# Franchising (& Distribution) Currents

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## ANTITRUST

***Partner & Partner, Inc. v. Exxonmobil Oil Corp.*, No. 08-1590, 2009 WL 1184796, Bus. Franchise Guide (CCH) ¶ 14,154 (6th Cir. May 4, 2009)**

The U.S. Court of Appeals for the Sixth Circuit affirmed the district court's decision "granting summary judgment to defendants ExxonMobil Oil Corporation and Michigan Fuels, Inc., on breach of contract, antitrust, unjust enrichment, and tortious interference with advantageous business relationship claims" and denied "plaintiff's motion to amend the complaint to assert new claims of fraudulent inducement and violation of the Michigan Franchise Investment Law (MFIL)."

Plaintiff initially "entered into a lease/franchise arrangement with ExxonMobil to operate a branded gas station" in the Detroit area. "Plaintiff leased the property and purchased branded gasoline directly from ExxonMobil under [] Petroleum Marketing Practices Act (PMPA) Franchise Agreements." Four years later, ExxonMobil terminated its direct dealer relations in the region, "executing a written agreement with plaintiff to that effect," and offered plaintiff to continue buying branded gasoline through one of three approved distributors. After a meeting, "at which plaintiff contend[ed] assurances were given that newly branded stations would not be located within one mile of an existing station," plaintiff purchased the station under the terms of a new sales agreement" with ExxonMobil and entered into a PMPA Motor Fuels Dealer Franchise Agreement with McPherson Oil Company. Significantly, neither agreement included provisions that granted an exclusive geographic area to sell ExxonMobil-branded gasoline.

One year after plaintiff purchased the station, ExxonMobil approved the rebranding of a gas station, Fenkell Stop Plus, operating within one mile of plaintiff's station. Plaintiff subsequently filed suit, maintaining that the rebranding of Fenkell was a breach of the oral assurances by ExxonMobil representatives. However, the court found that evidence of the alleged promises was barred by Michigan's parol evidence rule. The court stressed that there was no mention of exclusivity in the sales agreement, and the contract had an integration clause disclaiming any previous oral representations. Similarly, the court held that plaintiff was not entitled to amend the complaint to include an allegation of fraudulent inducement because the representations were nullified by the integration clause. The alleged fraud did not invalidate either the integration clause itself or the entire contract, which was the only way plaintiff could have succeeded on its claims. The court also found that ExxonMobil could not have tortiously interfered with plaintiff's business expectancy as plaintiff could "not have a valid expectation that no Exxon station would be opened nearby" where the alleged oral assurances "were not incorporated into the fully integrated written agreements."

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The court also rejected plaintiff's claim that ExxonMobil's action was an unreasonable restraint on trade in violation of the Sherman Act. Plaintiff was required to show an adverse, marketwide, anticompetitive effect resulting from a conspiracy between ExxonMobil and another distributor to restrain competition by rebranding Fenkell. However, the court found that plaintiff's losses resulting from the rebranding of Fenkell only constituted the loss of an individual competitor rather than an injury to the market as a whole. Additionally, the court found that plaintiff did not have a claim under the Michigan Antitrust Reform Act, which makes the establishment of monopolies unlawful. Plaintiff had argued that ExxonMobil monopolized the relevant market, or the stretch of road shared by Fenkell and plaintiff's station, "through the agreements that required plaintiff to buy a minimum quantity of branded gasoline from a single distributor." However, the court found that "relevant markets are generally not limited to a single manufacturer's products," and "plaintiff offered no evidence that ExxonMobil had the power to exclude competition," a necessary element for this claim. The court noted that "virtually every exclusive distributor relationship would be illegal" under plaintiff's theories.

Finally, the court did not allow plaintiff to amend its complaint to allege that ExxonMobil violated the MFIL by failing to provide it "with a statement disclosing whether the [plaintiff] would receive an exclusive territory." The court stated that no franchise relationship existed between plaintiff and ExxonMobil because the franchise relationship was "expressly terminated by written agreement, after which ExxonMobil

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had a distributorship contract with McPherson Oil. Rather, it was McPherson, which [was] not a party to the case, that had a franchise agreement with plaintiff." Plaintiff asserted, without citing authority, "that ExxonMobil [could] be liable under MFIL because McPherson Oil [was] the agent of ExxonMobil." However, the court concluded that plaintiff was not a franchisee under MFIL because it never paid a franchisee fee to McPherson. Therefore, the MFIL did not apply.

## ARBITRATION

***Bridge Fund Capital Corp. v. Fastbuck Franchise Corp.*, No. 2:08-CV-00767-MCE-EFB, 2009 WL 1325823, Bus. Franchise Guide (CCH) ¶ 14,140 (E.D. Cal. May 12, 2009)**

The U.S. District Court for the Eastern District of California granted the franchisor's motion to stay proceedings pending appeal after enforcing a Texas arbitration provision. This dispute centered on plaintiff franchisees' assertions that defendant franchisor made material misrepresentations and omissions in the sales process and that the franchisor's business model violated California law. Each franchise agreement contained an arbitration provision requiring all disputes to be resolved through arbitration, as well as choice of forum and choice of law provisions specifying Texas as the governing law and forum for dispute resolutions. The district court ruled that the choice of Texas law and forum provisions was unenforceable because California had a materially greater interest in the parties' disputes. In addition, the franchisor failed to show that franchisees' rights would be adequately protected in a Texas forum. The district court also found that the arbitration clause was unconscionable and therefore unenforceable. The franchisor appealed that ruling to the U.S. Court of Appeals for the Ninth Circuit.

After noticing its appeal, the franchisor moved for a stay of the district court proceedings pending appeal. The district court granted the franchisor's motion to stay after considering four factors: whether (1) the movant made a strong showing that it was likely to succeed on the merits; (2) the movant would be irreparably injured absent a stay; (3) a stay would substantially injure the opposing party; and (4) the public interest favored a stay.

The district court reasoned that the appeal raised substantial issues regarding the Federal Arbitration Act and California law, over which the Ninth Circuit could disagree with the district court. The second factor favored a stay because if a party "must undergo the expense and delay of trial before being able to appeal [a refusal to compel arbitration], the advantages of arbitration—speed and economy—are lost forever" (quoting Alascom Inc. v. ITT N. Elect. Co., 727 F.2d 1419 (9th Cir. 1984)). The third factor favored a stay because the parties' relationship was already over, so a stay would not substantially injure either party. Lastly, the public interest favored a stay because continuing the district court litigation pending appeal would undermine the policies of encouraging arbitration and the preservation and integrity of judicial resources.

***Johnson v. Shred-it Am., Inc.*, Am. Arbitration Ass'n No. 65 114 E 00298 08, Bus. Franchise Guide (CCH) ¶ 14,139 (Apr. 30, 2009)**

Franchisees operating a document-shredding business franchise were preliminarily enjoined by an American Arbitration Association arbitrator from using or displaying any of a franchisor's trademarks and from breaching any of the terms of a noncompetition covenant in their agreement with the franchisor. On the motion for preliminary injunction and summary adjudication, the franchisor was required to post a bond in the amount of $250,000 for the grant of its requested injunctive relief.

During the arbitration proceedings, the franchisees decided to let their franchise agreement expire. Because of their decision not to renew, the franchisees filed a summary determination motion that the noncompetition covenant could not be enforced because of a choice of California law provision in the agreement stating that "[t]his agreement shall be interpreted and construed under the laws of the State of California." California law does not generally permit noncompete clauses to be enforced.

The arbitrator found, however, that the choice of California law provision in the agreement had to be a mistake. He theorized that if the provision were to be enforced, it would invalidate a significant portion of the agreement, mainly the noncompete covenant. Thus, the arbitrator found that Florida law governed the parties' agreement and that the franchisor was likely to succeed on the merits of its request for an injunction enforcing the noncompetition provision.

The franchisees alleged that their claims of material breach against the franchisor precluded a finding that the franchisor was likely to succeed in enforcing the covenant. The arbitrator rejected that argument, stating that none of the breaches was sufficient to bar the enforcement of the noncompete clause. The franchisees added that they were proceeding with the de-identification of the franchisor's trademarks as quickly as possible and that an injunction was not necessary, but the arbitrator found that any difficulties the franchisees were having with the de-identification process were self-inflicted.

As a result, the franchisor was entitled to an immediate injunction enjoining any continued use of its marks by the franchisees and enforcing the noncompete covenant. The arbitrator concluded that the franchisees' decision not to renew the agreement was their own, and there was no reason not to hold them to the contract that they entered into ten years earlier. The franchisor's ability to maintain its goodwill, to find a replacement franchise, and to maintain its system were all jeopardized by the franchisees' election to operate independently in violation of the covenant.

***Faulkenberg v. CB Tax Franchise Sys., LP*, No. 08-CV-521-WDS, Bus. Franchise Guide (CCH) ¶ 14,105 (S.D. Ill. Mar. 24, 2009)**

This case is discussed under the topic heading "Forum Selection."

***Kam-Ko Bio-Pharm Trading Co. v. Mayne Pharma (USA) Inc.*, 560 F.3d 935, Bus. Franchise Guide (CCH) ¶ 14,095 (9th Cir. 2009)**

The Ninth Circuit held that Kam-Ko, a "company that assisted other companies in securing distribution deals . . . for anti-cancer drugs," failed to meet its burden of showing that the arbitration

  

clause in its agreement with a manufacturer was substantively unconscionable under Washington law. In so holding, the court stressed that during contract negotiations with the manufacturer, Kam-Ko itself proposed the arbitration clause that was ultimately included in the agreement. After the manufacturer terminated the parties' agreement, Kam-Ko filed suit in the district court seeking to compel arbitration. "[T]he district court ordered the dispute referred to . . . arbitration and dismissed the case without prejudice." The arbitration clause in the parties' agreement required arbitration of any dispute to be conducted by a panel of three arbitrators before the International Chamber of Commerce (ICC). Kam-Ko paid a small initial deposit to ICC, and ICC subsequently set the advance costs of arbitration of the dispute at $220,000, to be split by the parties. "Under the ICC rules, . . . Kam-Ko, as the claimant, was required to pay the entire amount due or some form of security" if the manufacturer did not pay its half for the arbitration to proceed. Neither party submitted further payments to the ICC, and Kam-Ko returned to the district court seeking a declaration "that the arbitration clause was substantively unconscionable because of the alleged unreasonable financial burden it placed on Kam-Ko as a precondition to arbitration."

The district court denied Kam-Ko's request and dismissed the case with prejudice after the parties failed to proceed to arbitration. The Ninth Circuit affirmed the district court's decision, emphasizing that Kam-Ko proposed the arbitration clause and "effectively controlled the amount of arbitration expenses and fees by the sum it chose to claim . . . and the number of arbitrators it requested." The ICC rules that Kam-Ko had in its possession "clearly indicated that arbitration expenses and fees" could have been even higher than the costs set by ICC. Kam-Ko set the sum in dispute at $2,527,000, which established arbitration expenses of $286,088 according to the tables. However, ICC set its advance fee for arbitration at just $220,000, less than the maximum cost allowable under the ICC rules. The court noted that it is well known that arbitral tribunal fees in international commercial arbitrations can be considerable. Moreover, Kam-Ko failed to provide any evidence regarding what other arbitration forums would charge to conduct the arbitration it sought or the administrative expenses that ICC would incur.

In light of the evidence, the court failed to see how the requested $220,000 arbitration fee could be characterized as "one-sided" or "shocking to the conscience" so as to be substantively unconscionable. "Although Kam-Ko cite[d] cases which [held] that high arbitration costs [could] effectively deny a plaintiff access to a forum to obtain justice and thereby render an arbitration clause unconscionable, those cases [were] distinguishable[] [because] they generally involve[d] contracts of adhesion in either a consumer or employment context." Kam-Ko cited only one commercial case, and that case was "readily distinguishable" because there "the filing fee was [] increased many times over that required by the arbitral forum by a separate 'tariff' that grossly favored the party that proposed the arbitration clause."

***PFIP, LLC & Pla-Fit Franchise, LLC v. You Fit, Inc.*, No. 08-271-JL, 2009 WL 1121359, Bus. Franchise Guide (CCH) ¶ 14,132 (D.N.H. Apr. 27, 2009)**

Defendant Rick Berks has owned and operated gyms in South Florida for almost thirty years. He was president and majority shareholder of Planet Fitness Enterprises (PFE), a Florida corporation, which owned three franchised Planet Fitness gyms located in South Florida.

Seven B-Fit, Inc., a Florida corporation half-owned by Berks, entered into a separate franchise agreement with PFIP for a Planet Fitness gym in Miami. For a period of close to a year, Berks and a high-level officer of PFIP had a series of telephone conversations discussing everything operational in dealing with running a Planet Fitness club. Berks then sold his interest in Seven B-Fit to one of his employees and less than a year later started another chain of gyms in South Florida entitled You Fit. Plaintiffs alleged that in setting up and operating the You Fit gyms, Berks made use of trade secrets he extracted from telephone conversations, breached the franchise agreement, and participated in trademark and copyright infringement.

Defendants moved to compel arbitration, and plaintiffs moved to invoke the forum selection clause contained in the franchisee agreement signed by Seven B-Fit, Inc. The district court ruled that PFIP could not invoke the New Hampshire forum selection clause and that Berks could not invoke the arbitration clause because Berks had sold his interest in his former franchise as opposed to the arbitration agreement's having been terminated or expired. Berks's sale of his interest in the franchise triggered a separate provision of the franchise agreement requiring the franchisee to assent to continue to honor certain obligations he had as an "owner" notwithstanding the sale. Neither the forum selection clause nor the arbitration clause was part of those postsale obligations. Because the agreement was not terminated or expired, the court could not enforce the dispute resolution provisions of a franchise agreement that defendant had sold and by which he was no longer bound.

## BREACH OF CONTRACT

***Bright Bay GMC Truck, Inc. v. Gen. Motors Corp.*, 593 F. Supp. 2d 495, Bus. Franchise Guide (CCH) ¶ 14,130 (E.D.N.Y. 2009)**

Plaintiff, a GMC dealer, alleged that the northeast regional manager for its franchisor, defendant General Motors, promised that plantiff would be awarded the next available GM franchise that became available on Long Island. Plaintiff claimed, however, that GM then discriminated against it in favor of another dealer. Plaintiff also alleged that GM had confirmed an intention to eliminate all stand-alone GMC dealerships, thereby making plaintiff's "stand alone GMC dealership unprofitable" and breaching the parties' agreement and the implied covenant of good faith and fair dealing. Plaintiff also alleged that GM had constructively terminated plaintiff's GMC dealership in violation of the New York Franchised Motor Vehicle Dealer Act (FMVDA).

The U.S. District Court for the Eastern District of New York dismissed plaintiff's complaint in its entirety, reasoning that the FMVDA's termination protections did not apply because plaintiff's dealership was not terminated and because GM did not coerce or attempt to coerce the "dealer to enter into an agreement or [to] act in a manner contrary to its economic interests by

  

threatening to cancel an unexpired contractual agreement." The court added that the dealer did not sufficiently allege that GM breached any provision of the parties' agreements. The court also dismissed plaintiff's good faith and fair dealing claim because Michigan law, which applied, does not recognize the claim.

***Courtesy Oldsmobile, Inc. v. Gen. Motors Corp.*, No. 07-17267, 2009 WL 1353762, Bus. Franchise Guide (CCH) ¶ 14,141 (9th Cir. May 15, 2009)**

General Motors passed another roadblock to its decision to terminate its Oldsmobile line when the Ninth Circuit affirmed a lower court's summary judgment ruling in its favor. The court ruled that GM neither breached its dealer agreement nor violated the Nevada Motor Vehicle Franchise Act when GM phased out its Oldsmobile line of vehicles.

Courtesy Oldsmobile alleged that GM violated the dealer agreement in three ways. First, it claimed that the dealer agreement gave Courtesy an absolute "opportunity to enter into a new Agreement(s) at the expiration date." But the court disagreed, finding no contract language to support that argument and that accepting that argument would render ineffective other provisions that deal with expiration. The dealer agreement expressly included language whereby GM would not extend an offer for a new dealer agreement.

Next, Courtesy argued that GM's discontinuation of the Oldsmobile line violated an article of the contract that gave Courtesy the right to achieve a reasonable return on investment. Again, the court disagreed, finding that "read in context," the phrase was "unambiguously aspirational" and did not "impose an obligation on GM." Undaunted, Courtesy argued that by discontinuing the Oldsmobile line, GM was violating its obligation to make a certain mix of models available to Courtesy. But the dealer agreement gave GM discretion over the availability and distribution of vehicles and which purchase orders it would accept. Courtesy could not provide any evidence that GM failed to fill any order that Courtesy placed during the term of the contract. Accordingly, the court granted GM's motion for summary judgment on the breach of contract claims.

The Ninth Circuit also affirmed the district court's ruling in favor of GM on the statutory claims, holding that GM's distribution of vehicles during the phase-out period was in accordance with the contract and was not an impermissible modification of the dealer agreement in violation of Nevada law. Furthermore, because the profit objective was merely aspirational, GM could not be liable for Courtesy's failure to obtain a profit due to the discontinuation of the Oldsmobile line. The court found that it was undisputed that GM complied with Nevada's statutory discontinuation procedures and that Courtesy did not protest through the administrative process.

Last, the Ninth Circuit affirmed the district court's ruling that GM's allegedly misleading statements did not constitute an unfair practice under Nevada law because the statements were not actionable as "advertising." In so holding, the court observed that the statements were not directed at the public to market Oldsmobile vehicles. Furthermore, the statements were not deceptive because they were made when GM was still trying to retain the Oldsmobile brand and before GM's decision to discontinue the line.

***Domino's Pizza Franchising LLC v. Making The Dough, Inc.*, No. 1:09-CF-0661, 2009 WL 1011584, Bus. Franchise Guide (CCH) ¶ 14,135 (M.D. Pa. Apr. 15, 2009)**

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

***Dunkin' Donuts Franchised Rests. LLC v. Kev Enters.*, No. 8:09-CV-131-T-17 MAP, 2009 WL 1587983, Bus. Franchise Guide (CCH) ¶ 14,151 (M.D. Fla. June 5, 2009)**

The U.S. District Court for the Middle District of Florida held that Dunkin' Donuts' acceptance of partial late payments from the franchisee did not prevent termination of the franchise agreements nor an injunction to enforce them.

Dunkin' Donuts and Baskin-Robbins entered into two franchise agreements with Kev Enterprises (Kev) enabling Kev to operate two combination ice cream and donut shops. Over the course of the relationship, Kev violated numerous operational requirements. It was also undisputed that Kev owed unpaid franchise and advertising fees. Ultimately, the franchisors sent termination notices and demanded that Kev cease using their trademarks. But Kev continued to operate the stores while displaying the trademarks. The franchisors sued, asserting a range of breach of contract and trademark infringement claims, and moved for a preliminary injunction to prevent continuing unauthorized use of their trademarks, trade name, and trade dress.

The court undertook the analysis for granting a preliminary injunction by first assessing the franchisors' likelihood of success on their claims. Although it was undisputed that Kev failed to timely pay amounts due, Kev argued that its consistent tardiness constituted a waiver of the franchisors' rights to terminate on that basis. The court was not persuaded. Citing nonwaiver language in the franchise agreement, the court held that the franchisors would likely prevail on this claim. Having made that determination, the court declined to address the claims regarding store operations.

The court also expressed confidence in the franchisors' likelihood of success on their trademark infringement claims. The court also cited U.S. Court of Appeals for the Eleventh Circuit precedent holding that a strong showing of confusion based on trademark infringement was a sufficient showing of irreparable harm. The court relied on the parties' acknowledgement in the franchise agreement that unauthorized use of trademarks would cause irreparable harm and that an injunction was appropriate to remedy it. The court also found that a balancing of the harms favored granting the preliminary injunction. Although Kev would lose revenue in the event of an injunction, its "self-inflicted injury" did not outweigh the ongoing damage to the franchisors' "hard-earned goodwill."

Finally, the court ruled that the public interest would not be adversely affected by the injunction. Rather, the public interest is served by preventing consumer confusion in the marketplace.

***Gen. Motors Corp. v. DealMaker, LLC*, No. 07-CV-141, 2009 WL 1310616, Bus. Franchise Guide (CCH) ¶ 14,138 (N.D.N.Y. May 8, 2009)**

General Motors sought a declaratory judgment against one of its Chevrolet dealerships that GM had the contractual right to

reject the dealer's relocation request. The dealer counterclaimed that, among other things, GM breached the parties' dealership agreement and violated § 466(1) of the New York Franchised Motor Vehicle Dealer Act (FMVDA). The parties cross-moved for summary judgment on their respective claims. The U.S. District Court for the Northern District of New York granted GM's summary judgment motion and denied the dealer's motion.

The parties' dealership agreement gave GM the discretion to deny relocation "in light of dealer network planning considerations . . . [and] pursuant to its business judgment." GM rejected the dealer's relocation request after determining that "relocation would be inappropriate due to the negative impact it would have on the overall Chevrolet dealer network and the sales at dealerships contiguous to the proposed location." The court applied Michigan law in accordance with the agreement's choice of law clause and granted summary judgment for GM on its declaratory judgment request.

The court also granted summary judgment in favor of GM on the dealer's counterclaim that relocation denial violated § 466(1) of the FMVDA's prohibition on

> unreasonable restrictions . . . relative to transfer, sale, right to renew or termination of a franchise, discipline, noncompetition covenants, site control (whether by sublease, collateral pledge of lease or otherwise), right of first refusal to purchase, option to purchase, compliance with subjective standards and assertion of legal or equitable rights with respect to its franchise or dealership.

The court agreed with GM that the "site control" restrictions in § 466(1) did not encompass relocation claims, relying in part on the existence of § 463(2)(dd), which directly addresses relocation restrictions. The dealer did not assert a claim under this alternate provision.

***Goldwell of N.J., Inc. v. KPSS, Inc.*, No. 07-3919 (KSH), 2009 WL 901158, Bus. Franchise Guide (CCH) ¶ 14,111 (D.N.J. Mar. 31, 2009)**

In a nonrenewal dispute over three distribution contracts, the course of dealing between the parties and a dispute over the formulas for calculating net sales resulted in the U.S. District Court for the District of New Jersey's finding that the New Jersey Franchise Practices Act (NJFPA) could apply extraterritorially to distribution contracts covering other states.

Defendant KPSS entered into three distribution agreements with Goldwell of New Jersey, Inc. (Mid-Atlantic) covering New Jersey, North Carolina, and a multistate area outside of New Jersey. Pursuant to each agreement, Mid-Atlantic was given the right to distribute Goldwell hair care products in the respective territories. Although the New Jersey distribution agreement required Mid-Atlantic to operate out of a place of business located in New Jersey, neither of the other two agreements did so. Each agreement not only contained a minimum sales performance requirement and prohibited Mid-Atlantic from selling competing products or switching customers to products other than Goldwell products but also included a best efforts obligation to market and sell the products.

In each agreement, "KPSS had the unfettered discretion . . . to renew or not renew." All three agreements were scheduled to expire on December 31, 2007, unless the parties signed a written extension agreement beforehand. All three agreements also stated that they would be governed by Maryland law. Both the North Carolina and multiple-state agreement expressly stated that they were separate and independent from the New Jersey agreement, and the New Jersey agreement contained a similar provision disclaiming any connection to the other two agreements. Despite their separation, at some point Mid-Atlantic started aggregating its orders, payments, and reports even though KPSS continued to ask for the reports to be separated by territory.

In July of 2007, KPSS notified Mid-Atlantic that it would not continue or extend any of the three agreements after their expiration, claiming that Mid-Atlantic had breached the agreements by not meeting the minimum sales requirements for 2006. In doing so, KPSS specifically stated that it was not terminating the agreements before their expiration dates. KPSS also indicated it would continue to comply with the agreements and expected Mid-Atlantic to do so as well.

Faced with KPSS's notice of nonrenewal, Mid-Atlantic began making other arrangements even though those arrangements violated the terms of the three agreements. Mid-Atlantic began selling competing products and stopped its best efforts in the promotion and sale of Goldwell products. Mid-Atlantic also stopped paying KPSS for the Goldwell products it did purchase, continued to miss the minimum sales quotas, and terminated sales and educational staff in violation of the agreements. Mid-Atlantic claimed that it did so because KPSS's notice of nonrenewal was an anticipatory repudiation of the agreements, thereby relieving it of its obligations. Nevertheless, despite breaching certain obligations, Mid-Atlantic did continue to order and sell some Goldwell products in each of the territories.

In August 2007, Mid-Atlantic sued KPSS on various grounds, alleging breach of contract, breach of good faith and fair dealing, and violation of the NJFPA. KPSS counterclaimed for breach of contract and trademark infringement. Both parties moved for summary judgment. KPSS argued that Mid-Atlantic's NJFPA claims failed as a matter of law, positing that the act did not apply to the distribution contracts outside of New Jersey; and even if it did, the termination was for cause and, thus, should not fall within the scope of the act. KPSS also argued that it did not initially terminate the agreements but rather indicated its intention not to renew upon expiration, and Mid-Atlantic's repudiation thereafter eliminated KPSS's liability under the NJFPA. Ruling that summary judgment on the NJFPA claims was inappropriate, the court found that there were issues of material fact with regard to the parties' conduct. Due to the aggregation of orders, payments, and reports, the court held that the three ostensibly separate distribution agreements could be treated as a single de facto agreement for activities emanating from New Jersey, and therefore within the scope of the NJFPA. It further held that Mid-Atlantic's failure to meet contractually mandated sales targets, KPSS's alleged "good cause" for terminating, was subject to a factual dispute over the appropriate sales formula. The court did, however, find, as a matter of law, that NJFPA liability could be triggered by a franchisor's unequivocal indication that it intends not to renew

  

without cause and where the franchisee treats such notice as a repudiation. It further noted that Mid-Atlantic's failure to honor contract obligations after KPSS's notice of intent not to renew did not deprive it of its NJFPA claim.

The court also addressed Mid-Atlantic's bad faith claims under applicable state common law. Seeing no fundamental policy difference between the two states on the issue of bad faith, the court applied the Maryland contractual choice of law to the parties' agreements. Noting that Maryland did not recognize an independent cause of action for breach of the implied duty of good faith, the court granted KPSS's motion for summary judgment as to the bad faith claims.

Mid-Atlantic's claim for breach of contract, under Maryland law, was similarly dismissed on summary judgment. The court was not persuaded by Mid-Atlantic's argument that the NJFPA created in every New Jersey franchise agreement an implied covenant to renew, absent cause to terminate. It held that although disputed issues of fact precluded summary judgment on the NJFPA claims, KPSS gave notice, terminated, and otherwise performed in full accordance with the parties' agreements. Thus, KPSS could not have breached the agreements.

Because KPSS's liability under the NJFPA was subject to factual dispute, the court did not grant summary judgment to KPSS on its own claim against Mid-Atlantic for breach of contract because any NJFPA liability would offset Mid-Atlantic's liability for unpaid products and absolve it of liability for its breach. Similarly, the court cited a need for additional evidence and details regarding the agreements' provisions for a transition period prior to expiration to determine Mid-Atlantic's liability, if any, under the Lanham Act.

***Greenville Funeral Supply, LLC v. Rockvale, Inc.*, 597 F. Supp. 2d 241, Bus. Franchise Guide (CCH) ¶ 14,128 (D.P.R. 2008)**

The U.S. District Court for the District of Puerto Rico's determination that a casket manufacturer terminated the distribution agreement for "just cause" under the Puerto Rico Dealer's Contracts Law buried the casket distributor's wrongful termination claims. After repeated violations of the credit limits under the distribution agreement and the delivery of numerous bad checks, Greenville Funeral Supply, a manufacturer of caskets and other funeral products, terminated its agreement with Rockvale, its exclusive distributor and sales agent for the Puerto Rico and Caribbean markets. Greenville's termination notice was sent in accordance with the distribution agreement's requirement for thirty days' prior notice. Greenville also sued Rockvale to recover amounts owed. Rockvale both defended and counterclaimed on the basis that the termination violated Puerto Rico's Law 75, designed to protect Puerto Rican distributors from arbitrary terminations. Greenville moved for summary judgment, claiming that Rockvale was not a dealer under Law 75 because the law did not protect distributors of generic products and because its termination was for just cause due to the fact that Rockvale exceeded its credit limit and failed to pay timely invoices.

The court declined to rule on whether or not Rockvale was a dealer protected by Law 75, but assumed arguendo that it was a dealer and protected by Law 75 and held that "the record amply demonstrates just cause for terminating the relationship." After an extensive review of the record evidence, the court found that credit limits and payment terms were essential obligations of the contract despite Rockvale's arguments that, prior to entering into the written agreement, Greenville had provided two credit limit increases and that the parties had experienced certain shipping delays. The court found that the agreement entered into after those events was both enshrined in the written agreement and reflected in Greenville's correspondence both before and after the agreement was executed. Accordingly, the court found that no reasonable jury could conclude that Greenville was not motivated to terminate the agreement due to Rockvale's violation of the credit limits and payment terms. Thus, the court granted Greenville's motion for summary judgment to dismiss Rockvale's counterclaim and ordered Rockvale to pay all amounts due.

***Honey Dew Assocs., Inc. v. Creighton Muscato Enters., Inc.*, 903 N.E.2d 239, Bus. Franchise Guide (CCH) ¶ 14,103 (Mass. App. Ct. 2009)**

A corporate president operating eight franchised doughnut shops through two separate companies successfully argued against the application of mandatory advertising programs for six of the shops.

Creighton Muscato served as president of both Creighton Muscato Enterprises, Inc. (CME) and Muscato Development Corporation, Inc. (MDC). CME operated six Honey Dew shops, and MDC operated two Honey Dew shops. Each of the eight shops operated pursuant to individual franchise agreements with Honey Dew Associates, Inc. (HDA). HDA sued both CME and MDC, alleging that each had failed to make required advertising contributions to HDA's centralized advertising fund. CME and MDC counterclaimed, alleging that HDA violated the FTC's Franchise Rule and Massachusetts's Little FTC Act by not providing a franchise offering circular.

The advertising contribution provision at issue only appeared in one of the eight franchise agreements, i.e., an agreement for MDC's North Shop. It required MDC to contribute to all advertising programs that were supported by a majority of Honey Dew shops. It also stated that if MDC, or any control person of MDC, operated other Honey Dew shops, then advertising contributions must also be paid by those franchises. The provision added a condition that if the additional franchisee was a different person or entity, then that additional franchisee must sign the franchise agreement containing the advertising contribution provision.

HDA argued that the advertising contribution provision applied to both MDC and CME. According to HDA, the provision bound the MDC shops because it applied to any shop owned by the franchisee that signed the first agreement. HDA argued that the provision applied to CME because CME was a control person of MDC. MDC and CME countered that the provision could not be enforced until a majority of Honey Dew shops actually voted to accept HDA's advertising program. Because there had never been a vote, they were not required to contribute. But the court distinguished "majority support" of the advertising program from a formal majority vote. Because a majority of shops "supported" the program by contributing

to it, the condition precedent was satisfied. CME responded that because it had not signed the North Shop agreement or any other agreement requiring the contribution, its six shops should not have to contribute. The court noted that MDC was plainly obligated to contribute to the fund on the basis of its assent to the North Shop agreement, which bound all MDC-owned franchises. In discussing the CME franchises, the court pointed out that even assuming that CME was a control person under the North Shop agreement, to be bound it had to also meet the second condition, i.e., signing an agreement to that effect. But only HDA and MDC, by their respective presidents, assented to the North Shop agreement's advertising terms. Thus, only HDA and MDC were bound by the advertising provision; CME was not. Although Muscato was president of both CME and MDC, he signed the North Shop agreement solely in his capacity as president of MDC.

HDA also claimed that the advertising provision applied to CME franchises by operation of a liability and cross-default provision in the franchise agreements. The court dismissed this argument because the purpose of the cross-default language was to make CME and MDC accountable for each other's defaults, not to alter what events would constitute a default.

The court concluded by addressing CME's and MDC's counterclaim, i.e., that HDA failed to provide MDC with the appropriate franchise disclosures. HDA initially admitted that it had provided no disclosures but denied the necessity of such information. Subsequently, HDA claimed to have amended its pleadings to deny the disclosure violations. However, HDA failed to introduce these amendments into evidence, so when it denied the violations in its closing argument, CME and MDC objected on the grounds that HDA strayed beyond the evidence. The court resolved the issue by remanding the case to determine whether HDA properly amended its pleadings and thus preserved its right to contest the Little FTC Act disclosure violations.

***Johnson v. Shred-it Am., Inc.*, Am. Arbitration Ass'n, No. 65 114 E 00298 08, Bus. Franchise Guide (CCH) ¶ 14,139 (Apr. 30, 2009)**

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

***Midw. Theatres Corp. v. IMAX Corp.*, No. 08-5823 (DSD/SRN), 2009 WL 649701, Bus. Franchise Guide (CCH) ¶ 14,116 (D. Minn. Mar. 11, 2009)**

This case is discussed under the topic heading "Tortious Interference."

***Reliable Tractor, Inc. v. John Deere Constr. & Forestry Co.*, No. 7:07-CV-00043-HL, 2009 WL 1620432, Bus Franchise Guide (CCH) ¶ 14,152 (M.D. Ga. June 9, 2009)**

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

***Rocky Mountain Chocolate Factory, Inc. v. SDMS, Inc.*, No. 06-CV-01212-PAB-BNB, 2009 WL 579516, Bus. Franchise Guide (CCH) ¶ 14,093 (D. Colo. Mar. 4, 2009)**

After trial, the U.S. District Court for the District of Colorado found that Rocky Mountain Chocolate Factory franchisees in San Diego, California, had materially breached their franchise agreement by failing to pay royalties, failing to make required candy purchases, and selling a competitor's products. Franchisor Rocky Mountain Chocolate Factory, Inc. (RMCF) was therefore justified in terminating the franchise agreement. The franchisor requested royalty amounts owed, interest, and costs and attorney fees, all of which were awarded.

The franchisor also requested future royalty payments and amounts for products that would have been purchased from the franchisor had the franchise relationship continued. The franchise agreement apparently had no liquidated damages provision. The court applied Colorado law in accordance with the franchise agreement's choice of law clause and rejected the franchisor's request for lost future royalty payments and lost future product purchases even though Colorado law permits recovery of future royalties where "there is sufficient reliable evidence royalties would have accrued but for defendant's breach" because the franchisor failed to establish the net profits (rather than the gross profits) that it would have received from these amounts.

The court also rejected the franchisees' counterclaim alleging fraud. The franchisees asserted that RMCF falsely stated in its Uniform Franchise Offering Circular (UFOC) that it did "not have access to nor knowledge of the expenses or costs incurred by each of the 169 franchised Stores," which information the franchisees had unsuccessfully sought before entering into their franchise agreement, because RMCF's franchise agreements gave RMCF the right to obtain franchisees' financial statements. Applying Colorado law, the court held that the franchisees could not have justifiably relied to their detriment on the UFOC's statement because "by virtue of the franchise agreement attached thereto, they had access to information which, if pursued by further inquiry, would have led to the true facts." Moreover, the UFOC also stated, among other things, that RMCF does not furnish "any oral or written information concerning the actual, average, projected, forecasted or potential sale, costs, income or profits of a franchise or prospects or chances of success that any franchisee can expect." Accordingly, "[e]ven if RMCF had access to such information[,] . . . defendants were certainly on notice that it would not be provided."

The court also rejected the franchisees' counterclaims under the California Corporations Code and the California Franchise Investment Law for the same reasons it rejected their fraud claim. It also rejected the franchisees' affirmative defenses, including an affirmative defense based on an allegation that "RMCF's business model had no value," after evidence of other franchisees' success was presented at trial.

## BREACH OF FIDUCIARY DUTY

***Kay Beer Distrib. Inc. v. Energy Brands, Inc.*, No. 07-C-1068, 2009 WL 425821, Bus. Franchise Guide (CCH) ¶ 14,112 (E.D. Wis. Feb. 20, 2009)**

After termination, a beverage distributor sued a beverage manufacturer and two other entities for alleged violation of the Wisconsin Fair Dealership Law (WFDL), breach of contract, unjust enrichment, beach of fiduciary duty, and civil conspiracy in violation of Wisconsin law. Defendants moved for summary judgment on all claims.

The U.S. District Court for the Eastern District of Wisconsin denied the distributor's motion to stay litigation and compel discovery after defendants moved for summary judgment, concluding that the discovery sought was not outcome-determinative or necessary for opposing summary judgment. The court then granted summary judgment in defendants' favor on all of the distributor's claims except for breach of contract. The court found that there was no "community of interest" between the distributor and manufacturer for the WFDL to apply because there were very few "sunk costs" in the manufacturer's product line, and the product line constituted less than 1 percent of the distributor's sales. The court also granted summary judgment to defendants on the distributor's breach of fiduciary duty claim because there was no evidence that the parties had a joint venture. The court further granted summary judgment for defendants on the distributor's unjust enrichment claim because the parties' contractual relationship barred the claim, and the distributor failed to offer any evidence of an unjustly retained benefit. The court also granted summary judgment on the distributor's conspiracy claim because there was no evidence of the type of malice that Wisconsin law requires.

The court denied summary judgment on the distributor's breach of contract claim, rejecting defendants' arguments that the distributor had acknowledged termination and released all claims. The court rejected defendants' arguments that the statute of frauds barred the distributor's claims of breach and that the agreement was too vague to be enforced. It further concluded that there were issues of fact involving the scope of the release and the terms of the parties' alleged oral distributorship agreement.

## CHOICE OF LAW

***Goldwell of N.J., Inc. v. KPSS Inc.*, No. 07-3919 (KSH), 2009 WL 901158, Bus. Franchise Guide (CCH) ¶ 14,111 (D.N.J. Mar. 31, 2009)**

This case is discussed under the topic heading "Breach of Contract."

***Reliable Tractor, Inc. v. John Deere Constr. & Forestry Co.*, No. 7:07-CV-00043-HL, 2009 WL 1620432, Bus Franchise Guide (CCH) ¶ 14,152 (M.D. Ga. June 9, 2009)**

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

## CLASS ACTION

***Bonanno v. Quizno's Franchise Co.*, No. 06-CV-02358-CMA-KLM, 2009 WL 1068744, Bus. Franchise Guide (CCH) ¶ 14,129 (D. Colo. Apr. 20, 2009)**

The District of Colorado upheld a class action bar contained in the franchise agreement against a franchisee class's claim of unconscionability when a group of franchisees sued Quizno's for fraud and misrepresentation relating to Quizno's sales pitch and statements regarding franchise ownership.

Each member of the group purchased a franchise from Quizno's but failed to open its store by the franchise agreement deadline. The group filed a motion for class certification for resolution of its claims. Quizno's opposed the motion, arguing that the claims could not be maintained as a class action because the franchise agreements expressly prohibited class actions.

The franchisees first responded by claiming that Quizno's could not demonstrate that the franchisees knowingly and voluntarily waived their right to proceed as a class. But the court distinguished class action certification as simply a procedural tool, not a substantive right such as a trial by jury. Because class certification is not guaranteed to litigants, the court did not require Quizno's to prove that the franchisees knowingly and voluntarily waived the option to proceed collectively. Instead, the court placed the burden of proof on the franchisees, as the party seeking to avoid an unambiguous contractual provision, to prove why the court should not enforce the class action bar.

The franchisees next asserted that enforcement of the class action bar was substantially unfair. They alleged that the franchisor's sales process infected the entire franchise agreement with fraud, thereby rendering the class action bar unconscionable. Pursuant to a Colorado choice of law clause in the franchise agreement, the court applied Colorado's seven-factor test to determine whether the class action bar was indeed unconscionable. The first factor of the test is whether a standard form contract is utilized. This factor favored the franchisees because Quizno's did not offer them an opportunity to negotiate the contract terms. However, the court awarded the franchisees only a slight advantage on this factor because the parties did not have an ongoing relationship prior to executing the agreement, and the franchisees could have invested their money in alternative franchise offerings. The court next examined the second factor, i.e., whether plaintiffs had a sufficient opportunity to read the contract before signing it. Each franchisee had at least a ten-day window to examine the agreement, so this factor cut squarely in Quizno's favor. The third factor relates to the use of fine print in the challenged provision. Quizno's prevailed on this element as well because the class action bar was in the same typeface and font size as the remainder of the contract. The fourth factor asks whether the provision serves a commercial purpose. Quizno's took a slight advantage in this inquiry because the class action bar potentially reduced the number of large lawsuits that Quizno's would face, which the court acknowledged as a legitimate commercial purpose. The fifth factor considers whether the contractual provision was substantively unfair. Again, this factor favored Quizno's primarily because the franchisees could still bring individual lawsuits against the franchisor. The sixth factor is whether the parties' relationship rendered the contractual provision unconscionable. This factor supported the franchisees' position because the court found that Quizno's retained the bulk of the bargaining power in the relationship. Finally, to apply the seventh factor, the court looks to the circumstances surrounding the formation of the agreement. Here, the franchisees argued that the allegedly fraudulent nature of the Quizno's franchise sales pitch infected the enforceability of the entire agreement, including the class action bar. The court disagreed, noting that no part of the alleged misrepresentation bore directly on dispute resolution. As such, even assuming the validity of the misrepresentation claims, the class action bar remained valid.

In sum, based on its weighing of the unconscionability factors,

the court enforced the class action bar. Notably, the factors considered most important by the court (substantive fairness and commercial purpose) favored the bar's enforcement. Therefore, the court denied the franchisees' motion for class certification.

***In re McDonald's French Fries Litig.*, No. 06 C 4467, 2009 WL 1286024, Bus. Franchise Guide (CCH) ¶ 14,153 (N.D. Ill. May 6, 2009)**

The U.S. District Court for the Northern District of Illinois denied class certification for plaintiffs claiming to have been "diagnosed with certain medical conditions" who sued McDonald's "for violations of all the fifty states' and the District of Columbia's consumer fraud and/or deceptive trade practices acts, breach of express warranty, and unjust enrichment," claiming that McDonald's deceived them about the ingredients of its french fries and hash browns (Potato Products).

Plaintiffs alleged that McDonald's "falsely claimed the Potato Products were gluten, wheat, and dairy free" but "specifically disclaim[ed] any physical injury" from eating the Potato Products. Instead, they alleged economic harm because they would not have purchased the products if they had known the truth. The court concluded that the claimed class was overinclusive because it was not limited to individuals who had actually relied on the alleged misrepresentations when purchasing the Potato Products. Moreover, there was no proof that the ingredients at issue actually worsened some of the class members' medical conditions, and it was "fairly assumable, therefore, that many persons in the class as defined by plaintiffs have gone on eating defendant's Potato Products since defendant corrected its disclosure. By any definition, these people have suffered no injury, not even the economic one claimed in this lawsuit."

## DAMAGES

***C&O Motors, Inc. v. Gen. Motors Corp.*, No. 08-1157, 2009 WL 891033, Bus. Franchise Guide (CCH) ¶ 14,110 (4th Cir. Apr. 1, 2009)**

A spurned Oldsmobile dealer's claims against General Motors stalled due to the dealer's success in mitigating its damages through acquisition of a Nissan dealership. Just before GM announced its decision to terminate the Oldsmobile brand over a four-year period, it entered into a five-year dealer agreement with C&O Motors, Inc. (C&O). After learning of GM's phase-out of the Oldsmobile brand, C&O acquired the rights to a Nissan dealership to cover for its anticipated loss of Oldsmobile sales, all without notifying GM. In acquiring the Nissan dealership, C&O agreed with Nissan to separate the Nissan and GM facilities over two years.

By all available evidence and its own admission, C&O's acquisition of the Nissan dealership was successful and achieved sufficient value to offset its alleged losses from GM shutting down the Oldsmobile brand. Nevertheless, C&O sued GM for alleged lost profits and the costs of separating its GM and Nissan facilities, both under breach of contract theories and violations of the West Virginia Motor Vehicle Dealership Statute. After C&O acquired the Nissan dealership, GM notified C&O that it breached the dealer agreement by acquiring the Nissan brand and operating it out of the same facility. Nevertheless, it offered a letter agreement to excuse it from the breach if C&O simply agreed that C&O would be solely responsible for all of the costs of separation. C&O struck certain provisions of the letter agreement and returned it but notably did not strike out the provisions of the letter agreement that required C&O to separate the Nissan and GM dealership facilities within two years, ostensibly because it had already agreed to do so with Nissan. Based on this proposed letter agreement, C&O alleged that GM was unreasonably requiring separation of the dealership facilities in violation of West Virginia law, as well as threatening and coercing it through threats of termination.

Recognizing C&O's success with its Nissan dealership, the district court dismissed the suit against GM because there was no actual loss. The U.S. Court of Appeals for the Fourth Circuit affirmed, holding that C&O was entitled to neither mitigation damages nor lost profits as it had suffered no economic loss. The Nissan dealership to which it acquired rights had increased in value well beyond the claim for damages. Finding no economic loss, the court declined to address the district court's qualms with C&O's formulation of lost profits. The court also addressed C&O's claim that GM violated a West Virginia motor vehicle dealer law, which prohibits a manufacturer from requiring a new dealer to maintain exclusive facilities in the absence of reasonable business justification. The court rejected the claim, noting that not only did C&O violate its agreement with GM by adding an additional brand without approval but also it had already agreed with Nissan to separate the facilities prior to GM's notice, thus undercutting any argument that the separation was unreasonable.

C&O's claim that GM violated West Virginia law by using threats of termination to coerce C&O into an agreement regarding separation of the facilities was similarly rejected. The court held that GM's good faith notice to C&O that it was in material breach did not constitute a violation of the statute. The fact that GM worked with C&O to remove offending terms from the letter agreement demonstrated no coercion. The court also addressed C&O's final statutory claim that GM wrongfully required the dealer to assent to a prospective release of its claim for the cost of separating the facilities. The court reasoned that the letter agreement regarding separation of the facilities and C&O's responsibility for the attendant costs did not amount to a release by C&O of any claim. Instead, they were consideration given to GM in exchange for a release of C&O from liability for breaching the contract by adding a new line of automobiles prior to GM's approval.

***Cold Stone Creamery, Inc. v. Lenora Foods I, LLC*, No. 08-15335, 2009 WL 1532736, Bus. Franchise Guide (CCH) ¶ 14,144 (11th Cir. June 3, 2009)**

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

***Country Inns & Suites by Carlson, Inc. v. Interstate Props., L.L.C.*, No. 08-16850, 2009 WL 1298401, Bus. Franchise Guide (CCH) ¶ 14,136 (11th Cir. May 12, 2009)**

The Eleventh Circuit upheld a liquidated damages clause that required a hotel franchisee to pay its franchisor three times the

  

royalty and marketing fees generated during a twelve-month period. After franchisee Interstate sold its franchised hotel to a buyer who did not continue to operate it as a Country Inns & Suites Hotel, the franchisor sued for breach of contract and sought liquidated damages.

Courts applying Florida law employ a two-pronged test for determining when to uphold a liquidated damages clause. First, the actual damages resulting from the breach must not be readily ascertainable. Second, the amount of liquidated damages must not be "grossly disproportionate to any damages that might reasonably be expected to flow from a breach."

Interstate challenged the liquidated damages clause as grossly disproportionate to expected damages for three reasons: (1) liquidated damages could conceivably exceed actual damages if the contract was breached with less than twelve months left on the term, (2) the liquidated damages award should be reduced to present value, and (3) the liquidated damages amount was calculated based on gross revenues instead of profits. Interstate also argued that the liquidated damages provision constituted an unreasonable restraint on its right to sell its property.

The court held that Interstate did not demonstrate that the liquidated damages clause operated as a "pure penalty" and that it was not an unreasonable estimate of the actual damages the franchisor may have suffered. Further, the clause did not constitute an unreasonable restraint on alienation because it simply made a transfer more costly if the hotel was not continued as a Country Inns franchise. For these reasons, the Eleventh Circuit affirmed the district court's summary judgment in favor of the franchisor.

***Guesthouse Int'l Franchise Sys., Inc. v. British Am. Props. Macarthur Inn, LLC*, No. 3:07-0814, 2009 WL 792570, Bus. Franchise Guide (CCH) ¶ 14,106 (M.D. Tenn. Mar. 23, 2009)**

This case arose following the closure of a failed hotel franchise. The U.S. District Court for the Middle District of Tennessee entered judgment against the hotel franchisee based on a liquidated damages provision in the franchise agreement. The franchisee moved for reconsideration or clarification of the court's rulings related to the applicability of the liquidated damages clause in its agreement with the franchisor, and the viability of its claim that the Tennessee Consumer Protection Act (TCPA) provided a "set-off" to an award of damages. The court also addressed the franchisor's motion for attorney fees. The court affirmed its earlier rulings that the liquidated damages clause was enforceable, with the exception of one provision within that clause, and that the franchisee was not entitled to any set-off under the TCPA. The franchisor was entitled to the full balance of the attorney fees and expenses it requested because the court found that the franchisee's multiple arguments against the totality of the award and its amount lacked merit.

The liquidated damages clause called for reservation fees to be calculated by "multiplying the number of years remaining in the term of this Agreement, rounding any partial years to the next whole number, by the sum of the monthly reservation fees due during the one year period immediately preceding the notice of terminations." The franchisee's contention that the damages clause was, as a whole, unenforceable, was without merit. Rather, the court held in the earlier ruling, "based on all of the damages requested by the [franchisor], the lack of justification for the 'rounding up,' and the strenuous arguments advanced by the [franchisee], . . . that permitting the [franchisor] plaintiffs to recover 'rounded up' reservation fees" operated as an unjustified penalty. However, the court "found that the liquidated damages clause, absent the 'rounding up' provision, was enforceable" and "directed the parties to apply the calculations described in the liquidated damages clause, only without 'rounding up' for the reservation fees." Moreover, the franchisee provided no case law to support its "argument that the court [could] not strike one offensive provision of a multi-pronged liquidated damages clause and then apply the remainder."

Additionally, the franchisee alleged that the franchisor violated the TCPA by making a series of allegedly false promises to the franchisee about the level of support that the franchisor would provide, by including grossly misleading terms in the Uniform Franchise Offering Circular (UFOC), and by allegedly failing to deliver the UFOC. Accordingly, the franchisee asserted that any damages awarded to the franchisor should be set off by its TCPA claims. In its motion for reconsideration, the franchisee argued that the court should have considered the merits of the claim related to the UFOC in spite of the fact that the court appeared to have previously concluded that the claim was time-barred. The court observed that the franchisee misread the earlier ruling. The court's rejection of the claim was not based on the statute of limitations but instead was based on causation. The court stated that the franchisee's failure to read the UFOC rendered its arguments about the flaws in the substance of the UFOC irrelevant, and the court merely noted that franchisee's "allegation that [it] never received the UFOC might be grounds for a TCPA claim but that such a claim [was] time-barred." Furthermore, the franchisee cited no authority to support its claim "that a TCPA claim is saved from the operation of the statute of limitations when it is asserted as a set-off." On the other hand, the franchisor provided recent cases holding "that a claim, asserted as a set-off, is subject to the same statute of limitations rules as any other claim or counterclaim."

For the foregoing reasons, the court found that the hotel franchisee and its two guarantors were jointly liable to the franchisor for $304,007 under the liquidated damages clause for the early termination of the parties' franchise agreement, and it awarded the hotel franchisor the full balance of its $76,463 requested attorney fees and $6,188 requested expenses.

***Rocky Mountain Chocolate Factory, Inc. v. SDMS, Inc.*, No. 06-CV-01212-PAB-BNB, 2009 WL 579516, Bus. Franchise Guide (CCH) ¶ 14,093 (D. Colo. Mar. 4, 2009)**

This case is discussed under the topic heading "Breach of Contract."

## DEFAMATION

***Midw. Theatres Corp. v. IMAX Corp.*, No. 08-5823 (DSD/SRN), 2009 WL 649701, Bus. Franchise Guide (CCH) ¶ 14,116 (D. Minn. Mar. 11, 2009)**

This case is discussed under the topic heading "Tortious Interference."

## ENCROACHMENT

***Parktown Imps., Inc. v. Audi of Am., Inc*., 278 S.W.3d 670, Bus. Franchise Guide (CCH) ¶ 14,101 (Mo. 2009)**

A franchisee protested the establishment of a new motor vehicle dealership ten miles from its location under the Missouri motor vehicle dealer law's § 407.825(1), which creates a cause of action for conduct that is "'capricious, in bad faith or unconscionable.'" The Supreme Court of Missouri affirmed the Administrative Hearing Commissions (AHC) decision dismissing the franchisee's claim, holding that Congress intended § 407.817 of the law to "be the sole mechanism to bring challenges to the establishment . . . of new motor vehicle dealerships." This provision, enacted in 2001, provides that franchisees within a six-mile radius of a proposed new franchise location in counties of the franchisee's population level are entitled to notice of the proposal and "a hearing to determine good cause for opening the proposed new location."

The franchisee argued that §§ 407.825(1) and 407.817 do not conflict and that the court should have attempted to harmonize the two provisions. The franchisee asserted that § 407.817 is "merely [a] procedural mechanism for challenging the establishment of a new franchisee location whereas § 407.825(1) contemplates a cause of action for a franchisor's egregious behavior." Accordingly, the franchisee argued that the court should have left "pending the litigation . . . for a determination by the AHC as to whether [the franchisee] [could] prove that [the franchisor] was acting" capriciously or in bad faith.

The court held the legislative intent was clear that outside of the six-mile radius described in § 407.817, franchisees were not to have the benefit of this provision and the market was to govern itself. As the proposed dealership was more than six miles from the franchisee's location, the franchisee had no authority to contest its establishment under Missouri's motor vehicle dealer law.

## FORUM SELECTION

***Faulkenberg v. CB Tax Franchise Sys., LP*, No. 08-CV-521-WDS, Bus. Franchise Guide (CCH) ¶ 14,105 (S.D. Ill. Mar. 24, 2009)**

At defendants' request, the U.S. District Court for the Southern District of Illinois dismissed plaintiff franchisees' lawsuit for improper venue. The parties' franchise agreement contained a Texas forum selection clause. Stating that "[i]n diversity litigation it is a familiar principle that federal courts use the whole law of the forum state, including that state's choice-of-law rules," the court applied Illinois law, which respects forum selection clauses that have "sufficiently mandatory language." The court noted that the Illinois Franchise Disclosure Act contains an exception to this general rule and "will void forum selection clauses in franchise agreements covered by the Act under certain circumstances." In this case, however, the franchisees did not contend that they were Illinois residents or that any part of the agreement was completed in Illinois, and therefore they were not entitled to the act's protection. The court also denied defendants' motion to compel arbitration, leaving that issue for the Texas court to resolve.

***Noodles Dev., LP v. DaNoonas, LLC*, No. CV-08-2083-PHX-DGC, 2009 WL 1097537, Bus. Franchise Guide (CCH) ¶ 14,131 (D. Ariz. Apr. 22, 2009)**

A venue provision in a franchise agreement specifying Indiana as the forum for dispute resolution required dismissal of the franchisor's complaint in this case. Plaintiff Noodles and defendant DaNoonas entered into a franchise agreement, pursuant to which DaNoonas opened two Nothing But Noodles franchises in Indiana. The U.S. District Court for the District of Arizona granted defendant's motion to dismiss under Federal Rule of Civil Procedure 12(b)(3) due to Noodles' failure to meet its heavy burden of showing that enforcement of the franchise agreement's Indiana forum selection clause was unreasonable. The court added that Noodles presented no evidence showing that defendant conducted any negotiations in Arizona, and any connections to Arizona were only marginally related to the claims in the case.

***PFIP, LLC & Pla-Fit Franchise, LLC v. You Fit, Inc.*, No. 08-271-JL, 2009 WL 1121359, Bus. Franchise Guide (CCH) ¶ 14,132 (D.N.H. Apr. 27, 2009)**

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

## FRAUD

***Noyes v. State Farm Gen. Ins. Co.*, No. C-08-5032 RBL, 2009 WL 927706, Bus. Franchise Guide (CCH) ¶ 14,115 (W.D. Wash. Apr. 1, 2009)**

Plaintiff insurance agent James A. Noyes alleged that defendant State Farm improperly induced his retirement by misrepresenting during a meeting to discuss three claims of sexual harassment filed against him that his retirement benefits could be in jeopardy if he did not immediately retire. Noyes also pursued claims of breach of duty of good faith and fair dealing as well as fraud under the Washington Franchise Investment Protection Act (FIPA), and unfair and deceptive acts in violation of Washington's Consumer Protection Act.

The U.S. District Court for the Western District of Washington held that Noyes could not, as a matter of law, establish several elements of both the common law fraud and negligent misrepresentation claims. The court also granted summary judgment on Noyes's FIPA claim because he was not a franchisee. He did not pay State Farm any franchise fee, which was a prerequisite to protection under the FIPA. Transactions under the insurance code are expressly exempted from the FIPA, and Noyes's argument that he paid State Farm an indirect franchise fee by exclusively limiting his business to only issuing State Farm policies also failed because no actual money changed hands. Noyes also failed to address any of the five elements of his Consumer Protection Act claim; and, because there was no impact on the public interest from Noyes's retirement, State Farm could not have violated the act.

***Midw. Theatres Corp. v. IMAX Corp.*, No. 08-5823 (DSD/SRN) 2009 WL 649701, Bus. Franchise Guide (CCH) ¶ 14,116 (D. Minn. Mar. 11, 2009)**

This case is discussed under the topic heading "Tortious Interference."

***Partner & Partner, Inc. v. Exxonmobil Oil Corp.*, No. 08-1590, 2009 WL 1184796, Bus. Franchise Guide (CCH) ¶ 14,154 (6th Cir. May 4, 2009)**
This case is discussed under the topic heading "Antitrust."

***Rand v. CM Franchise Sys., Inc.*, No. 61828-8, 2009 WL 667227, Bus. Franchise Guide (CCH) ¶ 14,094 (Wash. Ct. App. Mar. 16, 2009)**
The Washington Court of Appeals held that a restaurant franchisee alleging fraudulent misrepresentations in violation of the Washington Franchise Investment Protection Act (FIPA) was not entitled to the benefit of the discovery rule established by the Revised Code of Washington § 4.16.080, which provides that an action for relief upon the grounds of fraud does not accrue until the discovery by the aggrieved party of the facts constituting fraud. Central to the court's analysis was the duty imposed by the discovery rule for plaintiffs to exercise due diligence to discover fraud. As a result of the discovery rule's inapplicability, the three-year statute of limitations for such FIPA violations was not tolled, and the franchisee's claim was time-barred. Additionally, the franchisee claimed technical violations of FIPA's registration requirements that were barred by a two-year statute of limitations. Consequently, rescission of the franchise agreement was not available.

The franchisee asserted that the franchisor misrepresented the earnings data for its other franchises and failed to provide it with an offering circular registered in Washington. These alleged FIPA violations occurred in 2003 when the franchise agreement was signed, and the franchisee filed its complaint for rescission and damages arising from the franchisor's alleged violations of the FIPA in March 2007, nearly four years later. The basis of the franchisee's claim for fraudulent misrepresentation was that a profit-and-loss statement for the franchisor's most successful restaurant that had been given to the franchisee in 2002, along with a contact list of the franchisor's franchisees, was in gross disparity with the results of the other franchises. The franchisee stressed that it did not learn that it had been misled by the profit-and-loss statement until it received other financial information in October 2004. The franchisee argued that under the discovery rule, the statute of limitations was accordingly tolled until 2004, and its fraud claim consequently fell within the three-year limitations period. The court, however, disagreed and explained that the franchisee was only entitled to the benefit of the discovery rule if it could not have, through due diligence, discovered the claimed misrepresentations. As the franchisor provided the franchisee with contact information for its franchise owners in 2002 that would have enabled the franchisee to discover the extent of the earnings disparities among the restaurants through its own independent investigation, it was not entitled to the tolling of the statute.

Under the FIPA, the franchisor's technical violations of the act's registration requirements did not void the franchise agreement. Instead, the franchisee had a two-year statute of limitations to rescind the contract as a remedy. Because the franchisee did not seek rescission in a timely fashion, rescission was not available and the franchise agreement remained enforceable, including its attorney fees provision. Thus, the franchisor was entitled, as the prevailing party, to attorney fees and costs. A Washington trial court's award of attorney fees and costs to the franchisor was affirmed.

## GOOD FAITH AND FAIR DEALING

***Bright Bay GMC Truck, Inc. v. Gen. Motors Corp.*, 593 F. Supp. 2d 495, Bus. Franchise Guide (CCH) ¶ 14,130 (E.D.N.Y. 2009)**
This case is discussed under the topic heading "Breach of Contract."

***Goldwell of N.J, Inc. v. KPSS Inc.*, No. 07-3199 (KSH), 2009 WL 901158, Bus. Franchise Guide (CCH) ¶ 14,111 (D.N.J. Mar. 31, 2009)**
This case is discussed under the topic heading "Breach of Contract."

***Midw. Theatres Corp. v. IMAX Corp.*, No. 08-5823 (DSD/SRN), 2009 WL 649701, Bus. Franchise Guide (CCH) ¶ 14,116 (D. Minn. Mar. 11, 2009)**
This case is discussed under the topic heading "Tortious Interference."

## INJUNCTIVE RELIEF

***Domino's Pizza Franchising L.L.C. v. Making the Dough, Inc.,* No. 1:09-CV-0661, 2009 WL 1011584, Bus. Franchise Guide (CCH) ¶ 14,135 (M.D. Pa. Apr. 15, 2009)**
This case is discussed under the topic heading "Trademark Claims."

***Dunkin' Donuts Franchised Rests. LLC v. Kev Enters.*, No. 8:09-CV-131-T-17 MAP, 2009 WL 1587983, Bus. Franchise Guide (CCH) ¶ 14,151 (M.D. Fla. June 5, 2009)**
This case is discussed under the topic heading "Breach of Contract."

***Gen. Motors, Corp. v. Harry Brown's, LLC*, 563 F.3d 312, Bus. Franchise Guide (CCH) ¶ 14,124 (8th Cir. 2009)**
General Motors filed a declaratory judgment action and sought injunctive relief in the U.S. District Court for the District of Minnesota against one of its Minnesota dealerships after the dealership told GM that it planned to "move a related Chrysler dealership onto its property." The U.S. Court of Appeals for the Eighth Circuit affirmed the district court's denial of GM's request for a preliminary injunction even though GM had arguably demonstrated likelihood of success on the merits because (1) GM could be made whole through monetary damages, (2) the balance of harms favored the dealership, and (3) the public interest favored denial of the preliminary injunction. However, the court denied the dealership's attorney fees and costs request for filing a frivolous appeal, finding that GM's appellate arguments were not wholly without merit.

***Liberty Lincoln-Mercury, Inc. v. Ford Motor Co.,* 562 F.3d 553, Bus. Franchise Guide (CCH) ¶ 14,100 (3d Cir. 2009)**

The U.S. Court of Appeals for the Third Circuit reversed the entry of a preliminary injunction obtained by several motor vehicle dealers against Ford. "The New Jersey Franchise Practices Act [(FPA)] provides that a 'motor vehicle franchisor shall reimburse' its franchisee for parts used in warranty repairs at the franchisee's 'prevailing retail price,' provided that the retail price is not unreasonable. . . . The prevailing reimbursement rate prior to the statute was . . . 40% above the dealer cost." The dispute between Ford and its franchisees began in 1991 when one dealer asked Ford for a retail rate of 77 percent above the dealer cost. In reaction, Ford "began to add a fee to the wholesale price of cars that it delivered to [that dealer]." After the dealer filed suit challenging the fee, the court reaffirmed the district court's decision "that Ford's surcharge violated the warranty reimbursement statute."

"In 2002, Ford imposed a restructured surcharge program to recoup increased costs incurred from its compliance with the warranty reimbursement statute." This second program "applied to the wholesale price of all vehicles delivered to Ford franchisees in New Jersey." The Ford franchisees "sued Ford asserting that the second surcharge program also violated the warranty reimbursement statute"; and, "in a partial summary judgment, the [d]istrict [c]ourt ruled that Ford's reconstituted fee program violated the New Jersey statute. The [d]istrict [c]ourt also issued a preliminary injunction, prohibiting Ford from imposing the surcharge while the remaining issues [were] litigated."

As there was no evidence of a nonmonetary injury to plaintiff dealers, the Third Circuit reversed and remanded for further proceedings and held that Ford could not appeal the district court's partial summary judgment order holding that the surcharge program violated the FPA because the issue was not subject to appellate review. The court clarified that although it had "pendant jurisdiction to review underlying orders that are inextricably intertwined with a preliminary injunction," such a review was not necessary here. Because the element of irreparable harm was not met, it was not necessary for the appellate court "to reach the issue of whether the franchisees [were] likely to succeed on the merits."

***Saturn of Denville N.J., LP v. Gen. Motors Corp.*, No. 08-CV-5734 (DMC), 2009 WL 1545559, Bus. Franchise Guide (CCH) ¶ 14,148 (D.N.J. May 29, 2009)**

Plaintiffs operated a Saturn dealership in good standing for over eighteen years. In reliance on promises by General Motors of expanded sales, plaintiffs undertook efforts and incurred significant expenses to enlarge and update their showroom and service areas. During a 2008 meeting of all of the Saturn retailers in the New York District area, General Motors' sales manager informed dealers that General Motors was "out of money" and advised the dealers to "do what they had to" in order to survive. As a result, plaintiffs submitted an application to obtain a KIA franchise with the intention of combining the Saturn facility with a KIA dealership. Plaintiffs planned to subdivide the building and offer exclusive retail sales areas to both brands. In August 2008, plaintiffs received official notification from KIA that its application had been approved subject to General Motors' approval. On two separate occasions, General Motors denied plaintiffs' requests. In a financial plan submitted to the Department of the Treasury, General Motors stated that it was going to focus on its "core brands"; and because Saturn was not one of them, it would terminate the brand by 2011. In an updated plan presented in April 2009, General Motors stated that its plan to terminate the Saturn brand was moved up to as early as late 2009.

Plaintiffs submitted a motion for preliminary injunction, which was denied in April 2009. Plaintiffs renewed their request for emergency relief in mid-May because of changed economic circumstances. The court granted preliminary injunctive relief because (1) plaintiffs had a reasonable probability of success on the merits, (2) plaintiffs faced immediate and irreparable harm, (3) the harm to plaintiffs outweighed any potential harm to defendants, and (4) the public interest favored granting plaintiffs preliminary relief.

The court found that plaintiffs had a reasonable probability of success on the merits because General Motors had used the current economic conditions as justification to change dramatically the nature of the relationship it had with Saturn, thus placing the Saturn brand at risk. Despite General Motors' contention that it acted in good faith, the evidence suggested otherwise. By announcing that it had plans to terminate the Saturn brand by late 2009, General Motors undoubtedly affected Saturn's brand confidence. Those announcements, taken in conjunction with its conduct over the last few years of using Saturn cars as a "test market" for some of General Motors' other brands, placed plaintiffs' dealership in a precarious situation. By denying the preliminary injunction and entitling General Motors to refuse the addition of a KIA dealership to plaintiffs' facility, plaintiffs would face immediate and irreparable harm as there was nothing stopping General Motors from terminating the Saturn brand immediately. That, coupled with plaintiffs' assertion that they would go out of business if not allowed to dual brand, compelled the court to change its conclusion that monetary damages would be sufficient. Moreover, General Motors' bankruptcy seemed unavoidable, and plaintiffs were not likely to be able to collect monetary damages should they succeed in litigation. Therefore, plaintiffs would suffer irreparable harm if the injunction was not granted. The court added that balancing the harm favored the granting of the injunction because there was only a limited likelihood that injunctive relief would result in a decrease in sales of Saturns at plaintiffs' facility. On the other hand, if relief was denied, there was a much greater likelihood that plaintiffs would be forced out of business. Finally, the public interest greatly favored the granting of preliminary relief because allowing plaintiffs to stay in business would preserve jobs and make productive use of the property. The injunctive relief would also introduce a KIA dealership to the area, which would provide more options to the public.

***Total Petroleum P.R. Corp. v. TC Oil Corp.*, No. 09-1105 (JP), 2009 WL 702226, Bus. Franchise Guide (CCH) ¶ 14,097 (D.P.R. Mar. 11, 2009)**

Total Petroleum succeeded in obtaining an injunction requiring TC Oil to surrender the station premises and stop using Total's marks when Total terminated the franchise relationship after only a two-month relationship.

In November 2008, Total Petroleum leased the premises of a gasoline service station and convenience store to TC Oil. However, six weeks into the relationship, TC Oil owed Total Petroleum over $100,000 for petroleum purchases, and TC Oil stopped operating the station. When the parties could not agree on a payment plan, Total Petroleum terminated the franchise relationship, but TC Oil continued to display signs bearing Total Petroleum's trademarks and refused to surrender possession of the station, convenience store, and petroleum retail equipment. Total Petroleum sued TC Oil and sought a preliminary injunction to force TC Oil to surrender the station and store premises and to stop using Total Petroleum's trademarks and otherwise comply with the post-termination obligations of the agreements.

TC Oil first defended by asking the court to consolidate Total Petroleum's lawsuit with a prior lawsuit filed by various dealers against Esso Standard Oil Company, Total Petroleum's predecessor, when Esso withdrew from the Puerto Rico market. But the court found that the issues in this case were separate and distinct from the legal issues raised in the prior case. Moreover, the court determined that the prior litigation had effectively concluded as it related to TC Oil. Accordingly, the court refused to consolidate the cases and proceeded to rule on the injunction motion.

Moving beyond the threshold issue of consolidation, the court took up the four-factor analysis for granting a preliminary injunction. It ruled that the first factor, likelihood of success on the merits, was satisfied because the franchise relationship was validly terminated and TC Oil illegally retained possession. In so ruling, the court opined that Total Petroleum terminated the franchise in accordance with the Petroleum Marketing Practices Act. The court also found that Total Petroleum would likely succeed on its Lanham Act claims because the continued display of Total Petroleum's trademarks at a gasoline station no longer selling gasoline was likely to confuse consumers and dilute the trademarks' effectiveness.

Total Petroleum also met its burden to establish irreparable harm. Not only would TC Oil's unauthorized display of Total Petroleum's trademarks hurt Total Petroleum's reputation and goodwill, but also TC Oil's continued occupation of the property deprived Total Petroleum of the ability to use the site and to complete maintenance necessary to avoid possible liability for environmental law violations.

The third element was also satisfied, with the court holding that any harm suffered by TC Oil by the granting of the injunction was outweighed by the significant damage done to Total Petroleum's goodwill and reputation in its absence. The court reasoned that the same concerns served the public interest. Accordingly, the court ordered TC Oil to surrender the premises of the station, store, and equipment to Total Petroleum and immediately comply with all other post-termination covenants.

## JURISDICTION

***PFIP, LLC & Pla-Fit Franchise, LLC v. You Fit, Inc.*, No. 08-271-JL, 2009 WL 1121359, Bus. Franchise Guide (CCH) ¶ 14,132 (D.N.H. Apr. 27, 2009)**

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

## NONCOMPETITION AGREEMENTS

***Domino's Pizza Franchising L.L.C. v. Making The Dough, Inc.,* No. 1:09-CV-0661, 2009 WL 1011584, Bus. Franchise Guide (CCH) ¶ 14,135 (M.D. Pa. Apr. 15, 2009)**

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

***Johnson v. Shred-it Am., Inc.*, Am. Arbitration Ass'n No. 65 114 E 00298 08, Bus. Franchise Guide (CCH) ¶ 14,139 (Apr. 30, 2009)**

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

## STATUTORY CLAIMS

***Atl. Autocare, Inc. v. Shell Oil Prods. Co.*, 605 F. Supp. 2d 463, Bus. Franchise Guide (CCH) ¶ 14,098 (S.D.N.Y. 2009)**

The U.S. District Court for the Southern District of New York granted summary judgment for defendants on claims brought by plaintiffs that were operating or had formerly operated gas stations in the New York City area "selling either 'Shell' or 'Texaco' brand gasoline under franchise agreements with defendant Motiva Enterprises LLC, a joint venture of the Shell Oil Company, Texaco, Inc. and Saudi Aramco." Plaintiffs alleged that defendants violated the Petroleum Marketing Practices Act (PMPA), 15 U.S.C. §§ 2801–06, by improperly terminating or constructively terminating their franchise agreements. Plaintiffs further alleged that defendants "breached the parties' franchise agreements by setting gasoline prices in violation of the open price term provision of N.Y. U.C.C. § 2-305." The crux of plaintiffs' complaint was that "defendants have charged 'unconscionably high rents,' 'controll[ed] Plaintiffs' requests for the delivery of gasoline,' 'increased prices for wholesale gas,' and directly competed with plaintiffs 'in the retail sale of gasoline.'" The court granted summary judgment in defendants' favor because the PMPA does not give rise to a constructive termination claim except in the assignment context not at issue here, and plaintiffs failed to offer evidence to support a claim of actual termination. The court also concluded that "no reasonable finder of fact could conclude that defendants have violated N.Y. U.C.C. § 2-305 by setting the price of gasoline in bad faith."

***Bright Bay GMC Truck, Inc. v. Gen. Motors Corp.*, 593 F. Supp. 2d 495, Bus. Franchise Guide (CCH) ¶ 14,130 (E.D.N.Y. 2009)**

This case is discussed under the topic heading "Breach of Contract."

***C&O Motors, Inc. v. Gen. Motors Corp.*, No. 08-1157, 2009 WL 891033, Bus. Franchise Guide (CCH) ¶ 14,110 (4th Cir. Apr. 1, 2009)**

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

***Cold Stone Creamery, Inc. v. Lenora Foods I, LLC*, No. 08-15335, 2009 WL 1532736, Bus. Franchise Guide (CCH) ¶ 14,144 (11th Cir. June 3, 2009)**

Warnings, disclaimers, and admonitions against reliance on contrary representations melted away the franchisees' statutory claims

in an ice cream franchise dispute. Interestingly, the basis for the violations was misrepresentations attributed to other franchisees.

Defendants Cecil and Jacquatte Rolle borrowed money and signed a promissory note with Cold Stone to obtain a Cold Stone Creamery franchise. After the Rolles failed to timely pay amounts due on the note, Cold Stone sued them to collect. The Rolles counterclaimed, charging that Cold Stone violated the Florida Franchise Act (FFA) and the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). The district court granted Cold Stone summary judgment for the Rolles' liability on the note and on all of the Rolles' counterclaims. Later, a jury trial to determine damages returned a verdict of $800,000 in favor of Cold Stone. The Rolles appealed, arguing that the court erred in granting summary judgment against their counterclaims, denying their motion for leave to amend, failing to include setoff provisions in the jury instructions, and "denying their motion for a directed verdict."

The Eleventh Circuit first upheld the lower court's grant of summary judgment against the Rolles' statutory counterclaims. The Rolles alleged "that Cold Stone violated the FFA by misrepresenting the franchise's" likelihood of success. The court held that the Rolles could not demonstrate that they relied on the alleged misrepresentations. In so holding, the court emphasized the express disclaimers in the franchise agreement and the instructions to franchisees to undertake their own investigation into their likelihood of success. The court found that the record evidence showed that the Rolles not only understood the franchise agreement but also conducted their own independent investigation. The court similarly disposed of the Rolles' claim that the alleged misrepresentations violated the FDUTPA even though that statute does not require proof of actual reliance as an element of a cause of action. Instead, the court ruled that the Rolles must prove that "the alleged practice was likely to deceive a consumer acting reasonably in the same circumstances." The court compared the Rolles' evidence that two other Cold Stone franchisees misled them about their prospects for success with the myriad of contrary statements in the franchise agreement and franchise disclosure document. Those documents clearly indicated "that Cold Stone franchisees did not have the authority to make representations on Cold Stone's behalf about" profitability and that the Rolles should not rely on any information other than what was provided in the franchise disclosure document. The court also noted the admonition that actual results could vary from unit to unit and that the Rolles must accept the risk of not doing as well. Given those admonitions and the fact that the Rolles did conduct their own investigation about operating a Cold Stone Creamery store, the court found that the Rolles could not have reasonably been deceived by the information provided by the two other franchisees.

The Eleventh Circuit also upheld the district court's denial of the Rolles' tardy motion for leave to amend their pleadings to add an antitrust counterclaim. The motion was made six weeks after the deadline for amending. The court reasoned that denial of the motion was appropriate because even if the delay stemmed from Cold Stone's misconduct during discovery, as the Rolles contended, they admitted that there was a basis for the claim prior to discovery.

The Rolles also argued that the district court erred in not instructing the jury to consider the rebuttable presumption that the equipment recovered and sold by Cold Stone fully satisfied the debt because the Rolles were not notified of the sale. The Eleventh Circuit found the jury instructions to be appropriate, holding that the presumption was successfully rebutted by proof that the note covered more debt than just the value of the collateral, the Rolles had removed significant portions of the equipment prior to the sale, and the collateral had depreciated in value over time.

***Courtesy Oldsmobile, Inc. v. Gen. Motors Corp.*, No. 07-17267, 2009 WL 1353762, Bus. Franchise Guide (CCH) ¶ 14,141 (9th Cir. May 15, 2009)**

This case is discussed under the topic heading "Breach of Contract."

***Employment Dep't v. Nat'l Maint. Contractors of Or., Inc.*, 204 P.3d 151, Bus. Franchise Guide (CCH) ¶ 14,102 (Or. Ct. App. 2009)**

The Oregon Court of Appeals remanded for reconsideration the order of an administrative law judge (ALJ) that allowed a janitorial franchisor to avoid unemployment insurance tax assessments on its franchisees.

National Maintenance Contractors (NMC) operates as a janitorial services subfranchisor for Jani-King. It enters into contracts with building owners to provide janitorial services and then assigns the contracts to its franchisees. When the franchisees perform the services, NMC bills the customers, collects, and pays a portion to the franchisees. The Oregon Employment Department assessed NMC for unemployment insurance taxes for its franchisees. "NMC disputed the assessment," claiming that its franchisees did not fall within the statutory definition of *employees* found in the state's unemployment insurance statutes. Further, NMC argued that the Department was "precluded from litigating the issue" because of a previous administrative decision, issued twenty years earlier, in which a referee for the Oregon Employment Department stated that NMC and its franchisees were not in an employer-employee relationship. At the hearing, the ALJ rejected NMC's argument "with respect to issue preclusion," noting that "the previous administrative case[] involved different parties." However, the ALJ accepted NMC's contention that its franchisees were not employees within the statutory meaning of the term specifically because they did not provide services for remuneration for NMC.

The department sought review of the ALJ order. The appellate court affirmed the portion of the order respecting issue preclusion but found that NMC's franchisees did in fact meet the statutory definition of *employees*. The court reasoned that the franchisees provided services to NMC because the franchisees discharged NMC's obligation to provide janitorial services to the building owners. The court found that the franchisees provided these services for remuneration because, as a matter of contract, any customer payments were to be paid to NMC. Thus, the building owners did not pay the franchisees for janitorial services; instead, the building owners paid NMC for the services, and NMC then paid the franchisees remuneration in exchange for fulfilling NMC's contractual obligations.

After hurdling the definition requirement, the court examined Oregon's catchall statutory exception, which allows a court to depart from the statutory definition of *employees* as the context requires. An example of a permissible departure includes excluding corporate directors from the definition when other state statutes support that result. The court viewed franchise agreements in this context but decided that, unlike corporate directors, franchisees should not be categorically excluded from statutory coverage for unemployment insurance taxes. Rather, franchise relationships should be analyzed on a case-by-case basis by determining whether services for remuneration have been provided and, if so, whether some exclusion to the definition of *employment* nevertheless applies. NMC argued for the application of an exclusion; and because the ALJ did not reach this alternative argument, the appellate court remanded the case for further consideration.

***Gen. Motors Corp. v. DealMaker, LLC*, No. 07-CV-141, 2009 WL 1310616, Bus. Franchise Guide (CCH) ¶ 14,138 (N.D.N.Y. May 8, 2009)**
This case is discussed under the topic heading "Breach of Contract."

***Goldwell of N.J., Inc. v. KPSS Inc.*, No. 07-3919 (KSH), 2009 WL 901158, Bus. Franchise Guide (CCH) ¶ 14,111 (D.N.J. Mar. 31, 2009)**
This case is discussed under the topic heading "Breach of Contract."

***Greenville Funeral Supply, LLC v. Rockvale, Inc.*, 597 F. Supp. 2d 241, Bus. Franchise Guide (CCH) ¶ 14,128 (D.P.R. 2008)**
This case is discussed under the topic heading "Breach of Contract."

***Guesthouse Int'l Franchise Sys., Inc. v. British Am. Props. Macarthur Inn, LLC*, No. 3:07-0814, 2009 WL 792570, Bus. Franchise Guide (CCH) ¶ 14,106 (M.D. Tenn. Mar. 23, 2009)**
This case is discussed under the topic heading "Damages."

***Honey Dew Assocs., Inc. v. Creighton Muscato Enters., Inc.*, 903 N.E.2d 239, Bus. Franchise Guide (CCH) ¶ 14,103 (Mass. App. Ct. 2009)**
This case is discussed under the topic heading "Breach of Contract."

***Noyes v. State Farm Gen. Ins. Co.*, No. C-08-5032 RBL, 2009 WL 927706, Bus. Franchise Guide (CCH) ¶ 14,115 (W.D. Wash. Apr. 1, 2009)**
This case is discussed under the topic heading "Fraud."

***JJCO, Inc. v. Isuzu Motors Am., Inc.*, No. 08-00419 SOM/LEK, 2009 WL 1444103, Bus. Franchise Guide (CCH) ¶ 14,146 (D. Haw. May 22, 2009)**
A former Isuzu dealership sued Isuzu Motors America, Inc. (Isuzu) after Isuzu "decided to discontinue distributing new vehicles in certain areas, including Hawaii, given the drop in demand." Although Isuzu offered dealerships the option to continue as service dealerships, plaintiff dealership "declined this offer" and, relying on the Hawaii Franchise Investment Law, "demanded that Isuzu purchase all of [its] inventory, supplies, equipment, and furnishings at fair market value." The dealership moved for partial summary judgment on its Hawaii Franchise Investment Law claim. The court denied summary judgment because the dealership did not establish as a matter of law that it was a franchise protected by the law because it failed to demonstrate that it had paid the required franchise fee.

Not finding any cases interpreting the Hawaii Franchise Investment Law, the court looked to cases interpreting franchise fee requirements in other states' franchise statutes. It also considered the express statement in the parties' dealership agreement that "[n]o fee or other monetary consideration has been paid by Dealer to Distributor." The dealership argued that its "purchase of tools, parts, and service equipment; communications system licensing fees; marketing fees and purchase of signage and employee training expenses; flooring arrangements and service pricing" constituted an "indirect franchise fee." The court concluded that the question of whether business expenses constituted franchise fees was "highly fact specific" and that summary judgment was inappropriate because the dealership had not "met its burden of demonstrating that it paid a franchise fee."

***Faulkenberg v. CB Tax Franchise Sys., LP*, No. 08-CV-521-WDS, Bus. Franchise Guide (CCH) ¶ 14,105 (S.D. Ill. Mar. 24, 2009)**
This case is discussed under the topic heading "Forum Selection."

***Kay Beer Distrib. Inc. v. Energy Brands, Inc.*, No. 07-C-1068, 2009 WL 425821, Bus. Franchise Guide (CCH) ¶ 14,112 (E.D. Wis. Feb. 20, 2009)**
This case is discussed under the topic heading "Breach of Fiduciary Duty."

***Kenaya Wireless, Inc. v. SSMJ, LLC*, No. 281649, 2009 WL 763496, Bus. Franchise Guide (CCH) ¶ 14,107 (Mich. Ct. App. Mar. 24, 2009)**
The Michigan Court of Appeals determined that an operator of wireless phone stores did not pay a franchise fee as defined by the Michigan Franchise Investment Law (MFIL). Consequently, the operator's agreement with defendant, an authorized agent for various providers of wireless communication goods and services, did not constitute a franchise agreement. Accordingly, the operator's argument that defendant violated the MFIL by failing to provide the operator with a franchise disclosure statement and a notice describing provisions that are unenforceable in Michigan was rejected. The MFIL defines a franchise fee as "'a fee or charge that a franchisee . . . is required to pay or agrees to pay for the right to enter into a business.'" The operator submitted two arguments that it satisfied this definition.

First, it argued that it paid a franchise fee by purchasing "from defendant phones in excess of the bona fide wholesale price." The operator asserted that a markup of ten dollars per phone in a box of ten phones it bought from defendant constituted the payment of a franchise fee, but the court stated that

  

the fact that the phones were marked up does not prove that plaintiff purchased the phones in excess of the bona fide wholesale price. The court defined a bona fide wholesale price as "'a price which constitutes a fair payment for goods purchased at a comparable level of distribution.'" The court found that the phones were minimally marked up so as to account for defendant's shipping and general overhead expenses, and thus the markup was not considered a franchise fee.

The operator also argued that it paid a franchise fee by making monthly payments to defendant for marketing and Internet technology (IT) services. The court emphasized that a franchise fee is a required payment, and the parties' agreement did not impose any requirement on the operator to purchase marketing or IT services from defendant. Defendant's representative asserted that participation in its service programs was completely voluntary and optional, claiming that more than half of its operators did not purchase such services. There was "no evidence to suggest" that the operator was "forced to purchase the service[] . . . in order to enter the agreement" and no provision in the agreement setting out sanctions for failure to enroll in defendant's service programs.

***Liberty Lincoln-Mercury, Inc. v. Ford Motor Co.*, 562 F.3d 553, Bus. Franchise Guide (CCH) ¶ 14,100 (3d Cir. 2009)**
This case is discussed under the topic heading "Injunctive Relief."

***Midw. Theatres Corp. v. IMAX Corp.*, No. 08-5823 (DSD/SRN), 2009 WL 649701, Bus. Franchise Guide (CCH) ¶ 14,116 (D. Minn. Mar. 11, 2009)**
This case is discussed under the topic heading "Tortious Interference."

***Parktown Imps., Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670, Bus. Franchise Guide (CCH) ¶ 14,101 (Mo. 2009)**
This case is discussed under the topic heading "Encroachment."

***Partner & Partner, Inc. v. Exxonmobil Oil Corp.*, No. 08-1590, 2009 WL 1184796, Bus. Franchise Guide (CCH) ¶ 14,154 (6th Cir. May 4, 2009)**
This case is discussed under the topic heading "Antitrust."

***Rand v. CM Franchise Sys., Inc.*, No. 61828-8, 2009 WL 667227, Bus. Franchise Guide (CCH) ¶ 14,094 (Wash. Ct. App. Mar. 16, 2009)**
This case is discussed under the topic heading "Fraud."

***Reliable Tractor, Inc. v. John Deere Constr. & Forestry Co.*, No. 7:07-CV-00043-HL, 2009 WL 1620432, Bus Franchise Guide (CCH) ¶ 14,152 (M.D. Ga. June 9, 2009)**
The Maryland Equipment Dealer Contract Act (EDA) was exported to protect a Georgia dealer, even though it was enacted three years after the parties entered into their dealer agreements. In February 1984, Reliable entered into two equipment dealer agreements with John Deere at a time when John Deere was headquartered in Maryland. The agreements did not specify a term but allowed either party to terminate without cause on 120 days' notice. The agreements also provided for immediate termination based on a list of five circumstances or events.

Three years after the parties entered into the agreements, Maryland enacted the EDA, prohibiting equipment suppliers from terminating dealer agreements "without good cause." After over twenty years in business together, Deere purported to terminate the dealer agreements by 120 days' notice, expressly invoking the agreements' section entitling Deere to termination by notice without cause. Notably, Deere did not invoke any of the "for cause" reasons for termination. Less than two months later, Reliable sued Deere, alleging that the "without cause" termination violated the EDA, and sought preliminary and permanent injunctive relief. Both Reliable and Deere filed motions for summary judgment. Deere argued that the EDA did not apply because Maryland law did not apply to the agreements, and the EDA's enactment after entering into the agreements violated constitutional principles regarding retroactive application of new legislation. Deere also sought permission for discovery to determine whether good cause existed if the court ruled that the EDA applied.

The U.S. District Court for the Middle District of Georgia certified the question about the applicability of the EDA to the Maryland Court of Appeals. The Maryland court characterized the dealer agreements as a series of 120-day agreements that automatically renewed upon the parties' failure to terminate. In light of that characterization, the Maryland court found that the EDA applied because it applied prospectively to the automatically renewed contracts. With the Maryland court ruling in hand, the district court then held that Maryland law, not Georgia law, governed the dealer agreements. After determining that there was no conclusive indication that the agreements contemplated performance in either Georgia or Maryland, the court reasoned that Deere's performance took place in Maryland, at least before it moved to Illinois. The court also recognized that the final execution and stated acceptance of the dealer agreements took place in Maryland. Thus, the court ruled that Maryland law applied despite Deere's relocation of its headquarters to Illinois. Deere argued that if the dealer agreements were really a series of 120-day agreements, then each renewal, after Deere moved to Illinois, should not be subject to Maryland law. But the district court rejected this argument because the renewals were automatic and did not require a formal signed document.

The court also rejected Deere's argument that the termination of the dealer agreements may have been for good cause after all, recognizing that Deere's termination letter made no reference to a termination for the specified "for cause" events and specifically referenced the "no cause" termination by notice provision. Deere's attempts to create justification for termination of the agreements that might pass muster under the EDA were similarly rejected. Some of those grounds were not specified in the dealer agreements themselves, and another proffered justification was based on the dealer's merger with another company. According to Deere, this event "could have involved" a substantial reduction in the interest of a major shareholder of the dealer, an event warranting good cause termination under the dealer agreements. But Deere admitted that it did not know whether the merger, in fact, caused such a substantial reduction in interest; the merger simply could have had that effect.

Finally, the court refused Deere's request to conduct discovery prior to the issuance of the summary judgment motions. According to the court, allowing the manufacturer to go on "a fishing expedition" to find evidence to justify its termination decision was not appropriate.

***Rocky Mountain Chocolate Factory, Inc. v. SDMS, Inc.*, No. 06-CV-01212-PAB-BNB, 2009 WL 579516, Bus. Franchise Guide (CCH) ¶ 14,093 (D. Colo. Mar. 4, 2009)**
This case is discussed under the topic heading "Breach of Contract."

***Saturn of Denville N.J., LP v. Gen. Motors Corp.*, No. 08-CV-5734 (DMC), 2009 WL 1545559, Bus. Franchise Guide (CCH) ¶ 14,148 (D.N.J. May 29, 2009)**
This case is discussed under the topic heading "Injunctive Relief."

***Total Petroleum P.R. Corp. v. TC Oil Corp.*, No. 09-1105 (JP), 2009 WL 702226, Bus. Franchise Guide (CCH) ¶ 14,097 (D.P.R. Mar. 11, 2009)**
This case is discussed under the topic heading "Injunctive Relief."

## TERMINATION AND NONRENEWAL

***Atl. Autocare, Inc. v. Shell Oil Prods. Co.*, 605 F. Supp. 2d 463, Bus. Franchise Guide (CCH) ¶ 14,098 (S.D.N.Y. 2009)**
This case is discussed under the topic heading "Statutory Claims."

***Courtesy Oldsmobile, Inc. v. Gen. Motors Corp.*, No. 07-17267, 2009 WL 1353762, Bus. Franchise Guide (CCH) ¶ 14,141 (9th Cir. May 15, 2009)**
This case is discussed under the topic heading "Breach of Contract."

***Dunkin' Donuts Franchised Rests. LLC v. Kev Enters.*, No. 8:09-CV-131-T-17 MAP, 2009 WL 1587983, Bus. Franchise Guide (CCH) ¶ 14,151 (M.D. Fla. June 5, 2009)**
This case is discussed under the topic heading "Breach of Contract."

***Goldwell of N.J., Inc. v. KPSS Inc.*, No. 07-3919 (KSH), 2009 WL 901158, Bus. Franchise Guide (CCH) ¶ 14,111 (D.N.J. Mar. 31, 2009)**
This case is discussed under the topic heading "Breach of Contract."

***Kay Beer Distrib. Inc. v. Energy Brands, Inc.*, No. 07-C-1068, 2009 WL 425821, Bus. Franchise Guide (CCH) ¶ 14,112 (E.D. Wis. Feb. 20, 2009)**
This case is discussed under the topic heading "Breach of Fiduciary Duty."

***Reliable Tractor, Inc. v. John Deere Constr. & Forestry Co.*, No. 7:07-CV-00043-HL, 2009 WL 1620432, Bus Franchise Guide (CCH) ¶ 14,152 (M.D. Ga. June 9, 2009)**
This case is discussed under the topic heading "Statutory Claims."

***Rocky Mountain Chocolate Factory, Inc. v. SDMS, Inc.*, N0-06-CV-01212-PAB-BNB, 2009 WL 579516, Bus. Franchise Guide (CCH) ¶ 14,093 (D. Colo. Mar. 4, 2009)**
This case is discussed under the topic heading "Breach of Contract."

## TORTIOUS INTERFERENCE

***Midw. Theatres Corp. v. IMAX Corp.*, No. 08-5823 (DSD/SRN), 2009 WL 649701, Bus. Franchise Guide (CCH) ¶ 14,116 (D. Minn. Mar. 11, 2009)**
Plaintiff Midwest Theatres Corporation (CineMagic) alleged claims of tortious interference with prospective economic advantage, violation of the Minnesota Franchise Act, common law fraud, and breach of contract, among others, against defendants IMAX, corporate officers Atkins and Campbell, and two other unnamed IMAX employees. Defendants Atkins and Campbell moved to dismiss all claims against them pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6). The District of Minnesota granted Atkins and Campbell's motion on all counts.

CineMagic's claims were based upon IMAX's alleged representations to CineMagic's film distributors that CineMagic was in default under its purchase agreement with IMAX, which representations purportedly discouraged distributors from sending IMAX films to CineMagic. In addition, the complaint alleged that IMAX, Atkins, and Campbell dealt inequitably with CineMagic (in violation of the Minnesota Franchise Act) by failing to offer a joint venture agreement and instead recommending that CineMagic enter into a purchase agreement for the MPX equipment needed to show IMAX movies.

The court dismissed the tortious interference claim against the two corporate officers because the complaint only asserted claims against IMAX, but it was Atkins and Campbell who allegedly committed the tortious interference. In order to assert a claim against individuals, CineMagic was required to identify the individuals and their alleged tortious conduct, which it failed to do. CineMagic also failed to state a claim of inequitable conduct under the Minnesota Franchise Act against Atkins and Campbell because the complaint indicated only that one of the two officers told CineMagic that a joint venture agreement would be less lucrative than a straight-out purchase of the equipment by the operator. The complaint did not allege that either of the officers failed to offer CineMagic the joint venture agreement or that they materially aided in such a failure. In addition, CineMagic failed to adequately allege that Atkins and Campbell committed common law fraud and violated the Minnesota Franchise Act because CineMagic's fraud claim nowhere specifically referenced either of the two officers. Because no allegations of fraudulent conduct were made, the fraud claims against both officers were dismissed. Finally, Atkins and Campbell could not have breached the purchase agreement or the implied covenant of good faith and fair dealing because they were not parties to the agreement.

***Partner & Partner, Inc. v. Exxonmobil Oil Corp.*, No. 08-1590, 2009 WL 1184796, Bus. Franchise Guide (CCH) ¶ 14,154 (6th Cir. May 4, 2009)**

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

## TRADEMARK CLAIMS

***Domino's Pizza Franchising L.L.C. v. Making the Dough, Inc.*, No. 1:09-CV-0661, 2009 WL 1011584, Bus. Franchise Guide (CCH) ¶ 14,135 (M.D. Pa. Apr. 15, 2009)**

The U.S. District Court for the Middle District of Pennsylvania enjoined a former Domino's franchisee, which operated under the name Dominic's Pizza, from maintaining pizza delivery restaurants at either of its two former franchise locations. The court granted the franchisor's motion for a temporary restraining order prohibiting the franchisee from directly or indirectly infringing upon any of the franchisor's trademarks, using or disclosing any of the franchisor's trade secrets, and violating the terms of the noncompetition covenants in the franchise agreements.

Despite termination of the franchise agreement, the franchisee continued to sell pizza using certain of the franchisor's trademarks and logos and continued to utilize the franchisor's operating manual and telephone numbers, albeit using the trade name Dominic's Pizza. Domino's sued, alleging trademark infringement and breach of the covenant against competition, which prohibited the franchisee from operating a pizza delivery or carryout business for a period of one year within a ten-mile radius of the franchised locations. Domino's successfully sought a temporary restraining order. In weighing the parties' interests, the court noted that covenants not to compete are necessary to protect a franchisor's goodwill, customer lists, operating manuals, and other trade secrets. Further, the one-year and ten-mile restraints included in the covenant reasonably limited its duration and geographic scope.

The court also noted that the balance of equities favored the issuance of a temporary restraining order because Domino's could suffer significant damage to its goodwill in the absence of an injunction, whereas the franchisee was merely prevented from operating a business that historically had little financial success. Likewise, the public interest favored an injunction to prevent customer confusion and to protect the intellectual property rights of Domino's during the pendency of the dispute. For these reasons, the court granted the temporary restraining order and consolidated the parties' trial with a preliminary injunction hearing.

***Dunkin' Donuts Franchised Rests. LLC v. Kev Enters.*, No. 8:09-CV-131-T-17 MAP, 2009 WL 1587983, Bus. Franchise Guide (CCH) ¶ 14,151 (M.D. Fla. June 5, 2009)**

This case is discussed under the topic heading "Breach of Contract."

***Goldwell of N.J., Inc. v. KPSS Inc.*, No. 07-3919 (KSH), 2009 WL 901158, Bus. Franchise Guide (CCH) ¶ 14,111 (D.N.J. Mar. 31, 2009)**

This case is discussed under the topic heading "Breach of Contract."