would interpret the law in the instant action. Courts in other jurisdictions have found that franchisors may be liable where they control or have the right to control day-to-day operations of the franchisee sufficient to establish an agency relationship. Courts have also found franchisors liable where they have control of, or the right to control, the specific instrumentality of the harm. Here, the court concluded that the Hawaii Supreme Court would have embraced a test that focused on the nexus between the franchisor's control and the instrumentality of the harm.

Burger King argued that it cannot be held liable for plaintiffs' counts of negligence because it had no control over the franchisee's restaurant. According to plaintiffs' allegations, Burger King had strict specifications regarding the preparation of the Triple Whopper as well as the ingredients supplied. These contentions were supported by various provisions in the franchise agreement where Burger King included detailed instructions for assembling the Whoper, as well as requirements regarding what products, supplies, and equipment was authorized for use in the restaurant. Burger King maintained its position that the language within the agreement holds the franchisee responsible for the day-to-day operation of the business. However, the court recognized that a disclaimer of agency in a franchise agreement will not defeat liability where the circumstances indicate that the requisite control exists. Based upon the facts presented by plaintiffs, the court denied summary judgment for Burger King regarding its alleged negligence. The court concluded that there was a clear issue of material fact as to whether Burger King retained the requisite control over the Triple Whopper consumed by Bartholomew. The court similarly denied Burger King's motion for summary judgment regarding plaintiffs' products liability claims because Burger King's degree of control over the franchisee and the instrumentality in question (the Triple Whopper) were essential elements of plaintiffs' products liability claims, which have yet to be determined.

Next, the court considered whether questions of fact precluded summary judgment for Burger King on plaintiffs' apparent agency theory. The franchise agreement disavowed any agency relationship between Burger King and AAFES, but the court did not find this to be dispositive. The court found that other manifestations of control, such as the branding efforts of Burger King, the potential lack of AAFES signage at the restaurant, and the appearance of the Burger King logo throughout the premises, could lead a fact finder to conclude that the plaintiffs justifiably relied upon an apparent agency relationship between Burger King and AAFES. Accordingly, the court concluded that these claims were not properly situated for summary judgment at this stage of the litigation.

Finally, plaintiff alleged that Burger King engaged in a deceptive act or practice under Chapter 480 when it misrepresented its status as a franchisor by displaying its logo and failing to put plaintiffs on adequate notice that Burger King was not the actual operator of the AAFES restaurant. Burger King argued that the court should presume that AAFES posted signs to elucidate that AAFES operated the restaurant. However, the court found that there remained questions of fact concerning whether Burger King's actions were deceptive under Chapter 480 and denied Burger King's motion for summary judgment on this issue.

***Cornelis v. B&J Smith Assocs., LLC*, Bus. Franchise Guide (CCH) ¶ 15,283, 2014 WL 1828891 (D. Ariz. May 8, 2014)**

This case is discussed under the topic heading "Corporate Veil Piercing."

***FTC v. Wyndham Worldwide Corp.*, Bus. Franchise Guide (CCH) ¶ 15,249, CIV.A. 13-1887 ES, 2014 WL 1349019 (D.N.J. June 23, 2014)**
This case is discussed under the topic heading "Fraud."

***Los Felix Ford, Inc. v. Chrysler Grp., LLC*, Bus. Franchise Guide (CCH) ¶ 15,279, No. 12-56082, 2014 WL 1623697 (9th Cir. Apr. 24, 2014)**
This case is discussed under the topic heading "Statutory Claims."

VICARIOUS LIABILITY

***Bartholomew v. Burger King Corp.*, Bus. Franchise Guide (CCH) ¶ 15,248, CIV. 11-00613 JMS/RL, 2014 WL 1414975 (D. Haw. May 13, 2014)**
This case is discussed under the topic heading "Unfair Competition/Unfair and Deceptive Practices."

***Bright v. Sandstone Hosp., LLC*, Bus. Franchise Guide (CCH) ¶ 15,258, 755 S.E.2d 899 (Ga. Ct. App. Mar. 26, 2014)**
Plaintiff in this action was injured while he was a guest at a hotel that was owned and operated by franchisee Sandstone Hospitality, LLC (Sandstone) under a franchise agreement with franchisor Wingate International Inns, Inc. (Wingate). The injury occurred when the grab bar that plaintiff was holding while attempting to get out of the bath tub ripped from the wall, causing him to fall and strike his head and back. Plaintiff brought personal injury claims against both Wingate and Sandstone. Plaintiff alleged that Sandstone was liable as the owner of the premises for negligently repairing the grab bar, or alternatively, for defective construction. Plaintiff alleged that Wingate was liable for Sandstone's negligence under an apparent agency theory or, alternatively, because Wingate owed a duty of care to plaintiff arising out of the franchise agreement, pursuant to which Wingate conducted a program of quality assurance inspections. The trial court granted summary judgment to defendants, and plaintiff appealed.

On appeal, the Georgia Court of Appeals held that to establish apparent agency under Georgia law, it was not sufficient that plaintiff subjectively believe that an agency relationship existed. Instead, a plaintiff seeking to impose liability on a principal for the negligence of an agent must show that (1) the alleged principal held out another as its agent, (2) plaintiff justifiably relied on the care and skill of the alleged agent based on the principal's representation, and (3) the justifiable reliance led to the injury. On the first required element, plaintiff argued that Wingate held out Sandstone as its agent, because the provisions in the franchise agreement required Sandstone to display Wingate's approved signage. The court rejected plaintiff's argument, noting that under Georgia law, the mere display of signs or trademarks is insufficient to establish apparent agency. The court further noted that the undisputed facts showed that the hotel front desk displayed a sign that stated that the hotel was "owned and operated by Sandstone Hospitality LLC." Based on those facts, the court concluded that the trial court had properly granted summary judgment in favor of Wingate on the issue of apparent agency.

The court also held that for plaintiff to prevail on its alternative contention that Wingate owed plaintiff a duty of care based on the quality assurance inspection program in the franchise agreement, plaintiff needed to show that it was a third party beneficiary to the franchise agreement. But the evidence in the record reflected that the inspections performed by Wingate under the quality assurance program examined only cosmetic aspects of the hotel, such as whether the grab bars were rusty and not safety or functional aspects. In addition, the franchise agreement contained an express provision disclaiming any intention to confer benefits on any third parties. Accordingly, the court concluded that plaintiff was not a third party beneficiary to the franchise agreement, and affirmed the trial court's dismissal on that claim as well.

Although the court affirmed the dismissal of all of the claims against Wingate, Sandstone was not so fortunate. Sandstone's general manager testified that while she had no knowledge of any instances of grab bars coming loose or needing adjustment or replacement, she believed that there may have been one instance during Sandstone's operation of the hotel when Sandstone had repaired a defective grab bar. In addition, plaintiff's expert testified that the grab bar was defectively installed. The court construed in the light most favorable to plaintiff and held there was a genuine issue of material fact as to whether Sandstone had previously repaired or replaced the grab bar that failed, causing plaintiff's injuries. Accordingly, the court reversed the trial court's entry of summary judgment in favor of Sandstone on plaintiff's negligence and defective construction claims and remanded the case for trial.