

FRANCHISING (& DISTRIBUTION) CURRENTS

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ADVERTISING AND MARKETING

Teng Moua v. Jani-King of Minnesota, Inc., Case No. 08-4942 ADM/TLN, Bus. Franchise Guide (CCH) ¶ 14,665 (D. Minn. Aug. 30, 2011)

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

AMERICANS WITH DISABILITIES ACT

Vallabhapurapu v. Burger King Corp., No. C 11-00667 WHA, Bus. Franchise Guide (CCH) ¶ 14,609 (N.D. Cal. May 6, 2011)

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

ANTITRUST

Shred-It Am., Inc. v. MacNaughton, No. 10-00547, Bus. Franchise Guide (CCH) ¶ 14,616 (D. Haw. May 13, 2011)

The District of Hawaii granted the franchisees' motion to dismiss the franchisor's antitrust claims because the franchisor failed to plead sufficiently a "relevant market." Plaintiffs, Shred-It America, Inc. and Shred-It USA, Inc., operated company-owned and franchised document shredding businesses. After entering into the franchise agreement that granted the franchisees, Edward MacNaughton and SIH, LLC, exclusive rights to operate a Shred-It business in the State of Hawaii, the franchisees sold their operating assets to Access Information Management of Hawaii, LLC. Shred-It sued the franchisees and Access Information alleging violations of Sherman Act §§ 1 and 2 and Clayton Act § 7.

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The court found that regardless of the provision that the franchisees purportedly violated, Shred-It had to allege properly a relevant market in order to state a violation of the antitrust laws. After explaining that a relevant market must include a well-defined product market and geographic market, the court evaluated Shred-It's "merely seven words" devoted to defining the relevant market: "mobile, on-site document destruction industry in Hawaii." The court rejected plaintiffs' argument that the test as to the accuracy of the relevant market should be conducted at summary judgment or at trial. The court concluded that Shred-It provided nothing more than a legal conclusion and failed to plead the elements of a relevant market with sufficient specificity. The court, recognizing that it may be possible for Shred-It properly to state an antitrust claim, dismissed Shred-It's antitrust claims without prejudice with leave to amend.

ARBITRATION

Wakeman v. Aqua2 Acquisition, Inc., No. 10-4538 (MJD/JJK), Bus. Franchise Guide (CCH) ¶ 14,608 (D. Minn. May 3, 2011)

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

Brooks v. Fetch! Pet Care, Inc., No. A-5401-09T3, Bus. Franchise Guide (CCH) ¶ 14,614 (N.J. Super. Ct. App. Div. May 13, 2011)

Plaintiffs sued defendant in a New Jersey trial court. Defendant moved to dismiss the complaint based on a provision in the franchise agreement requiring all disputes to be resolved by arbitration in California. The New Jersey trial court granted defendant's application, relying on Supremacy Clause principles requiring enforcement of the arbitration provision in accordance with the Federal Arbitration Act. Plaintiffs appealed the trial court order, arguing that New Jersey was the proper venue based on their general claims of fraud under the New Jersey Franchise Practices Act. Although the appellate court did not accept this contention and held that the arbitration provision fell within the purview of the FAA, the court reinstated the complaint and remanded to the trial court for further development of the record. The record was not developed as to whether the arbitration clause was unconscionable, which the court noted is a defense to enforcement of the FAA. The appellate court reasoned that the issue would be ripe for adjudication only once a record was developed as to whether the franchise agreement was one of adhesion, the arbitration clause was unconscionable, or plaintiffs made a conscious business decision that the franchise agreement's overall benefits outweighed the detriments of the out-of-state arbitration clause.

***Wild v. H&R Block, Inc.*, No. 11-cv-01146, Bus. Franchise Guide (CCH) ¶ 14,615 (D. Colo. May 12, 2011)**

A franchisee moved for a temporary restraining order to stay an arbitration proceeding between her and H&R Block, the franchisor. The court denied the motion because the franchisee could not demonstrate a substantial likelihood of success on the merits that an arbitrator did not have authority to determine gateway issues of arbitration, such as the validity of the termination of the arbitration, or that she validly terminated the arbitration proceeding.

The franchisee initiated the arbitration proceeding consistent with the franchise agreement. The arbitration provision required the arbitrator to reach its decision within ninety days of filing. The parties agreed to stay the arbitration and toll the ninety-day deadline. The franchisee recommenced the arbitration and the parties later agreed to extend the ninety-day deadline once again. When the arbitrator rescheduled the hearing date during the tax season, the franchisee asked H&R Block to move the date until after tax season. H&R Block agreed. A little more than a month before the rescheduled hearing date, however, the franchisee sent notice to H&R Block purporting to terminate the arbitration because the arbitrator had missed the deadline for its decision. The franchisee then moved for a temporary restraining order to stay the arbitration.

The District of Colorado found that because the parties had adopted the American Arbitration Association's rules, there was a strong argument the arbitrator, not the court, would decide the gateway issues such as the validity of the termination of the arbitration proceeding. The court did not find convincing the franchisee's argument that the AAA rule, which provides that the "arbitrator shall have the power to rule on his or her jurisdiction," did not apply because it was adopted eighteen years after the franchise agreement was executed. The court further suggested that the franchisee likely waived enforcement of the ninety-day deadline by resetting the hearing until after tax season.

***Bachrach v. Cornwell Quality Tool Co.*, No. 25444, 2011 Ohio LEXIS 2498, Bus. Franchise Guide (CCH) ¶ 14,627 (Ohio Ct. App. May 25, 2011)**

The Ohio Court of Appeals reversed and remanded the trial court denial of manufacturer's motion to stay pending arbitration because the claims of eight former Cornwell dealers fell within the scope of the parties' arbitration agreement, irrespective of their potential classification as a class. Furthermore, the court held that arbitrability, i.e., whether the contract creates a duty for the parties to arbitrate that dispute under an apparently enforceable arbitration clause, is always a question for the court and not an arbitrator.

Eight Cornwell tool dealers brought class action claims based on similar franchising agreements and identical arbitration agreements with Cornwell to purchase and resell tools. The trial court denied Cornwell's motion to stay based on a determination that the contract language did not address class actions and construed the ambiguity against Cornwell, the drafter of the provision. Cornwell argued that

the arbitrator should decide whether the contract required class arbitration. On appeal, the court decided that under Ohio law the court must first decide whether the dispute falls within the scope of the arbitration agreement without regard to the class action allegations. The trial court improperly relied on the U.S. Supreme Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corporation*, which stood for the court's inability to compel class arbitration under an arbitration agreement silent as to class arbitration, as opposed to the arbitrability of the claim in any capacity under the contract. In *Stolt-Nielsen*, the Court considered whether the parties' contract language required an unwilling participant to submit to class arbitration instead of individual arbitration. In this case, the question presented was whether plaintiffs' claims fell within the scope of the arbitration provision. The arbitration provision in this case required that "[a]ny claim or controversy in connection with, arising out of, or relating to the Agreement between Dealer and Cornwell shall be settled by binding arbitration . . ." The court therefore held that all of the dealers' claims were within the scope of the clause. Thus, Cornwell's motion to stay pending arbitration was erroneously denied.

***Braverman Prop., LLC v. Boston Pizza Rests., LP*, Case No. 1:10-cv-941, Bus. Franchise Guide (CCH) ¶ 14,640 (W.D. Mich. June 27, 2011)**

The Western District of Michigan found that all claims asserted in a suit brought by a pizza restaurant franchisee against a franchisor were within the scope of the broad arbitration clause in the parties' franchise agreement. The court found specious the franchisee's argument that it was not subject to the arbitration clause because the predecessor franchisee and not the plaintiff franchisee itself signed the franchise agreement. All of the franchisee's claims were premised on the allegation that the franchisor exercised a right of first refusal provided in the franchise agreement to purchase the franchise and then backed out of the purchase and did not perform as required. The court found that the transfer agreement, which transferred the franchise to its current owner, unambiguously provided that the plaintiff franchisee assumed all obligations, covenants, and agreements arising under the franchise agreement, including the arbitration provision.

***EmbroidMe.Com, Inc. v. Am. Design Studios, Inc. & IDT Worldwide, Inc.*, Case No. 10-81180, Bus. Franchise Guide (CCH) ¶ 14,631 (S.D. Fla. July 5, 2011)**

Plaintiff, an embroidery business franchisor, and defendant American Design Studios, Inc. (ADS), a shirt manufacturer, entered into a settlement agreement arising out of an arbitration demand filed by ADS for plaintiff's alleged failure to pay for shirts that ADS had manufactured for sale to plaintiff's franchisees. ADS's parent company, IDT Worldwide, Inc., was not a signatory to the settlement agreement. Plaintiff had agreed that if the shirts were not sold to franchisees by a specific date, it would purchase all remaining inventory from ADS. Plaintiff filed a demand for arbitration, and a

hearing date was set. ADS and IDT failed to appear, and the arbitrator entered an award against them. This matter came before the Southern District of Florida pursuant to plaintiff's petition to confirm the arbitrator's final award.

The court granted plaintiff's petition after it presented compelling evidence that the settlement agreement's arbitration provision bound the parent company, IDT, because of its subsidiary's commitment to arbitrate. The court found that the arbitrator properly concluded the parent company had clearly and unmistakably agreed that the arbitrator could resolve arbitrability because the parties designated the AAA's Commercial Rules of Arbitration as governing any dispute and the parent company waived any objection to the arbitrator's jurisdiction by participating in the arbitration proceedings until the eleventh hour. Indeed, the parent company participated in the arbitration up until two days before the scheduled hearing and attempted to abandon the process. Evidence indicated that the signatory subsidiary was little more than a division of the parent company, and the parent company was regularly copied on communications between the plaintiff franchisor and the subsidiary leading up to their manufacturing agreement and as the parties sought to resolve their dispute. The court found that the franchisor established that the subsidiary was an agent of the parent company and that its agent's promise to arbitrate was its own promise as well.

***Mack Green v. SuperShuttle Franchise Corp.*, Case No. 10-3310, Bus. Franchise Guide (CCH) ¶ 14,673 (8th Cir. Sept. 6, 2011)**

In an appeal from the District of Minnesota, the Eighth Circuit affirmed "the district court's grant of [a] motion to compel arbitration, as well as its enforcement of . . . class action waivers." However, the court reversed a dismissal order in favor of staying the case pending completion of arbitration. Airport shuttle drivers, as a putative class, sued SuperShuttle International, Inc. and related entities (collectively, SuperShuttle) in Minnesota state court for violations of Minnesota employment law, claiming that SuperShuttle had misclassified them as franchisees rather than employees. SuperShuttle removed the lawsuit to federal court pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d) (2). The franchise agreements required arbitration, but the franchisees argued that they were exempt because they were transportation workers, and the FAA does not apply "to contracts of employment of . . . any . . . class of workers engaged in interstate commerce." The arbitration provisions expressly incorporated the AAA Rules, which provide that the "arbitrator has the power to determine his or her own jurisdiction over a controversy." Accordingly, the arbitrator could decide whether the FAA applied. As a result, the district court did not err in granting the motion to compel arbitration. The court also held that the district court did not err when it determined that the class action waivers in the parties' franchise agreements could not be enforceable under Minnesota law because the U.S. Supreme Court has determined that the FAA preempts state law and under the FAA

class action waivers are enforceable. The court did, however, determine that the district court should have stayed the lawsuit pursuant to the FAA rather than dismissing it, noting that the arbitrator could ultimately decide that the FAA did not apply and that the parties could then return to court and resume the litigation.

***Lammas Transp. Corp. v. Golden Touch Transp. of NY, Inc.*, Case No. 18757/08, Bus. Franchise Guide (CCH) ¶ 14,658 (N.Y. Sup. Ct. July 22, 2011)**

In this case, the trial court, applying New York law, reiterated New York's public policy favoring arbitration and granted the defendant franchisor's motion to stay litigation pending arbitration even though the franchisor conceded that one of the franchisee's two claims was not actually arbitrable. The court further found that the agreement's contractual 180-day deadline to submit claims was not unconscionable. Pursuant to the parties' franchise agreement, the plaintiff franchisee "was to use its vehicles and drivers to transport defendant's customers, who were crews of major national and international airline carriers." In return, the franchisee received 65 percent of certain "voucher payments." The complaint's first count alleged breach of the agreement for failure to make the voucher payments. The second count alleged that the franchisor breached the agreement by wrongfully terminating it without cause. The franchisor did not dispute that the second count was outside the scope of the obligation to arbitrate. The court nonetheless granted its motion to stay litigation because "[w]here arbitrable and non-arbitrable claims are inextricably interwoven, the proper course is to stay judicial proceedings pending the completion of the arbitration, particularly where the determination of issues in arbitration may well dispose of non-arbitrable matters" (citations omitted).

***Metro Premium Wines v. Bogle Vineyards, Inc. and Winebow, Inc.*, Case No. 11-C-911, Bus. Franchise Guide (CCH) ¶ 14,654 (N.D. Ill. June 14, 2011)**

Metro Premium Wines, an Illinois wine distributor, distributed the wine of Bogle Vineyards, Inc., a California wine manufacturer, in Chicago for twenty years until Bogle terminated Metro's distribution rights. Bogle handed the distribution over to a competitor, Winebow, Inc. Metro sued, alleging that Bogle and Winebow created a scheme to transfer Metro's distributorship improperly to Winebow, in part using Metro's confidential information acquired by Winebow under the guise of a potential transaction whereby Winebow would buy Metro. Bogle moved to dismiss Metro's complaint for improper venue or to transfer venue on the assertion that the dispute should be arbitrated under the terms of the distributor agreement.

The Northern District of Illinois denied the manufacturer's motion to dismiss the distributor's suit for arbitration, finding that the parties did not agree to arbitrate their dispute.

The parties had agreed that the Uniform Commercial Code (UCC) governed the matter, and the manufacturer argued that the UCC mandated arbitration of the dispute.

The parties' oral agreement for the distribution of wine began in 1990. In 2010, the manufacturer began printing its terms on the back of its invoices. The terms required mandatory arbitration of disputes. The distributor did not become aware of the terms until August 2010, after it received three invoices over a five-day period with those terms printed on the back.

The court held that because the parties were merchants, any extra terms from the manufacturer would become part of the original oral agreement unless they materially altered the contract. The court found that California law is clear in that an arbitration clause is a material alteration to a contract under the UCC because it deprives a party from procedural protection to which it would otherwise be entitled. Accordingly, the court found that the limited number of transactions over a short amount of time was plainly insufficient to establish a common understanding between the parties and the distributor's acquiescence in these circumstances.

***Pukar Int'l Inc. v. Hallmark Retail, Inc.*, Case No. A-4476-09T1, Bus. Franchise Guide (CCH) ¶ 14,662 (N.J. Super. Ct. App. Div. July 14, 2011)**

The New Jersey appellate court affirmed the trial court's dismissal in favor of arbitration of a franchisee's claim against Hallmark Retail, Inc. The parties had an account agreement and a sublease agreement, among other agreements. The franchisee defaulted on the sublease, and Hallmark sought to evict. While the eviction proceeding was pending, the franchisee filed a separate lawsuit against Hallmark "alleging breach of the covenant of good faith and fair dealing, violation of the [New Jersey] Franchise Practices Act, misrepresentation, breach of contract, negligence, and unjust enrichment." Hallmark moved to dismiss on the basis of the account agreement's arbitration clause. New Jersey courts favor arbitration as a means of resolving disputes when agreed to by contract. The franchisee argued that the account agreement was entered into with a Hallmark affiliate rather than with Hallmark itself. However, the account agreement's arbitration clause mandated that "all disputes between Hallmark, its affiliates and subsidiaries must be resolved by arbitration, excepting only real tenancy disputes initiated by Hallmark." The court agreed with the trial court that the provision should be enforced as written.

***Glen W. West, Sr. v. Gen. Motors LLC*, Case No. 11-819, Bus. Franchise Guide (CCH) ¶ 14,648 (D.N.J., June 7, 2011)**

After entering into an initial stockholders' agreement and arbitration agreement, a motor vehicle dealer and a manufacturer entered into a second stockholders' agreement and a dealer sales and service agreement. Plaintiff was a shareholder and franchisee of General Motors and the operator, president, and director of the dealership at issue until, on a particular day, he was stripped of his stock; removed as president, director, and operator; and forced from the premises of the dealership. The divestment and removal followed allegations by GM that plaintiff had engaged in self-dealing and failed to maintain books and records according to approved procedures. After the dealer filed suit in the Superior Court

of New Jersey, the manufacturer filed a motion to compel arbitration of the dealer's claims.

The dealer contended that his claims fell under the scope of the subsequent agreements entered into and were not within the scope of the arbitration agreement. Because neither of the subsequent agreements incorporated or otherwise referenced the arbitration agreement, the dealer argued that the arbitration agreement did not apply to disputes arising under those agreements. The District of New Jersey found that all of the claims asserted by the dealer against the manufacturer were subject to arbitration because they in fact fell within the scope of the arbitration agreement the parties had entered into contemporaneously with their first stockholders' agreement in which they agreed to certain investment obligations. The court found that the subject of the dealer's claims, i.e., his divestment and removal as operator of the dealership by the manufacturer, clearly arose from his investment in the dealership and were related to business decisions made by the manufacturer. Thus, the manufacturer's motion to compel arbitration of the dealer's claims was granted and the dealer's complaint was dismissed.

ATTORNEY FEES

***Chevron U.S.A. v. M&M Petroleum Servs., Inc.*, Case Nos. 09-56427, 09-56686, Bus. Franchise Guide (CCH) ¶ 14,682 (9th Cir. Sept. 12, 2011)**

The Ninth Circuit affirmed the district court's determination that franchisor Chevron U.S.A. was entitled to an award of attorney fees under the Petroleum Marketing Practices Act (PMPA). The court stated that "[a]s a general rule, only a franchisee may recover attorney fees under the [PMPA]. However, 15 U.S.C. § 2805(d)(3) authorizes a district court to award attorney fees to a franchisor against a franchisee if the franchisee is found to have brought a frivolous PMPA action." Here, Chevron sued one of its franchised dealers for declaratory judgment, and the dealer "responded with a counterclaim of its own, a counterclaim that was not only found to be frivolous, but the product of perjury and other misconduct." Accordingly, the fee award to the franchisor was appropriate. The court noted, however, that if the dealer had "merely defended Chevron's suit" rather than filing a frivolous counterclaim, "it could not have been held liable for attorneys' fees."

***Hardee's Food Sys. Inc. v. Shree Krishna Food, LLC*, No. 09-4083, Bus. Franchise Guide (CCH) ¶ 14,618 (C.D. Ill. June 2, 2011)**

Hardee's moved for attorney fees and costs after obtaining partial summary judgment on its claims against the franchisee for breach of the franchise agreement, the temporary license agreement, and the personal guarantees of those agreements. Defendants did not respond to the motion. The Central District of Illinois determined that under Missouri law, Hardee's was entitled to all of its attorney fees because each of the agreements contained a provision authorizing an award of fees to the prevailing party, and the amount of fees sought was not unreasonable. In support of that

determination, the court examined the affidavits and billing records and found that the \$111,616 in attorney fees was not unreasonable because defendants did not submit anything to suggest otherwise, and the hours expended were in line for similar services, especially in light of difficulties encountered by Hardee's in attempting to complete discovery in a timely and orderly manner against these defendants. The court also awarded Hardee's \$4,676 in costs because defendants did not challenge reasonableness, and the agreements authorized recovery of these costs.

BANKRUPTCY

***In re Quattrin*, No. 09-13410, Bus. Franchise Guide (CCH) ¶ 14,623 (Bankr. N.D. Cal. May 26, 2011)**

A franchisee of Total Car Franchising Corp. filed for bankruptcy while his Total Car franchise agreement was still in effect. The franchise agreement provided for a two-year non-competition period after termination of the agreement. After bankruptcy, Total Car took steps to enforce the franchise agreement. The franchisee sought damages for violation of the discharge injunction, declaratory relief that all of his obligations under the franchise agreement were discharged, and a declaration that the noncompetition clause in the franchise agreement was not enforceable under California law.

The prayer for damages was dismissed without prejudice on procedural grounds in a previous order, and the court abstained from deciding whether the noncompetition clause was enforceable under California law because the issue involved only state law and did not implicate the franchisee's bankruptcy rights. The only issue before the court was whether the discharge injunction prohibited enforcement of a noncompetition clause. Relying on cases from the Sixth and Seventh Circuits, the only two appellate courts to address the issue, the court held that the noncompetition agreement, to the extent enforceable under state law, was enforceable notwithstanding the bankruptcy discharge. The court further held that any liability for monetary damages as a result of pre-petition breaches had been discharged pursuant to Bankruptcy Code § 523(a) and that Total Car could not seek monetary damages for any pre-petition violation of the noncompetition clause.

***In re TMS Equip., LLC v. Volvo Equip. Rents, Inc.*, Case No. BK-10-81001-TJM, A11-8056-TJM, Bus. Franchise Guide (CCH) ¶ 14,661 (Bankr. D. Neb. Aug. 2, 2011)**

The U.S. Bankruptcy Court for the District of Nebraska denied a Volvo Construction Equipment Rents, Inc. franchisee's motion for preliminary injunction in a bankruptcy adversary proceeding. The franchisee sought to enjoin Volvo Rents and related entities from "exercising their remedies under the franchise agreement, the covenants not to compete, the security agreements" and an agreed order involving planned liquidation of inventory that was collateral for one of the Volvo entities. The debtor argued that Volvo Rents had a flawed business model and that he could make money if permitted to remain in business using a different business model unencumbered by the franchise agreement's

noncompete provision. Among other things, the court found that the debtor failed to establish that he had the financial expertise or ability to succeed in his proposed new venture. Moreover, allowing the debtor to compete using his Volvo inventory would be a "significant financial detriment to Volvo Rents," and another Volvo entity would "not be permitted to take possession of its collateral and control its liquidation." Public policy further supported denying the requested injunction because parties generally should be able to rely on the contracts they enter.

CHOICE OF FORUM

***Good Feet Worldwide, LLC v. Larry Schneider*, Case No. 10-CV-263 JLS (CAB), Bus. Franchise Guide (CCH) ¶ 14,659 (S.D. Cal. Aug. 1, 2011)**

This case is discussed under the topic heading "Oral Agreements."

CLASS ACTIONS

***Vallabhapurapu v. Burger King Corp.*, No. C 11-00667 WHA, Bus. Franchise Guide (CCH) ¶ 14,609 (N.D. Cal. May 6, 2011)**

This is the second class action suit concerning alleged Americans with Disabilities Act and state law violations by Burger King due to purportedly inaccessible restaurants in California that Burger King leases to franchisees. In the first action, an order certified a class for each of the ten restaurants that plaintiffs had visited and encountered access barriers. A settlement was reached concerning those ten restaurants. This action at issue relates to the remaining eighty-six restaurants in California that Burger King leases to franchisees that were not certified as a class in the previous action. The complaint raised nearly identical legal issues to the previous action. Burger King filed a motion to dismiss for failure to join the franchisees as necessary parties under Rule 19 of the Federal Rules of Civil Procedure and for lack of standing of certain plaintiffs to assert claims with respect to restaurants they had not allegedly visited.

The Northern District of California recognized that Burger King unsuccessfully raised this same motion in the previous suit and presented no new arguments and added no new law in its filings for this action. As a result, the court denied the motions based on its ruling in the previous suit that plaintiffs did not lack standing to assert claims with respect to restaurants they had not allegedly visited and that individual franchisees were not necessary parties to the class action.

***Bachrach v. Cornwell Quality Tool Co.*, No. 25444, 2011 Ohio LEXIS 2498, Bus. Franchise Guide (CCH) ¶ 14,627 (Ohio Ct. App. May 25, 2011)**

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

***Leroy Grayson & Alvin McKenzie v. 7-Eleven, Inc.*, Case No. 09-CV-1353, Bus. Franchise Guide (CCH) ¶ 14,653 (S.D. Cal. June 10, 2011)**

A certified class of former convenience store franchisees that sued a franchisor for withholding federal excise tax refunds could not be maintained as a nationwide class because the

parties failed to demonstrate that California law could apply to the nationwide class members' claims.

The Southern District of California found that a class could not be cohesive under Federal Rule of Civil Procedure 23(b)(2) if state laws governing other members of the class were notably different. The franchisor provided no legal authority for its assertion that California law did not conflict with the laws of other states for purposes of the class claims. Thus, the court ruled the class was required to be decertified.

In this case, the class action sought to recover federal excise tax refunds that had been issued to the franchisor in connection with the former franchises' sales of certain long distance telephone cards. The court initially granted the parties' joint motion stipulating to class certification, and the class brought claims for conversion and breach of implied contract. The court then ordered the parties to show cause why the class should not be decertified. The class failed to provide any comparison of the variances in state laws for the claims they asserted and did not provide an extensive analysis. The parties did not cite and the court did not find a case in which a nationwide class was certified to pursue the claims asserted here. Accordingly, the court decertified the class and found that when the laws of multiple states must be applied, a party seeking class certification under Rule 23(b)(2) must credibly demonstrate through an analysis of state law variances that certification did not present insurmountable obstacles.

***Mack Green v. SuperShuttle Franchise Corp.*, Case No. 10-3310, Bus. Franchise Guide (CCH) ¶ 14,673 (8th Cir. Sept. 6, 2011)**

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

CONTRACT ISSUES

***Coyote Portable Storage, LLC v. PODS Enters., Inc.*, No. 1:09-CV-1152-AT, Bus. Franchise Guide (CCH) ¶ 14,620 (N.D. Ga. May 16, 2011)**

Plaintiff franchisees sued franchisor PODS Enterprises, Inc. asserting, among other things, claims for breach of contract for improper calculation of royalties and failure to pay royalty rebates. In addition, plaintiffs sought an order declaring that the term *net sales*, as used in their franchise agreements and upon which royalty calculations were based, did not include monies received as part of the franchise's cross-country move program.

PODS designated an expert witness one month before the close of the twelve-month discovery period to provide expert testimony on the rules of grammar and their application in construing the term *net sales* in the franchise agreements to include monies received as part of the cross-country move program. Plaintiffs moved to exclude the testimony of the grammar expert, and the court granted plaintiffs' motion.

First, the court held that PODS failed to designate its expert sufficiently early in the discovery process to provide plaintiffs adequate time to identify a rebuttal witness as required under Local Rule 26.2(C). The case was initially

assigned to a four-month discovery term, and the parties were granted three extensions that ultimately extended the discovery period to twelve months. The court held that the proper interpretation of the franchise agreement is a central issue in the case, and the need for expert testimony on the issue should have been apparent to PODS well before the virtual end of the twelve-month discovery period.

Second, the court held that even if PODS had timely designated its expert, the expert's testimony is inadmissible under Federal Rule of Evidence 702 because the construction of a contract is a matter of law for the court to determine. The court recognized that under Florida law, which controlled in the case, interpretation of a contract, including determination of ambiguity, is a matter of law and held that the opinions of PODS' expert did not create ambiguity in the franchise agreements. The court held that because there is no need to "clarify or define terms of art, science, or trade" and the expert "is not testifying about a technical term in the contract that needs explaining," the expert's opinion was inadmissible; instead, the court would assess the plain language of the contracts to determine whether ambiguity exists. The court also rejected the argument by PODS that its expert's testimony does not offer legal opinions but "merely reviews the proper use of commas, the correct syntactic interpretation of a sentence, and the essential rules of contract drafting that compel his conclusions." The court held that, to the contrary, the expert "offers his opinion on the legal effect of the contractual provision at issue," which is the court's determination to make. Admission of the expert's testimony, the court held, "would give the appearance that the court was shifting to the expert the responsibility to decide the case."

***EA Indep. Franchisee Ass'n, LLC v. Edible Arrangements Int'l, Inc.*, Case No. 3:10-cv-1489, Bus. Franchise Guide (CCH) ¶ 14,650 (D. Conn. July 19, 2011)**

Plaintiff represented an association of more than 170 franchisees of Edible Arrangements (EA) and its affiliates. Plaintiff brought suit alleging that EA violated federal regulations by failing to disclose its relationships with its affiliates while requiring its franchisees to do business with them, and by failing to disclose fees associated with a mandatory ordering system. Plaintiff sought a declaratory judgment that EA breached the franchise agreements, violated the implied covenant of good faith and fair dealing, and violated the Connecticut Unfair Trade Practices Act. Defendants moved to dismiss for lack of standing.

The District of Connecticut found that an association such as plaintiff has standing to sue if its members would otherwise have standing to sue in their own right, the interests it seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested required the participation of individual members in the lawsuit. Here, the franchisor alleged that plaintiff had no standing to sue because its members lacked individual standing. The franchisor claimed that, in order to allege an injury, the association was required to identify at least one franchisee injured by each

of the franchisor's alleged wrongs. However, the court denied the franchisor's motion to dismiss, finding that there was no heightened pleading requirement for allegations of standing. Accordingly, the association did not need to identify specific franchisees and, to the contrary, general factual allegations sufficed in the early stages of litigation.

***KJE, LLC v. RAC Holdings, Inc.*, Case No. 02A03-1102-PL-52, Bus. Franchise Guide (CCH) ¶ 14,645 (Ind. Ct. App. June 23, 2011)**

The Indiana Court of Appeals reversed the lower court's grant of summary judgment to an ice cream restaurant franchisee on the franchisor's breach of contract claim. The franchisor sued, seeking to terminate the franchise agreement and later moved for summary judgment. The court found that the franchisee had breached its agreement with the franchisor by opening a deli restaurant in the same building that the franchisor had approved for use as a franchised ice cream restaurant without the franchisor's approval. The court found that the franchise agreement was unambiguous and did not permit the franchisee to operate another business in the same building without franchisor approval. Further, the franchise agreement clearly implied that the franchised ice cream restaurant should be a stand-alone operation. The court held that nothing suggested that the franchisor expressly approved only the front half of the building for use as a franchised restaurant, leaving the franchisee free to do as it pleased with the rear half. When the franchisor granted approval to remodel the front half of the building for use as a restaurant, there was nothing in the rear half of the building, and that was the arrangement and floor plan the franchisor approved. The remodeling of the rear half of the building and its later use as a deli clearly changed the entire character of the building and constituted a material alteration to the building that the franchisor had not approved.

***Maehal Enters., Inc. v. Thunder Mountain Custom Cycles, Inc.*, Case No. 09CA0806, Bus. Franchise Guide (CCH) ¶ 14,634 (Colo. Ct. App. July 7, 2011)**

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

***Teng Moua v. Jani-King of Minnesota, Inc.*, Case No. 08-4942 ADM/TLN, Bus. Franchise Guide (CCH) ¶ 14,665 (D. Minn. Aug. 30, 2011)**

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

CORPORATE VEIL PIERCING

***FLB, LLC v. 5LINX*, No. 06-CV-6453, Bus. Franchise Guide (CCH) ¶ 14,619 (W.D.N.Y. May 16, 2011)**

The court found that plaintiffs had failed to establish a triable issue of material fact that a corporate officer was an alter ego of the defendant corporation and therefore liable in his personal capacity. The court even went so far as to find that plaintiffs' counsel had violated Federal Rule of Civil Procedure 11 for making the claims but declined to impose monetary sanctions.

The case arose from an agency agreement between Verizon Wireless and @Wireless that permitted @Wireless to sell cellular communications services or delegate its obligations to other third parties, such as the main plaintiff, FLB. @Wireless purportedly breached its agreement with Verizon, which required it to sell Verizon products and services exclusively. Verizon terminated its agreement with @Wireless, and FLB, operating as a retail franchisee of @Wireless, allegedly suffered damages. FLB sued Verizon and @Wireless but later dismissed those causes of action. The remaining defendants were the president and sole owner of @Wireless in his personal capacity and another corporate entity owned by the same individual, 5Linx, which allegedly also sold non-Verizon products and services during the term of the agreement between Verizon Wireless and @Wireless.

Defendants were granted summary judgment on all claims. Principally, they successfully contended that there was no evidence to pierce the corporate veil between @Wireless and its president. Evidence submitted by plaintiffs that they believed that they were dealing with the president in his individual capacity was not sufficient to defeat summary judgment. Therefore, the president could not be found liable for breach of the contract between plaintiffs and @Wireless or for breach of the implied covenant of good faith. Further, the court held that because the relationship between the franchisor and the franchisee was at arm's length—and not a fiduciary relationship—FLB's claims for fraud, constructive fraud, negligent misrepresentation, and constructive trust against the president of @Wireless were not viable. The court also granted summary judgment in favor of 5Linx because there was no evidence of a breach of the franchise agreement.

The president of @Wireless and 5Linx also moved for sanctions for violation of Rule 11. The court found that the claims against him were not warranted by existing law or a nonfrivolous argument for establishment of new law on the alter ego/veil piercing theories. The court found that plaintiff's attorney violated Rule 11 but refrained from imposing a monetary sanction and instead admonished plaintiffs' counsel.

DAMAGES

***Choice Hotels Int'l, Inc. v. Smith Hotel Props., LLC*, Case No. 5:09CV-00258-80, Bus. Franchise Guide (CCH) ¶ 14,610 (E.D.N.C. May 6, 2011)**

This case dealt with whether a liquidated damages clause in a terminated hotel franchise agreement was valid and enforceable under Maryland law. The district court held that the liquidated damages clause at issue complied with Maryland law and was not an unenforceable penalty clause. Specifically, the court found that the undisputed evidence of record established that the liquidated damages provision at issue met all of the elements of an enforceable liquidated damages provision under Maryland law because it provided in clear and unambiguous terms a sum certain, reasonably compensated for damages anticipated by the breach, and could not be altered to correspond to actual damages after the fact.

With respect to whether the provision provided in clear and unambiguous terms a sum certain at the time of breach,

the court noted that the liquidated damages provision at issue did not specify an exact dollar amount. However, it did provide an exact mechanism to calculate the amount of damages upon termination, and thus the court determined that this was sufficient to constitute a clear and unambiguous sum certain. Next, with respect to whether the liquidated damages provision reasonably compensated for the damages anticipated by the breach, the court found that this element was satisfied because the contemplated amount was not grossly excessive or out of proportion to the damages that might reasonably have been expected to result from the breach of contract. Specifically, the court found that the liquidated damages provision attempted to put the franchisor back into the position it would have been but for the breach, and thus was not grossly excessive or out of proportion with reasonably expected damages. Finally, with respect to whether the liquidated damages clause could be altered after the fact, the court found that the liquidated damages provision was binding and could not be altered to correspond to actual damages. Thus, based on the fact that the liquidated damages provision provided for a sum certain, which was a fair estimate of potential damages, the court found that the liquidated damages provision was valid and enforceable under Maryland law.

***Cont'l Cars, Inc. v. Mazda Motor of Am., Inc.*, Case No. C11-5266BHS, Bus. Franchise Guide (CCH) ¶ 14,613 (W.D. Wash. May 12, 2011)**

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

***JSA Depot, Inc. v. Foreverlawn Inc.*, Case No. G044164, Bus. Franchise Guide (CCH) ¶ 14,679 (Cal. Ct. App. Aug. 31, 2011)**

The California Court of Appeal reversed a \$987,000 judgment against Foreverlawn, Inc. that a dealer obtained for "contract, interference, and implied covenant claims," holding that "no substantial evidence show[ed] plaintiffs suffered loss in the awarded amounts." Although the dealer presented evidence of lost contracts, it provided only the total sales price of those contracts rather than the "lost net profits on those canceled sales," and other evidence of lost sales was based on "speculation and conjecture." There was also no substantial evidence for the portion of award attributable to lost future profits. The dealer failed to show the reasonableness of its sales projections, and the bookkeeper who testified was not qualified to "predict income, expenses or profits" and "merely assumed [the dealer] would meet its sales requirements, though it had never done so." The case was remanded for a new damage trial, and Foreverlawn was awarded its costs of appeal.

***Passport Health, Inc. v. Travel Med, Inc.*, Case No. 2:09-cv-01753-GEB-JFM, Bus. Franchise Guide (CCH) ¶ 14,677 (E.D. Cal. Sept. 6, 2011)**

After a bench trial "solely on the damages portion of Plaintiff Passport Health Inc.'s claims," the Eastern District of California determined the appropriate amount of damages

to be paid by Travel Med, Inc., a former Passport Health franchisee. After Travel Med terminated its franchise agreement with Passport Health, it failed to pay royalties and continued to use Passport Health's trademarks for several months, including using the URL "www.passporthealthinca.com" to redirect visitors to "www.travelmed.com." The parties' franchise agreement required Travel Med to pay 7 percent of its gross revenues for the agreement's ten-year term to Passport Health. The court determined that Travel Med, its guarantor, or both should pay any past-due royalties and 7 percent of its gross revenues until the agreement would have terminated and, accordingly, awarded both past and future royalties. The court then reduced this amount for mitigation because of Passport Health's replacement of the franchisee. The replacement franchisee was not yet well-established, so the court based its projected performance on current revenue figures. Passport Health also requested Travel Med's profits trebled pursuant to 15 U.S.C. § 1117(a) for "willful infringement." Although the court awarded profits for the time period of infringement, it declined to treble those profits in its award.

DEFINITION OF A FRANCHISE

***Garbinski v. Nationwide Mut. Ins. Co.*, Case No. 3:10cv1191, Bus. Franchise Guide (CCH) ¶ 14,655 (D. Conn. July 26, 2011)**

Plaintiff sued defendant Nationwide Mutual Insurance Co., alleging breach of contract of an agent agreement and a securities agreement, along with causes of action for violations of the Connecticut Franchise Act (CFA), the Connecticut Unfair Trade Practices Act, and negligent and intentional misrepresentation. Nationwide moved to dismiss pursuant to a mandatory arbitration provision contained in the securities agreement or, in the alternative, to stay the proceedings and compel arbitration. The District of Connecticut found that the insurance agent plausibly alleged that the relationship between himself and the insurance company was a franchise under the meaning of the CFA for purposes of the company's motion to dismiss. Thus, the agent's claims that the company violated the CFA by terminating the parties' agent agreement without adequate notice or good cause were sustained.

Nationwide moved to dismiss the agent's CFA claims on the ground that the relationship was a traditional agency relationship. The agent cited *Charts v. Nationwide Mutual Insurance Co.* (Bus. Franchise Guide 2005-2006, New Developments Transfer Binder ¶ 13,200) to support his contention that the CFA applied to insurance agents. However, the court concluded that, at most, the *Charts* court found that the Connecticut Insurance Code did not preempt the CFA and acknowledged that an insurance agency relationship could possibly meet the test for a franchise relationship.

The Connecticut Supreme Court established a two-step inquiry to determine whether a franchise existed under the CFA: the franchisee must have the right to offer, sell, or distribute goods or services; and the franchisor must substantially prescribe a marketing plan for the offering, selling, or distributing of goods or services. Here, the terms of the agent agreement suggested that the agent had the right to offer, sell,

or distribute the insurance company's goods and services, and the terms of the agreement suggested there was a marketing plan or system prescribed in substantial part by the insurance company, and the plan or system was substantially associated with the insurance company's trademark. Thus, the court found that the agent adequately stated claims under the CFA. However, the court held that whether the nature of the relationship in practice met the statutory definition for franchise was a question best left for summary judgment or trial after the parties conducted discovery into the issue.

Kay Beer Distrib., Inc. v. Energy Brands, Inc., No. 09-3578, Bus. Franchise Guide (CCH) ¶ 14,625 (7th Cir. Feb. 14, 2011)
This case is discussed under the topic heading "Oral Agreements."

Missouri Beverage Co., Inc. v. Shelton Bros., Inc., Case No. 2:10-cv-04113, Bus. Franchise Guide (CCH) ¶ 14,651 (W.D. Mo. June 17, 2011)

Plaintiff, a Missouri beverage distributor, and defendant, a beer supplier, entered into an oral agreement whereby the distributor could purchase and be supplied beer from defendant but would not be obligated to order any particular amount. By subsequent letters, defendant appointed plaintiff as the distributor of more of its products, and both parties agreed that plaintiff had the right to offer, sell, and distribute defendant's imported beers within Missouri. In 2010, defendant stopped providing products to plaintiff. Plaintiff brought suit claiming that defendant violated the Missouri franchise law when it unilaterally terminated their relationship. The parties then cross-moved for summary judgment.

The Western District of Missouri found that the relationship between the distributor and the supplier was required to satisfy the general definition of franchise under the Missouri Franchise Law (MFL). The MFL's definition of *franchise* contained two parts. It began with a general definition, which required an oral or written agreement with terms of an ongoing business relationship; the grant of a license to use a trade name, trademark, or service mark; and a community of interest in the marketing of goods or services at wholesale, at retail, by lease, by agreement, or otherwise. The second portion of the MFL's definition was added in 1975 as an amendment and referenced liquor franchises specifically by setting out criteria applicable to liquor franchises, but stated they were included in the general definition of franchise.

The court found that the MFL did not carve out a separate definition of franchise for the relationship between companies that sold beer or liquor. Rather, the MFL applied equally to certain business relationships based on the sale of beer or liquor as it did other industries. Given the plain language of the MFL, the court found that the legislature did not intend to create a franchise whenever there was a commercial relationship between a liquor supplier and distributor, as the distributor argued. Accordingly, the court held that the relationship between the distributor and supplier was not a franchise under the MFL. Further, the

supplier did not grant a license to use a trade name to the distributor, the distributor failed to use the supplier's name or trademarks in its marketing efforts, and the parties had no community of interest under the meaning of the law. The court additionally found the New Jersey Franchise Practices Act, which had the same "community of interest" requirement as Missouri, to be instructive.

DISCRIMINATION

Beasley v. Arcapita Inc., Case No. 09-1125, Bus. Franchise Guide (CCH) ¶ 14,646 (4th Cir. June 23, 2011)

The Fourth Circuit affirmed a lower court's ruling that two African-American shareholders of a pizza restaurant franchisee lacked standing to sue the franchisor under the federal civil rights law alleging racial discrimination. The shareholders sued, claiming that their franchisee was the only existing franchise of the franchisor that was forbidden to sell pork products, and that the franchisor forbade them to do so because of their race.

Relying on the U.S. Supreme Court's decision in *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006), the District of Maryland had ruled that a corporation's sole shareholder could not bring a civil rights law action pursuant to a franchise agreement because he was not a party to and did not have rights under the franchise agreement. On appeal, the shareholders argued that they were in fact parties to the franchise agreement by virtue of a personal guaranty, and they were individually parties to the agreement pursuant to a specific section of the franchise agreement. The court found that the particular section did not establish that they were individually parties to the agreement. Rather, the language referenced by the shareholders that they "individually . . . executed this Agreement" did not establish they were parties to the agreement, and, in fact, the shareholders did not individually execute the agreement. To the contrary, one of the shareholders did not execute the agreement at all, and the other signed the agreement above the notation "president," thereby denoting her execution only in her corporate and not her individual capacity. The Fourth Circuit agreed with the lower court's determination that signing the agreement in such a representative capacity did not make her an individual party to the agreement.

EARNINGS CLAIMS

7-Eleven, Inc. v. Spear, Case No. 10-cv-6697, Bus. Franchise Guide (CCH) ¶ 14,644 (N.D. Ill. June 23, 2011)

After terminating the parties' franchise agreement for the franchisee's failure to meet the minimum net worth requirement, plaintiff-franchisor 7-Eleven, Inc. sought a preliminary injunction forcing the franchisee to de-identify and meet all post-termination obligations. The franchisee counterclaimed, alleging that 7-Eleven violated the Illinois Franchise Disclosure Act and the Illinois Consumer Fraud and Deceptive Business Practices Act, which constituted common law fraud.

The Northern District of Illinois granted the franchisor's motion to dismiss the franchisee's counterclaims, finding

that the franchisor's failure to provide material information concerning the historical performance of the franchisee's particular store to the prospective franchisee in connection with her consideration and purchase of the franchise did not amount to common law fraud or violate state statutes. The franchisor was not required by the Federal Trade Commission Franchise Rule or the UFOC Guidelines to disclose earnings information for any of its stores, let alone the store that the franchisee decided to purchase, which had only been operating for less than one year. The franchisor specifically disclosed in its UFOC that it was not providing information relating to stores that had been opened for less than twelve months, and informed the franchisee that it would not provide such information. The franchisee argued that she should have been provided with information on the subject store's historical poor performance in order to correct a misimpression created by the provided earnings claim.

The court held that the earnings claim made by the franchisor could only be deemed misleading if the franchisee ignored the express terms of the earnings claim and instead made projections based upon her own assumptions concerning historical information of other stores. The court found it was not deceptive or fraudulent for the franchisor not to give the franchisee exactly what the franchisor told the franchisee she would not receive—and what the franchisor had no duty to provide in any event. Accordingly, because the franchisor had no duty to disclose the historical financial performance of the subject store, the franchisee's claims failed.

***Ellering v. Sellstate Realty Sys. Network, Inc.*, Case No. 10-1025 (RHK/LIB), Bus. Franchise Guide (CCH) ¶ 14,664 (D. Minn. July 13, 2011)**

This case is discussed under the topic heading "State Disclosure/Registration Laws."

ENCROACHMENT

***WMW, Inc. v. Am. Honda Motor Co.*, Case No. A11A0251, Bus. Franchise Guide (CCH) ¶ 14,663 (Ct. App. Ga. July 14, 2011)**

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

ETHICS

***Planet Beach Franchising Corp. v. Fisher & Zucker L.L.C.*, Case No. 11-CV-915, Bus. Franchise Guide (CCH) ¶ 14,660 (E.D. La. July 28, 2011)**

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

FRAUD

***7-Eleven, Inc. v. Spear*, Case No. 10-cv-6697, Bus. Franchise Guide (CCH) ¶ 14,644 (N.D. Ill., June 23, 2011)**

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

***Coca-Cola N. Am. v. Crawley Juice, Inc.*, Nos. 09 CV 3259 (JG) (RML), 09 CV 3260 (KAM) (RML), (RML), Bus. Franchise Guide (CCH) ¶ 14,621 (E.D.N.Y. May 17, 2011)**

Coca-Cola filed three nearly identical actions against three former distributors of their Minute Maid brand products and their principals. The distributors entered into one-year distributor agreements with Coca-Cola granting them nonexclusive rights to sell Coca-Cola's products in defined geographical territories in New York and New Jersey. Coca-Cola sought monies allegedly due and owing under the distribution agreements for products allegedly ordered and received by the distributors. The distributors filed counterclaims asserting fraud, deceptive business practices, unfair competition, tortious interference with prospective economic advantage, misappropriation of goodwill/unjust enrichment, breach of the covenant of good faith and fair dealing, and misappropriation of inventory/unjust enrichment. Coca-Cola moved to dismiss the distributors' counterclaims under Federal Rule of Civil Procedure 12(b)(6), and the court granted Coca-Cola's motion.

The court first dismissed the distributors' fraud counterclaims, which were based on allegations that Coca-Cola representatives made certain oral representations upon which the distributors relied in entering into the distributor agreements. These included alleged promises of "marketing sup-

The court in *Coca-Cola* dismissed the distributors' fraud counterclaims, which were based on allegations that Coca-Cola representatives made [misleading] oral representations.

port," free product giveaways, and the ability to "sell all or a portion" of their routes after developing them "over many years." The court recognized that the distributor agreements did not contain any provision for the reimbursement of marketing expenses; were for a specific one-year term, renewable only "for additional one-year periods upon the mutual written agreement of the parties"; provided for termination by either party, with or without cause, upon thirty days' notice; and prohibited the distributors from assigning the agreements without Coca-Cola's express, written consent. The distributor agreements also explicitly stated that they "contain the entire and only agreement between the parties" and that "any representation. . . not expressly incorporated herein shall not be binding on either party." The court noted that while a general merger clause does not preclude parol evidence that a party was fraudulently induced to enter into a contract, a fraudulent inducement claim "fails where the alleged misrepresentations conflict with the unambiguous terms of the contract at issue." The court held that because the alleged representations relied on by the distributors contradicted the terms of the distributor agreements, their

fraud claims must be dismissed. The court also held that the distributors' fraud claims failed to satisfy Federal Rule of Civil Procedure 9(b)'s particularity requirements because they failed to allege specific facts, including the "where, when, who or how" of the allegedly fraudulent statements, and failed to allege specific facts that would give rise to a "strong inference of fraudulent intent."

Second, the court dismissed the distributors' counterclaims for deceptive business practices under New York General Business Law § 349 because the distributors failed to allege a "consumer-oriented" act or practice as required under the statute. The court recognized that a "consumer-oriented" act or practice must have "a broader impact on consumers at large" and held that the distributors' counterclaims did not meet this requirement because they did not "allege that Coca-Cola's acts affected the public or were aimed at consumers generally."

Third, the court dismissed the distributors' counterclaims for unfair competition. Such claims under New York law, the court held, involve a defendant's misappropriation of the labors and expenditures of another, and the distributors failed to allege that Coca-Cola misappropriated their "labors, skills, expenditures, goodwill or other property right of commercial value." The court further noted that Coca-Cola and the distributors were never competitors, and that it was not aware of any case sustaining an unfair competition claim in the context of a seller-distributor relationship similar to that of the parties.

Fourth, the court held that the distributors failed to state a claim for tortious interference with prospective business advantage. The court held that although the distributors conclusorily asserted that Coca-Cola "intentionally, maliciously, willfully and without justification" interfered with their relationships with customers, their pleadings were "silent as to the wrongful or improper means Coca-Cola allegedly employed." Further, the court held that termination of the distributor agreements could not amount to wrongful or improper conduct because the distributor agreements specifically permitted termination by Coca-Cola without cause on thirty days' notice.

Fifth, the court dismissed the distributors' counterclaims for misappropriation of goodwill, holding that the distributor agreements "clearly contemplate" the creation of goodwill and explicitly state that "[a]ny goodwill accruing from the sale, promotion and distribution" of products under the distributor agreements "shall accrue to [Coca-Cola] only." The court further noted that the distributor agreements were nonexclusive and provided that Coca-Cola could sell its products to other distributors in the same territory as the defendant distributors.

Sixth, the court held that the distributors' counterclaims for breach of the covenant of good faith and fair dealing failed because New York law does not recognize claims for breach of an implied covenant of good faith and fair dealing in at-will distribution contracts like the distributor agreements. Finally, the court dismissed the distributors' counterclaims for misappropriation of inventory/unjust enrichment

because the distributors' unspecific allegations failed to render their claims plausible under *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1939 (2009); and the existence of valid and enforceable contracts, the distributor agreements, governed the parties' disputes over inventory and precluded recovery in quasi contract for events arising out of the same subject matter.

***Hugo Antonio Castillo Marte v. Hernandez*, No. 66664-9-I, Bus. Franchise Guide (CCH) ¶ 14,622 (Wash. Ct. App. May 16, 2011)**

Franklyn Castillo and his brother Hugo Antonio Castillo Marte decided to purchase two McDonald's restaurant franchises in Oregon. They agreed that Frank would apply for the franchise and that Tony would supply a portion of the funds necessary to buy the franchise and pay other costs necessary to open the restaurant. They were aware that McDonald's sells franchises only to individuals who own the entire equity interest of the franchise and would not grant a franchise to a partnership. They thus agreed to conceal the partnership and Tony's financial involvement from McDonald's. Frank executed franchise agreements with McDonald's for two restaurants in Oregon and later, with McDonald's approval, assigned his interest in both franchises to a company owned entirely by Frank. In the franchise agreements, Frank warranted and agreed that he owned the complete equity interest in the franchise as well as the profits from the operation of the restaurant and that he would maintain that interest during the term of the franchise.

Frank died intestate, and his wife, Jessica Hernandez, was appointed personal representative. McDonald's approved Hernandez as the franchise operator for the restaurants after she completed the required training. The estate was entered into probate, and Tony filed a creditor's claim for his interest in the partnership. Hernandez rejected the claim, and Tony sued the estate claiming that he held an ownership interest in the McDonald's franchise and that he was entitled to receive the amount of his partnership interest from the estate.

The case proceeded to trial, and despite the jury's finding that a partnership existed, the trial court dismissed Tony's complaint. The trial court held that Tony was barred from enforcing the partnership because it was formed with the intent to defraud the franchisor and thus violated statutory and public policy restrictions. The court further held that under the theory of *pari delicto*, Tony could not maintain the action because both brothers were equally at fault in the illicit formation of the partnership and that the same legal theory barred recovery under unjust enrichment. Tony appealed, and the appellate court affirmed.

The appellate court rejected Tony's argument that the trial court erred as a matter of law in finding that the partnership was unlawful and unenforceable. The appellate court agreed with the trial court that the partnership was illegal because it violated the Washington Franchise Investment Protection Act (WFIPA) and the state securities statute and was based on common law fraud. The appellate court first held that the partnership was a security within the meaning of the securities statute, which prohibits fraud in the sale of a security,

and that the partnership was illegal under the statute. The appellate court likewise held that the partnership violated the WFIPA, which makes it unlawful for any person in connection with the offer, sale, or purchase of any franchise to, among other things, “employ any device, scheme or artifice to defraud.”

Further, the appellate court rejected Tony’s argument that the partnership was not barred by common law fraud. Tony argued that the only actionable fraud was between Frank and McDonald’s, making the transaction voidable by McDonald’s, but not invalidating the partnership between the brothers. The appellate court recognized, however, that the issue was not the validity of the transaction between Frank and McDonald’s but whether a court can enforce a partnership that served to defraud McDonald’s. The appellate court held that the statutes are clear that such conduct is prohibited by law, making the partnership agreement illegal. The appellate court further affirmed trial court’s holding that the partnership could not be enforced because it was a violation of public policy.

The appellate court also affirmed the trial court’s finding that Tony was in *pari delicto* and could not enforce the partnership contract on that basis. Washington courts recognize that when parties are not in *pari delicto*, or equally at fault, the less culpable party may bring an action to enforce an illegal contract. The appellate court upheld the trial court’s finding that both parties were equally culpable; thus Tony could neither enforce the illegal contract nor recover on his unjust enrichment claim.

***Teng Moua v. Jani-King of Minnesota, Inc.*, Case No. 08-4942 ADM/TLN, Bus. Franchise Guide (CCH) ¶ 14,665 (D. Minn. Aug. 30, 2011)**

A large group of plaintiffs sued franchisor Jani-King International, Inc. Three of the named individuals sued for violations of the Minnesota Franchise Act (MFA) and the Minnesota False Statement in Advertisement Act (Advertisement Act) and for “fraud, breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, quantum meruit, and vicarious liability.” Defendants moved for summary judgment with respect to the three individual plaintiffs.

One of the plaintiffs based his fraud and MFA claims on alleged statements by Jani-King that “owning a Jani-King franchise was a ‘good business’ and that the business would continue for ‘a long time.’” The court concluded that these statements were “not untrue statements of material fact or fraudulent because they [were] puffery as a matter of law.” The court also rejected this plaintiff’s argument that his status as an unsophisticated immigrant should change the result because “[i]mmigrants, even those with limited English skills and no business experience, are not a group so gullible that they cannot recognize obvious puffery.” This plaintiff further claimed “that Jani-King falsely represented a guarantee of \$1,000 per month in account billings.” However, he had acknowledged at his deposition (through an interpreter) that no one had made any promises to him

about sales income or profit levels before he signed his franchise agreement. Accordingly, there was “no *genuine* fact issue” preventing summary judgment from being entered (emphasis in original). These facts also doomed this plaintiff’s Advertising Act and breach of contract claims. The court also rejected plaintiff’s implied covenant of good faith and fair dealing claim, in which he claimed that Jani-King was obligated to offer him certain accounts because it would essentially require altering the explicit terms of his franchise agreement, which the covenant cannot do.

A second plaintiff made similar claims, which the court also rejected because of a lack of reasonable reliance based on the UFOC’s language and because at least some statements were made after plaintiff had entered into his franchise agreement so that he could not reasonably have relied on those statements. The court further rejected this plaintiff’s claim that Jani-King had “omitted material facts” when those facts were disclosed in the UFOC, commenting that plaintiff “cannot impose liability under either a com-

The Jani-King court found that the alleged representations were “not untrue statements of material fact or fraudulent because they [were] puffery . . .”

mon law fraud or MFA claim merely because he chose not to read the UFOC.” The court also rejected several other contract claims brought by this plaintiff because they sought to impose obligations on Jani-King that were not contained in the parties’ franchise agreement. However, the court denied summary judgment with respect to another contract claim because the particular contract term was ambiguous and therefore was “a question of fact for the jury.”

The court took a third plaintiff’s fraudulent nondisclosure claim under advisement because that plaintiff’s UFOC had not yet been presented to the court, but later granted summary judgment in favor of Jani-King on that claim in *Teng Moua v. Jani-King of Minnesota, Inc.*, Case No. 08-4942 ADM/TLN, Bus. Franchise Guide (CCH) ¶ 14,681 (D. Minn. Sept. 12, 2011). The court granted summary judgment for the franchisor on the remainder of this plaintiff’s claims for similar reasons as those discussed above and also because the applicable statute of limitation barred the MFA claim.

***Toyz, Inc. v. Wireless Toyz, Inc.*, Case No. 10-cv-10900, Bus. Franchise Guide (CCH) ¶ 14,657 (E.D. Mich. June 30, 2011)**

Several franchisees of a wireless phone store franchise system sued their franchisor claiming intentional fraud, negligent misrepresentation, violation of the Michigan Franchise Investment Law, and further claiming they were fraudulently

induced into entering into certain franchise agreements. The franchisees alleged that the franchisor failed to disclose material facts that would have impacted their decisions to enter into the franchise agreements, such as information pertaining to commission chargebacks, required discounts, and the amount of commission revenue they would receive as franchisees. The franchisees asserted that the majority of the alleged misconduct was not known until one of the franchisees examined the franchisor's books and records and the filing of another lawsuit revealed more information.

The Eastern District of Michigan found that the franchisees' claims were not barred by the Michigan Franchise Investment Law's four-year statute of limitations because the franchisees properly pleaded the necessary elements of fraudulent concealment, negligent misrepresentation, and intentional fraud. Further, the court found that the statute of limitations was tolled until the date when the actions giving rise to the claims became known to the franchisees.

***Vino 100, LLC v. Smoke on the Water, LLC*, Case No. 09-4983, Bus. Franchise Guide (CCH) ¶ 14,637 (E.D. Pa. July 1, 2011)**

Plaintiffs, a tobacco franchisor and wine store franchisor, sued defendants-franchisees for breach of two franchise agreements and for trademark violations under the Lanham Act. Defendants responded with a counterclaim for breach of contract, breach of the implied covenant of good faith and fair dealing, negligent and intentional misrepresentation, and fraudulent inducement. Plaintiffs moved to dismiss all counts of the counterclaim for failure to state a claim. The franchisees alleged that the two franchisors breached the parties' agreements by failing to provide the franchisees with an operations manual with marketing materials.

The court dismissed the franchisees' breach of the implied covenant claim, holding that those claims were not available where another cause of action could supply a remedy. Similarly, the franchisees' other claims of breach of contract were dismissed because the court found they were not breaches of a contractually imposed obligation or were time-barred. Further, because the parties' two franchise agreements explicitly stated they encompassed the parties' entire agreement, allegations of a breach of an obligation allegedly imposed by the UFOC were without merit because the statements in the UFOC constituted parol evidence and did not define the parties' obligations. Finally, the court ruled the franchisees failed adequately to allege negligent and intentional misrepresentation and fraudulent inducement based upon alleged prospective revenue statements because parol evidence is inadmissible under Pennsylvania law to provide that one party fraudulently induced another to enter into a contract.

FTC FRANCHISING RULE

***Fed. Trade Comm'n v. Am. Entm't Dists., Inc.*, Case No. 11-10150, Bus. Franchise Guide (CCH) ¶ 14,632 (11th Cir. July 8, 2011)**

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

GOOD FAITH AND FAIR DEALING

***Coca-Cola N. Am. v. Crawley Juice, Inc.*, Nos. 09 CV 3259 (JG) (RML), 09 CV 3260 (KAM) (RML), 09 CV 3279 (ERK) (RML), Bus. Franchise Guide (CCH) ¶ 14,621 (E.D.N.Y. May 17, 2011)**

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

***EA Indep. Franchisee Ass'n, LLC v. Edible Arrangements Int'l, Inc.*, Case No. 3:10-cv-1489, Bus. Franchise Guide (CCH) ¶ 14,650 (D. Conn. July 19, 2011)**

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

***Teng Moua v. Jani-King of Minnesota, Inc.*, Case No. 08-4942 ADM/TLN, Bus. Franchise Guide (CCH) ¶ 14,665 (D. Minn. Aug. 30, 2011)**

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

***Vino 100, LLC v. Smoke on the Water, LLC*, Case No. 09-4983, Bus. Franchise Guide (CCH) ¶ 14,637 (E.D. Pa. July 1, 2011)**

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

INJUNCTIVE RELIEF

***AAMCO Transmissions, Inc. v. Dunlap.*, Case No. 11-4009, Bus. Franchise Guide (CCH) ¶ 14,680 (E.D. Pa. Aug. 16, 2011)**

This case is discussed under the topic heading "Noncompetes Agreements."

***Wakeman v. Aqua2 Acquisition, Inc.*, No. 10-4538 (MJD/JJK), Bus. Franchise Guide (CCH) ¶ 14,608 (D. Minn. May 3, 2011)**

After the termination of a vehicle interior reconditioning business franchise, the franchisor commenced an arbitration proceeding seeking an injunction requiring the franchisee to comply with the franchise agreement's post-termination covenant not to compete. The arbitrator issued an initial order, enjoining only the individual franchisee from violating the covenant. In a subsequent order, the arbitrator clarified the initial order by enjoining the franchisee, as well as any manager, officer, director, shareholders, managers, members and/or partners, beneficial owners, investors, employees, consultants, representatives, or agents of franchisee (including immediate family members), from violating the covenant. The District of Minnesota then issued an order confirming the arbitrator's amended order. The franchisee then filed a motion to stay judgment, seeking to suspend the injunction pending its appeal to the Eighth Circuit.

To grant a stay pending appeal, the court required the franchisee to show that it is likely to succeed on the merits; it will suffer irreparable injury unless the stay is granted; no substantial harm will come to the other interested party; and the stay will not harm the public interest. The District of Minnesota determined that the franchisee failed to establish any of the requirements and denied the franchisee's motion to stay the injunction pending appeal.

The franchisee contended in determining the likelihood of success on the merits, the court wrongly relied on

the common law doctrine of *functus officio* as opposed to American Arbitration Association (AAA) Rule 46, which was the basis of his appeal to the Eighth Circuit. However, the court contended that it did consider AAA Rule 46 and determined that the rule essentially codified the common law doctrine of *functus officio*, which forbade an arbitrator from redetermining an issue he already decided. The franchisee failed to show the court that he was likely to succeed on appeal by reiterating the same unsuccessful arguments previously made before the court when it confirmed the arbitrator's order.

The franchisee also failed to establish that he would suffer irreparable injury if the stay was not granted. The court found no evidence indicating that enforcement of the injunction would require the franchisee to close his business permanently or that the franchisee would not be able to resume his business once the injunction ended. The court distinguished this situation from a case in which a party was faced with shutting down his business because of a law passed by the state, in which case it was not the party's actions that required ceasing operations. In contrast, the court determined that the franchisee cannot now claim irreparable injury where he has chosen to disregard the agreement he signed by continuing to operate a business he knew was unauthorized.

The court did not accept that no substantial harm will come to the franchisor as a result of the stay after the arbitrator had already determined that the franchisor would suffer irreparable harm from the franchisee's continued operations. The court reasoned that the franchisee's continued competition utilized and copied the franchisor's business system, and the franchisor's failure to establish a new franchise in the franchisee's area was in part due to the continued competition from the franchisee's unauthorized business.

Finally, the court determined that the public interest was served by enforcing a valid restrictive covenant in the parties' franchise agreement. The court rejected the franchisee's argument that the public interest was served by waiting for clarification of AAA Rule 46 in the appeal and avoiding unnecessarily putting people out of work. Therefore, the motion to stay the arbitration order was denied.

***Wild v. H&R Block, Inc.*, No. 11-cv-01146, Bus. Franchise Guide (CCH) ¶ 14,615 (D. Colo. May 12, 2011)**

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

***Curves Int'l, Inc. v. Szostek*, No. 11 CV 1645, Bus. Franchise Guide (CCH) ¶ 14,617 (N.D. Ill. June 6, 2011)**

The Northern District of Illinois entered a temporary restraining order and preliminary injunction order enjoining a franchisee from competing with Curves pursuant to a covenant not to compete under the franchise agreement that prohibited defendant from conducting a competitive business for one year after expiration of the franchise agreement within ten miles of the former Curves location and ten miles of any other Curves location. Defendant continued to operate its Curves franchise, use the same marks and suppliers, and service the same customers from the same location, even

after failing to renew the franchise agreement when it expired. The court held that there was a strong likelihood of success by Curves on the merits because defendant's continued operations violated the noncompete, and use of the marks caused a likelihood of confusion by the public. The court also found that the balance of harms factor for issuance of the injunctive relief favored Curves because the breach of the noncompete provision by defendant was intentional so any harm suffered should be given little weight and the harm to its inability to operate a competing business was limited. The court further found that it was in the public interest to issue the temporary restraining order and injunction because it enforces contracts and protects consumers from the confusion created by defendant's use of the Curves marks.

***Victory Lane Quick Oil Change, Inc. v. Darwich*, Case No. 11-11786, Bus. Franchise Guide (CCH) ¶ 14,639 (E.D. Mich. June 29, 2011)**

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

***Wetzel's Pretzels, LLC v. Johnson*, Case No. CV-11-004459, Bus. Franchise Guide (CCH) ¶ 14,642 (C.D. Cal. June 27, 2011)**

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

JURISDICTION

***Tankersley v. Lynch*, No. C09-05763 HRL, Bus. Franchise Guide (CCH) ¶ 14,606 (N.D. Cal. May 9, 2011)**

This case addressed whether officers and employees of a franchisor can be subject to personal jurisdiction in the state where the plaintiff franchisee is located. Plaintiffs, two California residents, alleged that the franchisor's UFOC contained misstatements and omissions of material fact. Plaintiffs engaged in arbitration with the franchisor in Michigan and filed suit against the five individual employees in California for violations of Michigan franchise law. Defendants moved to dismiss plaintiffs' complaint on the ground that the Northern District of California did not have personal jurisdiction over defendants.

Plaintiffs argued that the court exercised general jurisdiction over defendants because the franchisor registered its UFOC with the California Department of Corporations; the franchisor sold franchises to California residents, including plaintiffs; the franchise agreement included a California-specific addendum; and the franchisor provided ongoing support services to its California franchisees. The court determined that, although these facts might subject the franchisor entity to personal jurisdiction, they do not establish that the individual representatives of the franchisor had "substantial" or "continuous and systematic" ties to California to support the exercise of general jurisdiction.

The court then assessed whether it had specific jurisdiction over defendants through a three-prong test. First, the court agreed that the claim arose out of or related to the nonresident defendants' forum-related activities, i.e., their participation in the franchisor's sale of a franchise to

plaintiffs. For the next prong of the test, the nonresident defendants must purposefully direct their activities or consummate some transaction with California or a California resident, or perform some act by which defendants purposefully avail themselves of the privilege of conducting activities in California, thereby invoking the benefits and protections of California. The court determined that of the two options, the “purposeful direction” test applied because the alleged violations were similar to a tort. However, the court determined that it was unclear based on the pleadings whether plaintiffs established the “purposeful direction” test by pleading that defendants sent a copy of the UFOC to a plaintiff in California, engaged in telephone calls and e-mail communications with a California resident, participated in nationwide weekly conference calls with potential franchisees, provided and helped complete a pro forma income

The Culligan court ruled that general jurisdiction was not appropriate when defendants had no “continuous and systematic” contacts in the state.

statement spreadsheet for a prospective franchise in California, and invited California residents to a discovery day in Michigan to learn about the franchise program. Although many of these acts were not specific to California and defendants did not travel to California, they did conduct specific actions to help plaintiffs determine whether purchasing a franchise was right for them.

Defendants argued that the actions highlighted by plaintiffs were taken on behalf of the franchisor and the fiduciary shield doctrine prevented the exercise of personal jurisdiction over defendants unless there is a reason to disregard the corporate form. Because plaintiffs failed to allege that the franchisor was the agent or the alter ego of defendants, the court focused on whether defendants were “guiding spirits” in the alleged wrongdoing directed at plaintiffs in California. However, the court did not rule on the applicability of the fiduciary shield doctrine because, after weighing a number of factors, the court determined that defendants satisfied the third prong of the test refuting personal jurisdiction by establishing that the exercise of jurisdiction over defendants would be unreasonable given the minimal extent to which defendants injected themselves into California, the greater judicial efficiency of having the matter heard in the state where the majority of parties and potential witnesses are located, and the fact that plaintiffs had already engaged in arbitration with the franchisor entity in Michigan. Therefore, the court concluded that it lacked personal jurisdiction over defendants.

***Culligan Int’l Co. v. Water Sys.*, No. 10 C 8199, Bus. Franchise Guide (CCH) ¶ 14,607 (N.D. Ill. Apr. 27, 2011)**

Culligan filed a suit in Illinois against defendants, a former franchisee and its affiliates, for trademark infringement, false advertisement, and violations of Illinois law after defendants allegedly continued to utilize Culligan trademarks after the termination of a Culligan franchise agreement for an Alabama territory. Defendants, an Alabama resident and two Alabama corporations, moved to dismiss the action for lack of personal jurisdiction and improper venue. The Northern District of Illinois granted the motion to dismiss for lack of personal jurisdiction and denied the motion to dismiss for improper venue as moot.

The court ruled that general jurisdiction is not appropriate when defendants have no offices, no employees, no business accounts, and no designated agent for service of process in Illinois to establish the type of “continuous and systematic” contacts in the state to permit the court to exercise general jurisdiction. The court further determined that it did not have specific jurisdiction over defendants because, in addition to the above reasons, all of defendants’ business occurred in Alabama, Culligan initiated contact with defendants in Alabama, and Culligan solicited defendants in Alabama to become Culligan franchisees. The parties discussed, negotiated, and executed the franchise agreement in Alabama. Plaintiff’s pleading failed to state where defendants received training from Culligan representatives, if defendants ever made business trips to Illinois, or if the franchise agreement contained a choice of law provision indicating that Illinois law would govern any dispute, factors that would have supported the assertion of specific jurisdiction. Although plaintiff alleged that defendants sent payments and other correspondence to Culligan in Illinois and purchased goods from Culligan within Illinois, the court found that these actions alone were too attenuated to provide a sufficient connection to Illinois for personal jurisdiction purposes.

Relying on the “express aiming test” based on *Calder v. Jones*, 465 U.S. 783 (1984), plaintiff argued that defendants are subject to jurisdiction in Illinois simply because a plaintiff incurs injury in Illinois. However, in light of the Seventh Circuit’s clarification of this line of case law, the court limits the holding from these cases to situations where a defendant has committed an intentional tort directly aimed at a plaintiff. Therefore, this argument did not help plaintiff when there was no evidence indicating how defendants’ alleged torts were expressly aimed at Illinois or how defendants’ advertising, run by a business occurring exclusively in Alabama, specifically targeted customers in Illinois.

***Cont’l Cars, Inc. v. Mazda Motor of Am., Inc.*, Case No. C11-5266BHS, Bus. Franchise Guide (CCH) ¶ 14,613 (W.D. Wash. May 12, 2011)**

This case deals with whether the minimum amount in controversy requirement of federal diversity jurisdiction was satisfied where the plaintiff dealer sought damages to be proven at trial, treble damages, other equitable relief, and costs and attorney fees. The court held that the \$75,000

minimum controversy requirement more likely than not was satisfied based on the damages sought by plaintiff at the time the suit was filed. Specifically, the court found that the minimum amount in controversy requirement was met because, in addition to monetary damages to be proven at trial, plaintiff sought equitable relief in the form of specific performance of its dealer agreement. The court reasoned that the pecuniary result of seeking specific performance was that plaintiff would either realize the revenues it would have generated under a dealership agreement, which the court found was sufficiently proven by defendant to be more than \$75,000, or obtain damages in an amount equal to the lost opportunity for such revenues. In either case, the minimum amount in controversy requirement was satisfied based on potential revenue. Moreover, the court held that even if the potential revenue was proven to be something less than \$75,000, the minimum controversy amount could still be satisfied by aggregating all potential damages, which in this case included treble damages and statutory attorney fees. The court determined that if all of these amounts were aggregated with any monetary damages, the minimum amount in controversy would likely be met.

***A Love of Food I, LLC v. Maoz Vegetarian USA, Inc.*, Case No. AW-10-2352, Bus. Franchise Guide (CCH) ¶ 14,633 (D. Md., July 7, 2011)**

This case is discussed under the topic heading “Statutory Claims.”

***Planet Beach Franchising Corp. v. Fisher & Zucker L.L.C.*, Case No. 11-CV-915, Bus. Franchise Guide (CCH) ¶ 14,660 (E.D. La. July 28, 2011)**

The Louisiana Planet Beach franchisor sued a Pennsylvania law firm and its Pennsylvania resident partners who represented it in franchise matters after learning that “all or some of the defendants were representing and had an ownership interest in plaintiff’s competitor Sunset Tan.” Planet Beach sued “defendants for violations of Pennsylvania’s Rules of Professional Conduct and for legal malpractice and breach of contract, complaining that the defendants improperly acquired an ownership interest in a competitor” and represented the competitor “without fully disclosing the possible conflict.”

The court explained that the mere existence of an attorney-client relationship is insufficient to confer jurisdiction in the client’s state but that “[u]ltimately, the Court may exercise specific jurisdiction if the defendants’ contacts with the forum give rise to the plaintiff’s cause of action.” Here, the court granted defendants’ motion to dismiss, concluding that simply representing Planet Beach; sending mail, e-mails, and faxes; and making telephone calls to Louisiana did not establish jurisdiction under Fifth Circuit precedent. Moreover, there was also no connection established between these activities and the causes of action alleged.

***Tankersley v. Lynch*, Case No. C09-05763, Bus. Franchise Guide (CCH) ¶ 14,636 (N.D. Cal. June 27, 2011)**

This case is discussed under the topic heading “Statute of Limitations.”

NONCOMPETE AGREEMENTS

***Wakeman v. Aqua2 Acquisition, Inc.*, No. 10-4538 (MJD/JJK), Bus. Franchise Guide (CCH) ¶ 14,608 (D. Minn. May 3, 2011)**

This case is discussed under the topic heading “Injunctive Relief.”

***Curves Int’l, Inc. v. Szostek*, No. 11 CV 1645, Bus. Franchise Guide (CCH) ¶ 14,617 (N.D. Ill. June 6, 2011).**

This case is discussed under the topic heading “Injunctive Relief.”

***In re Quattrin*, No. 09-13410, A.P. No. 10-1167, Bus. Franchise Guide (CCH) ¶ 14,623 (Bankr. N.D. Cal. May 26, 2011).**

This case is discussed under the topic heading “Bankruptcy.”

***AAMCO Transmissions, Inc. v. Dunlap*, Case No. 11-4009, Bus. Franchise Guide (CCH) ¶ 14,680 (E.D. Pa. Aug. 16, 2011)**

The Eastern District of Pennsylvania granted a preliminary injunction in favor of AAMCO Transmissions, Inc. to prevent a former franchisee from using AAMCO’s trademarks and violating a noncompete provision but stayed the litigation and compelled arbitration at the franchisee’s request. The parties were involved in earlier litigation in which the former franchisee had participated and then settled, even though the parties’ agreement contained an arbitration provision. AAMCO then filed this new lawsuit and moved for a preliminary injunction after the franchisee failed to abide by the settlement agreement. The court concluded that this was a new lawsuit, and AAMCO therefore could not point to the franchisee’s activities in the earlier lawsuit as establishing waiver of the right to arbitrate. The court noted that AAMCO’s waiver argument would have been stronger if it had moved to enforce the settlement agreement rather than filing a new lawsuit and that “AAMCO did not fashion this lawsuit as a continuation of the 2007 litigation.” The court also stated, however, that the arbitration provision did not prevent the court from granting injunctive relief and that AAMCO would not be prejudiced during the arbitration because of the injunction. The parties’ contract also contained a noncompete agreement that prohibited the franchisee from, among other things, engaging “in the transmission repair business within a radius of 10 miles of the subject center or of any other AAMCO center” for one year. The court found that the provision, as written, was not enforceable under Pennsylvania law because the prohibition of competing within a ten-mile radius of any AAMCO center was unreasonable. The court therefore modified the provision so that it only prevented competition within ten miles of the former franchisee’s former AAMCO location. The court also required AAMCO to post a \$100,000 bond pursuant to Federal Rule of Civil Procedure 65 “given the evidence submitted regarding the total gross sales” of the former franchised location.

***Victory Lane Quick Oil Change, Inc. v. Darwich*, Case No. 11-11786, Bus. Franchise Guide (CCH) ¶ 14,639 (E.D. Mich. June 29, 2011)**

In an action arising out of a dispute between an oil change business franchisor and its franchisee, the court found that the franchisor was likely to succeed on the merits of its claim that the terminated franchisee was breaching the noncompete covenant by permitting a competing business to occupy the same location as the former franchise. The franchisor claimed violation of the noncompetition clause in the parties' franchise agreement and sought a preliminary injunction on its claims under the Lanham Act for use of the competing business's logo, which it claimed was a colorable imitation of the franchisor's trademark. Because the terminated franchisee still held the lease for the location and allowed the competing business to operate there, the Eastern District of Michigan found the franchisee was arguably "connected with," had "an interest in," or was "assist[ing] any person or Entity engaged in any Competitive Business," in violation of the terms of the noncompete provision in the parties' franchise agreement. The court further found that the franchisor would be irreparably harmed if its request for a preliminary injunction was not granted.

ORAL AGREEMENTS

***Kay Beer Distrib., Inc. v. Energy Brands, Inc.*, No. 09-3578, Bus. Franchise Guide (CCH) ¶ 14,625 (7th Cir. Feb. 14, 2011)**

The Seventh Circuit upheld the Eastern District of Wisconsin's holding that a beverage distributor and a manufacturer did not have an enforceable contract and that their relationship was not a dealership under the Wisconsin Fair Dealership Law (WFDL).

Plaintiff Kay Beer distributed the Glaceau line of enhanced water products manufactured by defendant in some counties of Wisconsin from 2002 to 2007. In 2005, defendant entered into an exclusive distributorship agreement with a third-party distributor. For a period of two years, Kay Beer purchased the Glaceau line of products from the exclusive distributor and continued to distribute the products. However, in 2007, the distributor ceased to allow Kay Beer to be part of its distribution network. Kay Beer sued the manufacturer alleging that the manufacturer broke its distribution contract by allowing an exclusive distributor to stop distributing the Glaceau product through Kay Beer.

Kay Beer contended that its distribution contract should last as long as it used its "best efforts" to sell Glaceau products. The Seventh Circuit disagreed and upheld the lower court finding that no oral contract existed between Kay Beer and the manufacturer because there was no evidence of the exchange of specific promises to form an oral contract, only testimony as to one side's mere understanding of events or beliefs. Because no contract was formed, Kay Beer had no legal rights, thereby disposing of its unjust enrichment claims.

Moreover, the Seventh Circuit upheld the trial court's finding that the parties' relationship was not a dealership under the WFDL because there was no community of

interest. Glaceau products never accounted for more than 3 percent of Kay Beer's sales or profits, and Kay Beer made no investments specific to Glaceau products.

***Good Feet Worldwide, LLC v. Schneider*, Case No. 10-CV-263 JLS (CAB), Bus. Franchise Guide (CCH) ¶ 14,659 (S.D. Cal. Aug. 1, 2011)**

The Southern District of California denied the defendant franchisee's motion to dismiss for improper venue or, in the alternative, to transfer venue. The Good Feet franchisor sued franchisee Larry Schneider pursuant to the forum selection clause in the parties' franchise agreement. Schneider, however, denied ever entering into that agreement, and Good Feet did not provide a signed copy to the court. Schneider argued that the parties' franchise agreement was "unenforceable [under California law] because of the statute of frauds." The court found that the statute of frauds was satisfied because there was an "adequate memorandum of the contract signed by the party to be charged" because, among other things, Schneider had signed "four 'Territory and Location Exhibits to the Franchise Agreements.'" Schneider further argued that Good Feet lacked standing because a different entity had actually executed the franchise agreement. The court rejected this argument based on Good Feet's assertion that it had a valid assignment, which Schneider failed to rebut.

RELEASES

***Fed. Trade Comm'n v. Am. Entm't Distribs., Inc.*, Case No. 11-10150, Bus. Franchise Guide (CCH) ¶ 14,632 (11th Cir. July 8, 2011)**

The FTC filed an enforcement action against ten defendants, charging that they deceptively promoted video rental machines as business opportunities, thereby violating the Federal Trade Commission Act, 15 U.S.C. § 45(a), and various provisions of the FTC Franchise Rule, 16 C.F.R. § 436. One of the defendants and the FTC negotiated a settlement over a year and a half, signed a stipulated order, and jointly moved the district court for entry of a final order and permanent injunction. Three weeks later, defendant moved to withdraw her consent to settlement. The court denied defendant's motion to withdraw, finding that she freely consented to and signed the agreement and that the agreement was fair, reasonable, and adequate and served the public interest. Upon defendant's death, a personal representative of her estate continued to represent her interests in the suit.

The Eleventh Circuit affirmed the lower court's denial of the decedent's motion, holding that whether a settlement agreement had been accepted by a federal court and properly incorporated into a valid and enforceable judgment was purely a question of federal procedural law. Accordingly, the court found that, under federal law, a court could not reject a proposed consent judgment solely because one of the parties to a settlement agreement no longer wished to honor the agreement. The decedent's motion did not suggest or argue that she did not freely consent to and sign the settlement agreement.

STATE DISCLOSURE/REGISTRATION LAWS

Kaeser Compressors, Inc. v. Compressor & Pump Repair Serv., Inc., Case No. 09-C-521, Bus. Franchise Guide (CCH) ¶ 14,612 (E.D. Wis. May 18, 2011)

Plaintiff Kaeser Compressors, Inc. is a supplier of compressors, parts, and related industrial products. Defendant Compressor & Pump Repair Services, Inc. (CPR) and Kaeser entered into a written agreement pursuant to which Kaeser granted CPR the exclusive right to be a distributor for Kaeser's compressors in Wisconsin and Minnesota. When CPR refused to sign Kaeser's new uniform distributorship agreement, Kaeser sought to terminate its agreement with CPR. Kaeser brought this action seeking a declaration that its relationship with CPR was not a dealership within the meaning of the Wisconsin Fair Dealership Act (WFDL) or, if its relationship was deemed a dealership, that CPR's failure to sign the new dealership agreement constituted good cause for termination under the WFDL.

Kaeser initially argued that its relationship with CPR was not a dealership because there was no community of interest between the parties, a requirement of a dealership under the WFDL. Specifically, Kaeser argued that the deteriorating relationship between the two parties over the past few years had led to a difference in strategic vision, and thus there could be no community of interest between the parties. The court, however, disagreed, finding that Kaeser's and CPR's relationship met the guideposts for determining whether a community of interest exists, and such existence of a dealership does not cease to exist merely because of a conflict. Specifically, the court found that the parties shared financial interest in selling Kaeser products and were interdependent on each other in that "they cooperated, coordinated their activities and shared common goals in their business relationship." The court noted that it was not surprising that conflicts do arise between a supplier and a distributor and that the existence of a community of interest does not mean an absence of serious conflict between the parties or a complete agreement on strategic vision or perfect alignment of goals.

Kaeser next argued that even if its relationship with CPR was a dealership within the meaning of the WFDL, CPR's failure to sign the uniform distributorship agreement constituted good cause under the WFDL. However, the court disagreed. Specifically, the court found that Kaeser did not provide sufficient evidence showing that the uniform agreement and the corresponding changes to the parties' relationship set forth therein were essential or even important to its operations. The court dispelled Kaeser's argument that a uniform contract was important to its overall operation, noting that Kaeser had previously operated under numerous forms of agreement and that it was understandable that different dealers would have different forms of agreement based on when they became dealers and where their territories were located. Moreover, the court further noted that even if uniformity of agreement was important to Kaeser's operations, Kaeser had failed to prove the new agreement was essential to Kaeser's continued growth and prosperity. Thus, the court found that CPR's failure to sign Kaeser's

uniform agreement was not good cause under the WFDL.

Finally, the court rejected Kaeser's argument that in determining the reasonableness of the new terms of the agreement, specifically whether Kaeser was changing the competitive circumstances between the parties, the court must consider not just the terms themselves, but how the terms could be mitigated by the WFDL. Specifically, Kaeser argued that CPR's right to seek relief under the WFDL ultimately made it reasonable for CPR to sign. The court held that this argument failed for two reasons. First, the court noted that Kaeser had previously argued in its motion to dismiss a CPR counterclaim, and had in fact successfully cited to several decisions that had held it was the contract that determined the parties' rights to change the competitive circumstances between the parties. Moreover, even assuming that the WFDL protected CPR's rights, the court still found that there is nothing essential and reasonable in requiring a dealer to sign an agreement that Kaeser concedes is not enforceable.

7-Eleven, Inc. v. Spear, Case No. 10-cv-6697, Bus. Franchise Guide (CCH) ¶ 14,644 (N.D. Ill. June 23, 2011)

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

Ellering v. Sellstate Realty Sys. Network, Inc., Case No. 10-1025 (RHK/LIB), Bus. Franchise Guide (CCH) ¶ 14,664 (D. Minn. July 13, 2011)

The District of Minnesota granted the franchisor's summary judgment motion (and denied the franchisees' cross-motion) on a claim made by John and Karen Ellering that franchisor Sellstate Realty Systems Network, Inc. and others violated the Minnesota Franchise Act (MFA). Before entering into that agreement, John Ellering received an e-mail from Sellstate "soliciting prospective franchisees to purchase Sellstate 'Master Territories.'" The e-mail attached "a bar graph comparing Sellstate's growth to that of well-known real estate company RE/Max." After receiving the e-mail, Ellering inquired about a possible Minnesota master territory. At a face-to-face meeting in Florida, a Sellstate representative allegedly told the Ellerings that they could make \$37,000 per month as Sellstate franchisees and that the representative himself had earned \$250,000 in one month. After this meeting, Sellstate gave the Ellerings the required UFOC, which stated, among other things, that salespeople were not authorized to provide "any oral or written information concerning actual or potential sales. . . ." Thereafter, the Ellerings entered into an area representative agreement with Sellstate, which granted them "the exclusive right to represent . . . Sellstate in procuring prospective franchisees to operate Sellstate franchised businesses in the State of Minnesota." In the end, the Ellerings opened only one franchise—their own. When their business failed, they terminated the relationship and stopped paying on a promissory note from Sellstate that they had used to purchase their area representative rights.

Count VIII of the Ellerings' (and related parties') complaint alleged that Sellstate had violated the MFA "by

(i) offering to sell franchises before Sellstate was registered to do so with the State of Minnesota and (ii) making false and misleading future revenue projections.” The parties filed cross-motions for summary judgment, and the court granted Sellstate’s motion and denied plaintiffs’ motion. The MFA contains a three-year statute of limitations. The court found that this statute barred plaintiffs’ claim that the solicitation e-mail that John Ellering received before Sellstate registered in Minnesota violated the MFA. In so doing, the court rejected plaintiffs’ argument that the discovery rule should extend the limitations period because “they were unaware Sellstate was unregistered” when it sent the e-mail and did not become aware until discovery that Sellstate was not registered at the time. The court noted Minnesota courts’ reluctance to expand the discovery rule and stated that there is “little justification to apply a discovery rule . . . to causes of

The Ellering court found that because “registration status is a matter of public record,” failure to disclose nonregistration would not toll the limitations period.

action which . . . do not involve allegations of fraud,” and there is “nothing inherently fraudulent about” the failure to register a franchise. The court further explained that the discovery rule tolls the statute only “until a plaintiff knew or reasonably should have known . . . of the facts necessary to support [a] claim.” Because “registration status is a matter of public record,” failure to disclose nonregistration would not toll the limitations period.

The court ruled that the future earnings projection claim was timely but that the “language of the UFOC [was] inimical to this claim.” The court distinguished *Randall v. Lady of America Franchise Corp.*, 532 F. Supp. 2d 1071 (D. Minn. 2007), which was “largely based on the MFA’s ‘anti-waiver’ provision, which renders void any ‘condition, stipulation or provision’ in a franchise agreement purporting to waive a franchisor’s obligations under the statute.” But “*Randall* also recognized that a viable MFA claim requires evidence of plaintiff’s *reliance* upon the franchisor’s alleged misstatements” (emphasis in original). Here, it was “impossible for Plaintiffs to show reasonable reliance on the alleged misrepresentations” not just because of the UFOC language but also “because the Ellerings *expressly* acknowledged in the Area Representative Agreement” that they had not relied on any future earnings projections (emphasis in original). The court therefore also granted Sellstate’s summary judgment motion and denied plaintiffs’ with respect to the future income projection portion of plaintiffs’ MFA claim.

***Free Green Can, LLC v. Green Recycling Enters., LLC*, Case No. 10-cv-5764, Bus. Franchise Guide (CCH) ¶ 14,649 (N.D. Ill. June 20, 2011)**

The plaintiff franchisor (Free Green Can) had developed a recycling concept whereby its franchisees would place dual-purpose recycle and trash bins at host-site venues and sell advertising rights on those bins to third parties. Disputes arose between the franchisor and its Nebraska franchisee concerning the franchisee’s claimed right of first refusal to establish franchises in states other than Nebraska, and the Nebraska franchisee’s claim that Free Green Can had stated that the franchisee was free to place bins in any state that did not have a Free Green Can franchise.

The franchisor sued the Nebraska franchisee asserting claims for trademark infringement, unfair competition, and breach of contract, and seeking injunctive relief and damages, as well as declaratory relief as to the franchise agreement validity. The franchisee counterclaimed, alleging violations of the Nebraska Seller-Assisted Marketing Plan Act, Nebraska Consumer Protection Act, and Nebraska Deceptive Trade Practices Act, as well as a breach of warranty. The counterclaims alleged that the franchisor failed to complete the franchise disclosures required under Nebraska law, and that its decision to become a franchisee was based on alleged misrepresentations made by the franchisor. In addition, the franchisee asserted claims against an individual investor in the franchisor, claiming that the investor caused the franchisor to engage in a scheme to defraud the franchisee and used the franchisor to steal the business model for the concept that the franchisee claimed it developed.

The franchisor moved to dismiss the Seller-Assisted Marketing Plan Act and Consumer Protection Act claims, and the investor moved to dismiss the entire counterclaim as to him. The Northern District of Illinois granted the franchisor’s motion to dismiss the Consumer Protection Act claim, finding that the franchisee failed to allege any direct or indirect impact on consumers in Nebraska. However, the court denied the franchisor’s motion to dismiss the Seller-Assisted Marketing Plan Act claim, stating that it was inappropriate for the court to make a factual determination as to whether the statute even applied at this early stage of the proceeding.

As to the investor, the court granted the motion to dismiss all claims against him personally. The investor could not be held liable under a veil piercing theory because the franchisee failed to establish a unity of interest between the individual investor and the franchisor, the court held. The court also held that the investor could not have violated the Seller-Assisted Marketing Plan Act by failing to provide the franchisee with allegedly required disclosures because the franchisee purchased its franchise before the investor invested in or had become involved with the franchisor. For the same reason, the court held that the investor could not have violated the Deceptive Trade Practices Act or the Consumer Protection Act, or committed a breach of warranty, because the actions alleged by the franchisee all allegedly occurred prior to the investor’s investment in and involvement with the franchisor.

***Teng Moua v. Jani-King of Minnesota, Inc.*, Case No. 08-4942 ADM/TLN, Bus. Franchise Guide (CCH) ¶ 14,665 (D. Minn. Aug. 30, 2011)**

This case is discussed under the topic heading “Fraud.”

STATUTE OF LIMITATIONS

***Ellering v. Sellstate Realty Sys. Network, Inc.*, Case No. 10-1025 (RHK/LIB), Bus. Franchise Guide (CCH) ¶ 14,664 (D. Minn. July 13, 2011)**

This case is discussed under the topic heading “State Disclosure/Registration Laws.”

***Teng Moua v. Jani-King of Minnesota, Inc.*, Case No. 08-4942 ADM/TLN, Bus. Franchise Guide (CCH) ¶ 14,665 (D. Minn. Aug. 30, 2011)**

This case is discussed under the topic heading “Fraud.”

***Tankersley v. Lynch*, Case No. C09-05763, Bus. Franchise Guide (CCH) ¶ 14,636 (N.D. Cal. June 27, 2011)**

In 2007, plaintiff franchisees purchased a franchise and three exclusive territories from Collision on Wheels International, LLC, a Michigan-based seller of mobile auto body repair system franchises. Their decision to do so was based in part on information garnered from the franchisor’s UFOC. Plaintiffs alleged that they relied on misstatements and omissions of material fact contained in the UFOC, and were harmed as a result. Plaintiffs sued five officers and employees of the franchisor, alleging violations of the Michigan franchise statute.

Defendants removed the action from California state court and moved to dismiss the complaint on the ground that the court did not have personal jurisdiction over defendants in California. The court granted defendants’ motion and dismissed plaintiffs’ complaint without prejudice, finding that based on the parties’ representations, the franchisee could obtain the same relief in Michigan that it could in a California court. Ten days later, the franchisee moved to vacate the dismissal and transfer the case to the Eastern District of Michigan. However, by the time the motion was filed, the Michigan statute of limitations had run. The franchisees argued that their counsel failed to “check” the statute. The Northern District of California court granted the franchisees’ motion for relief from the court’s final judgment under Federal Rule of Civil Procedure 60(b)(1), finding that the failure by the franchisees’ counsel to request transfer of its action to the federal district court in Michigan was due to excusable neglect. Accordingly, the court vacated this prior order and ordered that plaintiffs’ action be transferred to the Eastern District of Michigan.

***Toyz, Inc. v. Wireless Toyz, Inc.*, Case No. 10-cv-10900, Bus. Franchise Guide (CCH) ¶ 14,657 (E.D. Mich. June 30, 2011)**

This case is discussed under the topic heading “Fraud.”

STATUTORY CLAIMS

***Am. Estates, Inc. v. Marietta Cellars Inc.*, No. 10-6763-WJM, Bus. Franchise Guide (CCH) ¶ 14,605 (D.N.J. Apr. 25, 2011)**

Plaintiff, a wine distributor, alleged that defendants violated the New Jersey Franchise Practices Act (NJFPA), among other claims, when they terminated a distributorship arrangement without notice. Defendants moved to dismiss the entire complaint due to plaintiff’s failure to file timely foreign corporation reports as required under New Jersey statute and moved to dismiss the NJFPA claim because the complaint did not adequately plead the existence of a franchise between the parties.

The District of New Jersey agreed that if plaintiff failed to adhere to the statutory filing requirements of a foreign business, it would be barred from bringing a suit in state or federal court in New Jersey. However, the court determined that plaintiff had sufficiently met a statutory filing exemption by regularly paying taxes to the State of New Jersey. The court noted that even if plaintiff had failed to comply with statutory reporting requirements, it would not dismiss the complaint with prejudice but would allow plaintiff an opportunity to file the necessary reports and/or taxes so that plaintiff may proceed with its claims.

Defendants further argued that the complaint did not adequately plead the existence of a franchise between the parties under the NJFPA because it failed to plead that the relationship contemplated or required plaintiff to maintain a place of business in New Jersey, that a community of interest existed between the parties, that a written arrangement existed, and that plaintiff had met the gross sales requirement.

The court then focused on each alleged pleading deficiency and found that numerous facts presented within the complaint sufficiently suggested that the arrangement between the parties contemplated that plaintiff would maintain a place of business in New Jersey. The court also determined that plaintiff adequately pleaded the existence of a community of interest by alleging that plaintiff made “enormous investments” of its “resources, reputation and goodwill” into developing a market specifically for defendants’ wines. However, the court determined that nothing in the complaint asserted or implied the existence of a written agreement or that plaintiff’s gross sales of defendants’ products or services exceeded \$35,000 during the appropriate twelve-month period, which the court determined to be the twelve months prior to the termination. However, the court recognized that the pleading deficiencies were likely the result of an unrefined pleading and, because the litigation was in an early stage, the court granted plaintiff fourteen days to amend its complaint to address the deficiencies described in the court’s opinion.

***Audi of Smithtown, Inc. v. Volkswagen Group of Am. Inc.*, No. 12372-2008, Bus. Franchise Guide (CCH) ¶ 14,629 (N.Y. Sup. Ct. May 26, 2011)**

The court granted partial summary judgment to Audi dealerships, holding that Volkswagen’s bonus incentive programs violated both the letter and spirit of the New York Franchised Motor Vehicle Dealer Act that was enacted to equalize the disparity in bargaining power between dealers and manufacturers. The act prohibits price discrimination arising from sales promotion programs unless they are available

to all franchised dealers and prevents a franchisor from using affiliates and subsidiaries to accomplish the same. The court found that the two Audi bonus incentive programs discriminated against existing Audi dealership franchisees in favor of new franchisees.

Two Audi dealerships sued Volkswagen for violating the act by initiating two bonus incentive programs that financially favored new dealers over existing ones. The first incentive program placed new dealers automatically into a higher category for three years under which they would qualify for certain discounts, whereas to reach the same category existing dealers had to purchase a minimum number of off-lease vehicles. New dealers also automatically received advertising and other bonuses to which existing dealers would not be entitled unless they met certain goals. Plaintiffs alleged that this purchasing power unfairly benefited new dealers under a second incentive program, which gave bonuses based on the number of cars they sold, as opposed to those they purchased, the requirement for existing dealer participation.

Volkswagen asserted that it did not violate the act because its affiliate, VW Credit Inc., was engaged in the allegedly unlawful behavior and was not covered by the act. Moreover, the bonus programs' disparate treatment was meant to help new dealers build up inventory and give them incentives to purchase more lease return vehicles to meet Volkswagen's sales objectives. Further, because the bonuses were applied the following quarter, the actual purchase price of the vehicle was unchanged.

In finding for the dealerships, the court looked to whether the programs violated both the language and intent of the act as a matter of statutory construction. First, they violated the language even if another entity ran the programs because the programs gave discounts only to new dealers and had the stated purpose of financially benefiting Volkswagen through increased sales. Moreover, the programs were created in conjunction with an entity that Volkswagen wholly owned and, therefore, cannot be used to engage in behavior that would otherwise be unlawful on the part of the franchisor. It also contravened the intent and legislative history of the act, which was clearly a remedial statute enacted to equalize the disparate economic positions of dealers and manufacturers.

7-Eleven, Inc. v. Spear, Case No. 10-cv-6697, Bus. Franchise Guide (CCH) ¶ 14,644 (N.D. Ill. June 23, 2011)

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

A Love of Food I, LLC v. Maoz Vegetarian USA, Inc., Case No. AW-10-2352, Bus. Franchise Guide (CCH) ¶ 14,633 (D. Md., July 7, 2011)

A vegetarian restaurant franchisee based in Washington, D.C., filed suit in Maryland against a franchisor alleging fraudulent inducement and violations of the Maryland Franchise Registration and Disclosure Law and the New York Franchise Sales Act. The Delaware franchisor had its principal place of business in New York. The franchisor moved to dismiss for improper service of process, lack of personal jurisdiction, and

failure to state a claim. The District of Maryland found that the franchisee was entitled to rely on language in the franchisor's UFOC, which appointed the Maryland Securities Commissioner as the franchisor's agent for service of process because there was no suggestion that the appointment was conditional or limited to situations where the Maryland Franchise Registration and Disclosure Law required registration. Accordingly, the franchisor's motion to dismiss for improper service of process was denied. The court determined that the franchisor was still bound by the representations it made to the franchisee in its UFOC.

The court further found the franchisor subject to jurisdiction in Maryland by virtue of certain sections of the Maryland long-arm statute that extend jurisdiction over a person who transacts business in the state, or over a person who causes tortious injury in the state. The court ruled that the franchisor's relationship with the franchisee sufficed to forge a substantial connection between the franchisor and the State of Maryland, such that the exercise of personal jurisdiction over the franchisor was consistent with due process.

Furthermore, the court held that the New York Franchise Sales Act applied to the relationship between the franchisor and the franchisee because the franchisor's offer to sell the franchise originated from New York and important aspects of the franchise transaction occurred in New York, such as the initial in-person discussions of the potential purchase of the franchise and the fact that the UFOC and franchise agreement were mailed by the franchisor from its principal place of business in New York.

EA Indep. Franchisee Ass'n, LLC v. Edible Arrangements Int'l, Inc., Case No. 3:10-cv-1489, Bus. Franchise Guide (CCH) ¶ 14,650 (D. Conn. July 19, 2011)

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

Garbinski v. Nationwide Mut. Ins. Co., Case No. 3:10cv1191, Bus. Franchise Guide (CCH) ¶ 14,655 (D. Conn. July 26, 2011)

This case is discussed under the topic heading "Definition of a Franchise."

Jan-Pro Franchising Int'l, Inc. v. Depianti, Case No. A11A0342, Bus. Franchise Guide (CCH) ¶ 14,643 (Ga. Ct. App. June 23, 2011)

Plaintiff, Jan-Pro Franchising International, Inc. (JPI), created a master franchise plan for commercial cleaning businesses. JPI entered into franchise agreements with regional franchisees that would be assigned the rights to use JPI's franchise branding and processes in a designated region in exchange for fees. The regional franchisees would then enter into unit franchise agreements with unit franchisees that would perform cleaning services for client accounts provided by regional franchisees in exchange for fees. In the unit franchise agreement, the regional franchisee promised to provide a particular volume of business to each unit franchisee. After a dispute arose between unit franchisee Depianti and his regional franchisee, he and other unit franchisees

initiated arbitration proceedings, asserting that they should be classified as employees and not as independent contractors and were therefore eligible for more favorable treatment under Massachusetts law.

The trial court granted summary judgment to Depianti ruling that he was JPI's employee under the Massachusetts Independent Contractor Law. On appeal, the Georgia Court of Appeals reversed the lower court's grant of summary judgment, finding that the parent franchisor was not in fact the employer of the unit franchisee. Under Massachusetts law, the putative employer had the burden to overcome a rebuttable presumption that "any person performing services for another is an employee unless the employer meets a three prong test" showing the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; the service is performed outside the usual course of the business of the employer; and the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

Here, the appellate court found that the unit franchisee performed work pursuant to a contract with the regional master franchisee, which was a separate entity from the parent franchisor, created by persons unaffiliated with the parent. The regional franchisee made its own hiring and firing decisions without control by the parent franchisor. The parent franchisor did not market cleaning services to clients and did not invoice or collect payment from them for cleaning services. Lastly, the nature of the three-layer franchise arrangement necessarily meant that the parent franchisor and the franchisee were engaged in operating independent businesses. The parent franchisor did not limit or control the scope of the franchisee's services or the continuation of its business.

***Missouri Beverage Co., Inc. v. Shelton Bros., Inc.*, Case No. 2:10-cv-04113, Bus. Franchise Guide (CCH) ¶ 14,651 (W.D. Mo. June 17, 2011)**

This case is discussed under the topic heading "Definition of a Franchise."

***Pius Awuah v. Coverall N. Am., Inc.*, Case No. SJC-10829, Bus. Franchise Guide (CCH) ¶ 14,671 (Mass. Aug. 31, 2011)**

In the continuing Massachusetts saga of Coverall as its janitorial franchisees' employer, the District of Massachusetts certified certain questions to the Massachusetts Supreme Court after ruling that "Coverall North America, Inc., misclassified as independent contractors those plaintiffs who are Massachusetts residents." The questions certified to the court "relate[d] to whether, under Massachusetts law, an employer may use a system of customer accounts receivable financing to pay its employee [when] the customer pays the employer for the employee's work rather than when the work is performed; and whether, under the Massachusetts Wage Act . . . , an employer and an employee may agree that the employee will pay the cost of workers' compensation and other work-related insurance coverage." The court found

that these activities were impermissible under Massachusetts law and further found that the "damages incurred' for which a misclassified worker can seek recompense under [the Massachusetts Wage Act] include costs that an employer statutorily must bear."

***Chevron U.S.A. v. M&M Petroleum Servs., Inc.*, Case Nos. 09-56427, 09-56686, Bus. Franchise Guide (CCH) ¶ 14,682 (9th Cir. Sept. 12, 2011)**

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

***S. Shore Imported Cars, Inc. v. Volkswagen of Am., Inc.*, Case No. 10-1488, Bus. Franchise Guide (CCH) ¶ 14,635 (1st Cir. July 5, 2011)**

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

***Hill Distrib. Co. v. St. Killian Importing Co.*, Case No. 2:11-CV-706, Bus. Franchise Guide (CCH) ¶ 14,675 (S.D. Ohio Sept. 7, 2011)**

The Southern District of Ohio granted a distributor's motion enjoining St. Killian Importing Co. from terminating the distributor's franchise relationship with beer manufacturer Carlsberg S/A though the distributor was a wholesaler for Carlsberg's beer brands in Ohio. St. Killian's acquired the rights to import Carlsberg's brands, which had earlier belonged to another company and, before that, to Carlsberg. St. Killian's sent a notice to the distributor pursuant to the Ohio Alcoholic Beverages Franchise Act purporting to terminate the distributor's relationship with Carlsberg. The Act requires notice and just cause to terminate under most circumstances. An exception to the just cause requirement, however, is that termination is proper "if a successor manufacturer 'acquires all or substantially all of the stock or assets of another manufacturer through merger or acquisition or acquires or is the assignee of a particular product or brand of alcoholic beverage from another manufacturer.'" However, St. Killian's acted as an importer, not a manufacturer, of alcoholic beverages. Accordingly, plaintiff distributor was likely to succeed on the merits. In addition, although the Carlsberg brands made up "only a small percentage" of the distributor's profits, termination "would have an impact that resonates long after the initial termination. Thus, there [was] a risk of irreparable harm" to the distributor.

***Toyz, Inc. v. Wireless Toyz, Inc.*, Case No. 10-cv-10900, Bus. Franchise Guide (CCH) ¶ 14,657 (E.D. Mich. June 30, 2011)**

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

***WMW, Inc. v. Am. Honda Motor Co.*, Case No. A11A0251, Bus. Franchise Guide (CCH) ¶ 14,663 (Ga. Ct. App. July 14, 2011)**

The Georgia Court of Appeals affirmed the trial court's finding that a Honda dealer lacked standing under the anti-encroachment provision of the Georgia Motor Vehicle Franchise Practices Act "to prohibit or enjoin the establishment

of a new dealership.” The relevant portion of the Act allows dealers under certain circumstances to go to court to “enjoin or prohibit the establishment of [a] new or relocated dealership within the relevant market area of the existing dealership.” The Act defines relevant market area as “the area located within an eight-mile radius of an existing dealership.” The court found, however, that the proposed new dealership was not within the dealer’s relevant market area. Because the Act’s plain language defines dealership as the “person” of the dealership corporation, the court needed to look at the location of the “person” of the corporation, and not the actual location of the affected location. Although the new dealership would be within the relevant market area of a dealership owned by the affected dealer, the new dealership would not be located within the relevant market area of the corporation itself. Accordingly, the dealer lacked standing under the Act’s anti-encroachment provision.

TERMINATION AND NONRENEWAL

Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States of Am., Inc., Case No. 10-1986, Bus. Franchise Guide (CCH) ¶ 14,611 (7th Cir. May 31, 2011)

In this case, defendant, the Girl Scouts of the United States of America, Inc., sought to rearrange the boundaries of its over 300 local councils, each of which had an exclusive territory designated in its charter. Each council was authorized by the Girl Scouts to sell merchandise, including cookies, under the Girl Scout trademark and each council remitted membership fees to the Girl Scouts. As part of the rearrangement, the Girl Scouts sought to dissolve the territory of plaintiff, the Girl Scouts of Manitou Council, Inc. Manitou sued to enjoin the Girl Scouts from taking away its territory arguing that it was a dealer under the Wisconsin Fair Dealership Law (WFDL). On appeal, the Seventh Circuit held that the First Amendment’s right to freedom of expression did not exempt the Girl Scouts from the WFDL. The court further held that the WFDL applied with equal force to nonprofit organizations as it did to for-profit organizations. Finally, the court held that the proposed rearrangement effectively altered the boundaries such that Manitou’s franchise would be terminated altogether, which the court characterized as a constructive termination, and found no evidence of good cause to terminate Manitou as required by the WFDL.

With respect to the Girl Scouts’ contention that the First Amendment overrode the WFDL, the Girls Scouts had argued, and the district court had agreed, that the Girl Scouts were an “expressive association” with a congressionally granted charter setting forth certain goals. Thus, the court reasoned that the WFDL could not be applied to the Girls Scouts to prevent it from exercising its constitutional right to pursue its goals, one of which, it argued, was increasing its racial and ethnic diversity by rearranging the boundaries of its councils. However, the Seventh Circuit disagreed, holding that the First Amendment did not override the WFDL, in particular where there was a lack of evidence suggesting a connection between the rearrangement

proposed by the Girl Scouts and the promotion of diversity. Specifically, the court was persuaded by the fact there were other means of achieving diversity other than rearranging the councils’ boundaries. For instance, the court suggested that the Girl Scouts could order the councils to achieve diversity, and if the council failed to achieve the requisite diversity, the Girls Scouts could revoke or refuse to renew the charter. Thus, the court held that the First Amendment does not exempt the Girl Scouts from state laws of general applicability, such as the WFDL, where the impact of the law is remote and hypothetical on the organization’s message.

The Girl Scouts next argued that, even if the First Amendment did not exempt them from the reach of the WFDL, the WFDL did not apply to nonprofit entities. Specifically, the Girl Scouts argued that the references to “commercial” and “engaged in business” in the statute’s definitions of dealer and dealership agreement exempted them based on the argument that nonprofit entities do not conduct commercial activities. However, the Seventh Circuit disagreed, finding that nonprofit entities can and often do engage in commercial activities. In particular, the court noted that the Girl Scouts engaged in commercial activities by selling cookies and other merchandise. Thus, the Girl Scouts met the requirements of a dealer and the charter constituted a dealership agreement under the WFDL.

Finally, the Girl Scouts argued that the alteration of Manitou’s boundaries did not violate the WFDL by terminating or changing the competitive circumstances of the dealership agreement without cause. Specifically, the Girl Scouts argued that the competitive circumstances of Manitou’s charter were not changed by altering its boundaries because its charter permitted the Girl Scout’s board of directors to make final decisions on jurisdictional lines during the term of the charter. Thus, the Girl Scouts argued, the board had the right to change the lines as they saw fit. However, the Seventh Circuit again disagreed finding that, although the Girl Scouts had the right to alter the boundaries, they could not without good cause alter the boundaries such that the result was that Manitou’s dealership agreement was effectively terminated. Relying on a Wisconsin court case addressing good cause, which stated that “the need for change sought by the grantor must be readily ascertainable,” the court then found that no good cause existed. Specifically, the court focused on whether the Girl Scouts needed to rearrange the boundaries to further their expressive activity, which was the reason for the boundary rearrangement). Ultimately, however, the Seventh Circuit found no evidence suggesting that the rearrangement of the boundaries was essential to the attainment of their expressive activity. Thus, the Girl Scouts did not have good cause constructively to terminate Manitou’s charter.

Kaeser Compressors, Inc. v. Compressor & Pump Repair Serv., Inc., Case No. 09-C-521, Bus. Franchise Guide (CCH) ¶ 14,612 (E.D. Wis. May 18, 2011)

This case is discussed under the topic heading “State Disclosure/Registration Laws.”

***Gentile, Inc. v. Wis. Div. of Hearings & Appeals*, No. 2010AP2524, Bus. Franchise Guide (CCH) ¶ 14,626 (Wis. Ct. App. May 24, 2011)**

Applying due weight deference, the Wisconsin Court of Appeals upheld the decision of the Wisconsin Division of Hearings and Appeals that a franchisor's termination of a motor vehicle dealer under the Wisconsin Motor Vehicle Dealer Law was lawful because there was substantial evidence of "just provocation," and the decision was "fair and equitable."

Nissan North America, the franchisor, terminated an authorized dealer based on its material breach of a sales performance provision in the dealership agreement. The agreement required a dealer to "actively and effectively promote through its own advertising the sale of Nissan vehicles to customers in the Dealer's Primary Market Area (PMA)." A dealer's sales performance is evaluated by Nissan North America based on achievement of set sales objectives, a percentage based on registrations of Nissans and other competitive vehicles, and comparisons to other Nissan dealerships within the dealer's PMA. The agreement allowed Nissan to take into account the dealership's location; the shopping habits of the public in that market area, including past sales trends; and any special conditions that would affect a dealer's performance. This type of evaluation criteria was typical of the industry. For four years, Gentile had ratings lower than 50 percent, even though its predecessor in the same location typically ranked consistently closer to 100 percent, which was the industry percentage for an average dealer. Gentile's sales also decreased at a time when national Nissan sales were increasing.

Under the dealer law, to find "just provocation," the manufacturer, distributor, or importer must show that the dealer materially breached the agreement; the breached provision was reasonable and necessary; the breach was caused by matters within the dealer's control; and within a reasonable time after receiving written notice of the breach, the dealer failed to cure it.

The court evaluated each factor separately and agreed the division properly found just provocation. First, the low sales percentages, especially when compared to its predecessor and other state and regional dealers, qualified as a material breach. The provision itself was reasonable and necessary because it was a reasonable construction of the industry practice of making a regional sales effectiveness calculation. Additionally, if termination was not based on sales performance, the provision at issue would make the agreement into one only for advertising. Further, in the period after receiving notice of default of its failing sales record, the dealer's sales further decreased, leaving it unable to cure the breach within the 180-day period prior to termination.

Moreover, the court upheld the finding that the termination decision was fair and equitable because similarly situated dealers were meeting sales expectations under the same criteria and could not find any other reason for poor sales aside from plaintiff's lack of effort to sell and comparatively inadequate spending on advertising. The court rejected plaintiff's

argument that if the legislature had meant "similarly situated" to encompass only Wisconsin dealers, it would have done so. However, the court, giving due weight deference to the agency's statutory interpretation, found that no such language was needed due to the Commerce Clause implications of subjecting out-of-state dealers to Wisconsin law. Therefore, excluding their sales from consideration was reasonable.

***Hill Distrib. Co. v. St. Kilian Importing Co.*, Case No. 2:11-CV-706, Bus. Franchise Guide (CCH) ¶ 14,675 (S.D. Ohio Sept. 7, 2011)**

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

***Maehal Enters., Inc. v. Thunder Mountain Custom Cycles, Inc.*, Case No. 09CA0806, Bus. Franchise Guide (CCH) ¶ 14,634 (Colo. Ct. App. July 7, 2011)**

Plaintiff, Pikes Peak Harley-Davidson (PPHD), was a motor vehicle dealer licensed in Colorado. Defendant, Thunder Mountain Custom Cycles, Inc. (TMCC), was a licensed manufacturer of motor vehicles in Colorado for a certain period of time, as well as a licensed motor vehicle dealer. The parties reached a sales contract agreement under which PPHD would become a dealer of TMCC's motorcycles, with the understanding that PPHD could immediately display and resell the motorcycles. The parties then executed a written dealer contract, which provided that PPHD would act as a dealer of TMCC's motorcycles, and would thereafter be renewed on an annual basis only upon the joint concurrence of the parties. Sometime later, the Auto Industry Division reviewed TMCC's manufacturer license renewal application and found it was licensed as both a manufacturer and a dealer in violation of a Colorado statute. The division advised the parties that PPHD was no longer authorized to sell TMCC motorcycles and that TMCC would have to buy back the motorcycles from PPHD. TMCC did not do so.

PPHD later sued TMCC for breach of the dealer contract. At trial, the court found in favor of PPHD on its breach of contract claim but in favor of TMCC on PPHD's claims for statutory violations and negligent misrepresentation. On appeal, the Colorado Court of Appeals affirmed the lower court's ruling in part, finding that TMCC did not violate the Colorado motor vehicle dealer law because it had just cause under the meaning of the statute for nonrenewal of the parties' dealer agreement. Just cause for the nonrenewal of the dealer contract was found because the contract explicitly provided for a one-year term, the dealer never made a timely demand for renewal, and PPHD made several judicial admissions that the contract had been terminated by mutual agreement. The state dealer law required the court to consider the context of all circumstances surrounding the cancellation or nonrenewal of a contract. The subject contract provided that it would be renewed annually on the joint concurrence of the parties and the manufacturer "was under no obligation to renew [it] at any time."

The court additionally reversed the lower court's rulings on the claims for statutory violations and breach of contract

and remanded for further proceedings. The court found that the motorcycle dealer could recover for its loss or damage caused by the manufacturer's violation of the statute's "independent control of dealer" provision. The independent control of dealer provision made it unlawful for a manufacturer to own a motor vehicle dealer—a provision that the manufacturer violated when it became licensed as both a manufacturer and a dealer.

***S. Shore Imported Cars, Inc. v. Volkswagen of Am., Inc.*, Case No. 10-1488, Bus. Franchise Guide (CCH) ¶ 14,635 (1st Cir. July 5, 2011)**

Plaintiff dealer sued the defendant manufacturer for breach of an auto sales franchise agreement in violation of a Massachusetts statute preventing manufacturers from terminating a dealer's franchise agreement except for good cause. The statute further requires a reasonable opportunity to cure a violation of the agreement and a minimum notice of sixty days with specification of cause prior to the effective date of any termination.

The First Circuit affirmed the lower court's grant of summary judgment in favor of the manufacturer on the dealer's breach of contract and statutory claims. The court found that the manufacturer did not in fact violate the Massachusetts motor vehicle dealer law or breach its auto sales franchise agreement with the dealer by failing to consider the application of a prospective purchaser of the dealership made one week before the termination date of the parties' agreement. By both statute and the parties' express agreement, the franchisor had a right to a longer period to make due diligence inquiries about the buyer than the remaining period of the franchise. A reasonable reading of the parties' agreement was that the franchisor was required to consider a dealer's proposed successor only when the remaining duration of the franchise agreement included sufficient time for the period of inquiry by the franchisor, which the statute and the franchise agreement allowed.

TORTIOUS INTERFERENCE

***Coca-Cola N. Am. v. Crawley Juice, Inc.*, Nos. 09 CV 3259 (JG) (RML), 09 CV 3260 (KAM) (RML), 09 CV 3279 (ERK) (RML), Bus. Franchise Guide (CCH) ¶ 14,621 (E.D.N.Y. May 17, 2011)**

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

TRADEMARK INFRINGEMENT

***Original Rex, LLC v. Beautiful Brands Int'l, LLC*, Case No. 10-CV-424-GFK-FHM, 2011 U.S. Dist. LEXIS 56987, Bus. Franchise Guide (CCH) ¶ 14,628 (N.D. Okla. May 27, 2011)**

The Northern District of Oklahoma denied plaintiff's motion for summary judgment and granted that of defendants as to trademark infringement, false advertising, and unfair competition claims under the common law and the Lanham Act because plaintiff had abandoned the trademark.

The Rex Chicken mark was first used by Vernon McFarland in connection with Rex restaurants, which sold boneless bite-size spiced chicken under the mark. McFarland,

through McFarland's Distributors, Inc. (MDI), entered into franchise agreements, including that with Ballard's Drive-In, that gave the owner the right to sell Rex Chicken products under the mark. Ballard received a letter from MDI notifying him his agreement was up for termination in 1992, as part of MDI's intent to end the franchise entirely. At this point, Ballard was no longer required to pay royalties, use Rex Chicken products, or be subject to franchisor oversight, and began making his own products with an entirely different menu. In 1993, MDI sold all of its assets, including the franchising system and the Rex Chicken marks, to Rex Chicken LLC. Rex Chicken LLC ceased to operate all Rex Chicken restaurants and sold everything to Magnum Foods, Inc. Magnum then canceled the Rex Chicken mark and replaced it with the new mark, which was also canceled in 2006. In 2010, nine years after it ceased operating the Rex Chicken franchise, both Rex Chicken LLC and Ballard assigned their rights in the mark in favor of the McFarlands' children, the founders of plaintiff Original Rex LLC, which conducts no business.

Defendants began selling bite-size boneless chicken under the Rex Chicken name in 2008, filing a federal trademark registration application, which was denied under likelihood of confusion. It also began running a website under the Rex Chicken domain name to solicit franchisees and advertise. Plaintiff sued for trademark infringement, false advertising, and unfair competition under the Lanham Act, common law, and the Ohio Deceptive Trade Practices Act.

Defendants claimed in their motion for partial summary judgment that plaintiff had no rights to the mark because the mark had been long abandoned. Plaintiff argued that it was entitled to summary judgment on its claim for federal trademark infringement. The primary issue in both motions was whether the Rex Chicken trademark was abandoned. The court determined that defendants established that the prior owners abandoned the mark with no intention of resuming use. Plaintiff attempted to rebut the presumption by arguing that it obtained an assignment of the mark from Rex Chicken LLC; the affidavit it secured from Ballard evidenced that he assigned McFarland's widow and plaintiff's owners all rights he has in the mark, subject to his continuing right to use the mark; and the dispute between the parties to the litigation constituted a valid reason for not using the mark. The court held that the assignment was invalid because the prior owner clearly canceled the mark and replaced it with another, which was also canceled before defendants' filing of the registration for the Rex Chicken mark. The court also found Ballard's affidavit to be self-serving and that it should carry little weight. Additionally, the assignment from Ballard was also ineffective because, without quality control by the licensor or evidence of reasonable steps to prevent misuse of the mark, his interest was in a naked mark and treated as abandoned. Moreover, Magnum's termination of the entire franchise and closing of all franchisee restaurants four years prior to defendants' use indicated its intent to never resume use, especially given that three consecutive

years of nonuse is prima facie evidence of abandonment. Therefore, plaintiff had no legal right to enforce the Rex Chicken trademark.

The court also granted defendants' summary judgment motion on the Lanham Act false advertising claim because plaintiff had no standing to sue. Plaintiff never owned or operated any restaurants and conducted no business at all. Additionally, it was formed two years after defendants began marketing Rex Chicken and using the mark on its website to solicit franchisees. As such, plaintiff was never in competition with defendants and suffered no competitive injury. Further, because plaintiff never had any actively competing franchises or restaurants, defendants obtained summary judgment on the Ohio Deceptive Trade Practices Act claim.

AAMCO Transmissions, Inc. v. Dunlap, Case No. 11-4009, Bus. Franchise Guide (CCH) ¶ 14,680 (E.D. Pa. Aug. 16, 2011)
This case is discussed under the topic heading "Noncompete Agreements."

Passport Health, Inc. v. Travel Med, Inc., Case No. 2:09-cv-01753-GEB-JFM, Bus. Franchise Guide (CCH) ¶ 14,677 (E.D. Cal. Sept. 6, 2011)
This case is discussed under the topic heading "Damages."

Wetzel's Pretzels, LLC v. Johnson, Case No. CV-11-004459, Bus. Franchise Guide (CCH) ¶ 14,642 (C.D. Cal. June 27, 2011)
A franchisor of pretzel bakeries sued a former franchisee after it failed to cease using the franchisor's marks. The franchisor sought a preliminary injunction ordering the franchisee to de-identify itself from the franchisor's system. The franchisee contended it was entitled to continue use of the franchisor's marks because the termination was improper.

The court granted the franchisor's motion because the franchisor would be irreparably harmed by the franchisee's continued actions, including harm to its goodwill and reputation. The court further found the franchisor was likely to succeed on the merits of its claims against the terminated franchisee for trademark infringement and unfair competition under federal and California state statutes because the franchisor properly terminated the parties' franchise agreement and because the franchisee conceded it continued to use the franchisor's marks after notification of the termination.

UNFAIR COMPETITION/UNFAIR AND DECEPTIVE PRACTICES

Coca-Cola N. Am. v. Crawley Juice, Inc., Nos. 09 CV 3259 (JG) (RML), 09 CV 3260 (KAM) (RML), 09 CV 3279 (ERK) (RML), Bus. Franchise Guide (CCH) ¶ 14,621 (E.D.N.Y. May 17, 2011)

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

Original Rex, LLC v. Beautiful Brands Int'l, LLC, Case No. 10-CV-424-GFK-FHM, 2011 U.S. Dist. LEXIS 56987, Bus. Franchise Guide (CCH) ¶ 14,628 (N.D. Okla. May 27, 2011)
This case is discussed under the topic heading "Trademark Infringement."

VICARIOUS LIABILITY

EmbroidMe.Com, Inc. v. Am. Design Studios, Inc. & IDT Worldwide, Inc., Case No. 10-81180, Bus. Franchise Guide (CCH) ¶ 14,631 (S.D. Fla. July 5, 2011)

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

Hayes v. Ennon Enters., LLC, Case No. 3:10-CV-00382, Bus. Franchise Guide (CCH) ¶ 14,647 (S.D. Miss. June 22, 2011)
Factual issues precluded summary judgment in favor of a janitorial business franchisor in a case arising after an individual sustained injuries after an alleged slip and fall across a wet floor that a franchisee had recently mopped. The individual sued, claiming direct liability against the franchisee and vicarious liability against the franchisor on a respondeat superior theory. The franchisor argued it did not have sufficient authority and control over the franchisee's performance of its duties to warrant vicarious liability.

Under Mississippi law, the negligent acts of an employee committed within the course and scope of his employment could subject his employer to liability, but those of an independent contractor would not. The Southern District of Mississippi found a genuine issue of material fact existed as to whether the relationship between the franchisor and the franchisee was an employer-employee relationship or whether the franchisee was an independent contractor because conflicting factors in the franchise agreement supported the existence of both arrangements. Although the franchise agreement specifically stated that the franchisee was an independent contractor, the court's analysis of the ten factors delineated by the Mississippi Supreme Court to determine the "legal character of a relationship" suggested otherwise. The franchise agreement contained provisions designed to afford the franchisor control of the training of the franchisee's employees; the location and appearance of the franchisee's business; and the "policies, practices, procedures, and standards" by which the franchisee performed its work. Further, the franchisor reserved the right to take over any job it viewed the franchisee was performing inadequately. The court's analysis culminated in five factors suggesting the franchisee was an independent contractor and five factors supporting in favor of an employer-employee relationship, resulting in the denial of summary judgment on the issue.