Franchising (& Distribution) Currents

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ANTITRUST

***All Weather Exteriors Distrib., Inc. v. Cal. Wholesale Material Supply, Inc.*, No. 2:06-CV-346 TS, 2007 WL 445281, Bus. Franchise Guide (CCH) ¶ 13,551 (D. Utah Feb. 6, 2007)**

A Utah district court dismissed a regional distributor's antitrust and price discrimination claims without prejudice. Plaintiff was a regional distributor of a specific brand of exterior cladding products. Defendants were regional distributors of competing products consisting of a group of distributors and a group of suppliers. Plaintiff contended that distributor defendants contracted, combined, and conspired to use their collective market power to gain agreements or understandings with supplier defendants to refuse to sell, or to sell at unfair prices, accessory materials necessary for plaintiff's competitive sale of its products in its Utah market. Plaintiff alleged that as a result of these actions, it had been unable to effectively distribute its products in its Utah market. Plaintiff sued under § 1 of the Sherman Act and Utah antitrust laws and under the Robinson-Patman Act and Utah price discrimination laws. Defendants moved for dismissal of, or judgment on, each of these causes of action.

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In view of *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 943 F.2d 1022, 1026 (10th Cir. 1992), the court granted defendants' motion to dismiss plaintiff's Sherman Act and Utah Antitrust Act claims. In *TV Communications*, plaintiff alleged that a specific group of distributor defendants conspired to prevent a specific supplier from supplying plaintiff with a specific product. The Tenth Circuit upheld the dismissal of plaintiff's amended complaint as deficient because plaintiff only alleged that a defendant conspired with the other defendant without alleging facts in support of its conspiracy claims. In the instant case, the court found that plaintiff's complaint was similarly deficient as plaintiff made only conclusory allegations and did not provide supporting facts to either demonstrate a horizontal conspiracy between distributor defendants or establish a conspiracy between distributor defendants and supplier defendants. Accordingly, the court held that there was no reasonable prospect plaintiff could support an antitrust action against defendants.

As to plaintiff's price discrimination claims, the court also granted defendants' motion to dismiss. Plaintiff contended that its allegations fit within the indirect purchaser doctrine exception, which precludes a discriminating seller from using a dummy wholesaler or distributor to avoid the Robinson-Patman Act's price discrimination provisions. The court stated that indirect purchaser claims under the Robinson-Patman Act are subject to dismissal where plaintiffs fail to allege that a defendant can set or control a distributor's resale price or to allege facts that support an inference that a defendant controls a dummy distributor. Because plaintiff presented no such allegations, the court granted defendants' motion to dismiss plaintiff's price discrimination claims without prejudice.

***Smith Wholesale Co., Inc. v. Philip Morris USA, Inc.*, No. 05-6481, 2007 WL 614237, Bus. Franchise Guide (CCH) ¶ 13,558 (6th Cir. Feb. 27, 2007)**

Cigarette Wholesalers, which also served as direct distributors for defendant Philip Morris USA, Inc. (PM), brought an action against PM for antitrust violations. Plaintiffs consisted of sixteen full-service wholesalers that served as direct distributors for grocery stores and other retail outlets in a multistate region for defendant PM. The distributors brought this action against PM, alleging secondary-line price discrimination in violation of the Robinson-Patman Price Discrimination Act and attempted monopolization in violation of the Sherman Act. This action was prompted by PM's realignment of its discount program, known as the Wholesale Leaders program (WL 2003 program).

After a drop in its market share, PM realigned its WL 2003 program to regain competitiveness. Under the WL 2003 program, PM established three performance levels (Levels 1, 2, and 3), which offered hierarchical discounts. Such discounts were determined based on the percentage of a distributor's sales of PM's products as compared to the sales of competitive products by the distributor. The higher the percentage of sales of PM's products against total tobacco sales, the higher the discount available to the distributor under the WL 2003 program.

A distributor with a PM share below PM's section share target qualified for the lowest level, Level 1, which offered the smallest discount. A distributor with a PM share within range of PM's section share qualified for Level 2 and earned

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Published in Franchise Law Journal, Volume 27, Number 2, Fall 2007.

a larger discount than Level 1 distributors. A distributor with a PM share above PM's section share qualified for the highest level, Level 3, and received the highest discount. Distributors of all sizes have qualified for all of the WL 2003 program's discount levels; PM's qualification formula for the WL 2003 program does not inherently disfavor the smaller distributors.

The district court granted summary judgment in favor of PM. On appeal, the Sixth Circuit affirmed the district court's grant of summary judgment. The Sixth Circuit found an absence of evidence of a discriminatory application of the WL 2003 program's market share incentives. Deposition testimony of distributors' representatives consistently indicated that brand prioritization and marketing strategy governed a distributor's level of participation in the WL 2003 program. Because the distributors chose to focus on selling PM's rival tobacco brands, especially fourth-tier brand products that offered distributors a higher price margin than PM brand products, it was unreasonable for distributors to expect to receive the same WL 2003 program discount level as distributors that focused on selling the PM brand. As a result, the court concluded that it was the distributors' choices, not PM's qualification formula for the WL 2003 program discount levels, that governed whether the distributors reached the higher discount levels. Accordingly, the WL 2003 program did not violate the Robinson-Patman Act.

The Sixth Circuit also affirmed the district court's finding that the distributors' claim that PM engaged in an attempt to monopolize contrary to the Sherman Act failed as a matter of law. There was no evidence in the record that PM had the ability to unilaterally control prices because PM prices its cigarettes almost five times higher than fourth-tier brands. Further, there was no evidence that PM had the power or ability to control other brands' production capacity since the competition from fourth-tier brands had grown rapidly, thus making the market even more competitive.

***Worldhomecenter.com, Inc. v. L.D. Kichler Co., Inc.*, No. 05-CV-3297 (DRH) (ARL), 2007 WL 963206, Bus. Franchise Guide (CCH) ¶ 13,581 (E.D.N.Y. Mar. 28, 2007)**

This case concerns a manufacturer's efforts to protect its distributor dealer network from Internet discounters of the manufacturer's products. Plaintiff is an online retailer that purchases Kichler products from distributors and resells the products exclusively through its website. Plaintiff can offer its customers sharp discounts because of its low overhead costs and high volume sales. Defendant Kichler manufactures and sells Kichler products exclusively to its authorized distributors. In February 2005, Kichler unilaterally adopted an Internet minimum advertised price (IMAP) policy providing that a customer may not advertise or otherwise promote Kichler products over the Internet at a net price lower than the IMAP Kichler has established or sell Kichler products to any other person who advertises or otherwise promotes Kichler products over the Internet at a price less than the IMAP. Violation of this policy would result in Kichler's revocation of a customer's right to sell, display, or list the products for six months.

Plaintiff alleged that Kichler's IMAP policy was the result of conspirational relations between Kichler and its exclusive dealers and allowed Kichler to maintain the price of its products while helping its exclusive distributors enjoy higher price margins. Plaintiff claimed violations of the Sherman Act, the Donnelly Act, and the New York Deceptive Trade Practices Act (DTPA). Kichler moved to dismiss plaintiff's complaint for failure to state a claim upon which relief could be granted.

The New York district court found that plaintiff's complaint sufficiently alleged vertical price fixing and denied the motion to dismiss plaintiff's Sherman Act claim. Kichler argued that the IMAP policy was not a price fixing agreement because the IMAP policy is expressly limited to advertised prices and unequivocally states that distributors can set their own resale prices. The court recognized that, facially, Kichler's IMAP policy only established minimum prices for advertised prices. However, because an Internet shopper on a website like plaintiff's only sees the advertised price of the products, the advertised price is, in fact, the retail price for the Internet shopper. Accordingly, the IMAP policy restricted retail prices for plaintiff and thus could constitute a price fixing agreement.

The court observed that New York courts have narrowly construed the Donnelly Act to encompass only those causes of action falling within the Sherman Act. Kichler conceded that plaintiff's federal and state antitrust claims should be analyzed together, and asked the court to dismiss the Donnelly Act claim on the same grounds it raised concerning the Sherman Act claim. Based on the same analysis as that of the Sherman Act claim, the court concluded that the Donnelly Act claim was also actionable. Accordingly, the court also denied Kichler's motion to dismiss the Donnelly Act claim.

The court dismissed the DTPA claim because in order to state an actionable claim under DTPA, a plaintiff's allegation must be supported by facts that, if true, can show the defendants engaged in a deceptive act. Plaintiff alleged Kichler's IMAP policy to be anticompetitive, but it was not alleged to be deceptive. Thus, the court granted Kichler's motion to dismiss the DTPA claim.

***Smith Wholesale Co. v. R.J. Reynolds Tobacco Co.*, 477 F.3d 854, Bus. Franchise Guide (CCH) ¶ 13,539 (6th Cir. Feb. 27, 2007)**

The U.S. Court of Appeals for the Sixth Circuit affirmed summary judgment in favor of the R.J. Reynolds Tobacco Co. (RJR) on claims of secondary-line price discrimination under § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, by some of its wholesalers/distributors.

Due to competitive difficulties in the cigarette market, RJR began providing financial incentives to wholesalers willing to focus on RJR's savings or lower-tier brands, such as Doral. Plaintiffs all participated and benefited from the program but complained that because of the demographics at their particular locations, the most favored prices under the incentive program were not realistically available to them. Plaintiffs sought damages for loss of profits, customers, sales, goodwill, and business value allegedly resulting from RJR's discriminatory pricing, as well as injunctive relief.

Plaintiffs initially met with some success, convincing the trial judge to enjoin certain discount reductions under the program. The court later stayed the injunction, however, and RJR moved for summary judgment after discovery. The court referred RJR's motion for summary judgment to the magistrate judge, who recommended granting the motion and dismissing plaintiffs' complaint, and the district court later adopted and approved the magistrate's recommendation.

The district court granted summary judgment because RJR's discounts were "functionally available" to plaintiffs. The court reached this conclusion because the case did not involve a quantity discount, plaintiffs were told about the discount and were permitted to participate, and the discount was available to all wholesalers using a nondiscriminatory formula even though the actual price paid could differ. The Sixth Circuit agreed and affirmed summary judgment.

ARBITRATION

Doctor's Assocs., Inc. v. Downey*, Bus. Franchise Guide (CCH) ¶ 13,580 (D. Conn. Feb. 12, 2007)

This matter is another in a long series of disputes between Doctor's Associates, Inc. (DAI), the national franchisor of Subway shops, and its franchisees regarding the arbitration provisions contained in Subway's franchise agreements. The defendant franchisees are all members of the North American Association of Subway Franchises (NAASF). DAI petitioned the court to compel arbitration and moved for preliminary injunction to enjoin defendants, non-NAASF parties, or any third party from pursuing a lawsuit filed by defendants in Connecticut Superior Court, *North American Ass'n of Subway Franchises, Inc. v. Doctor's Associates, Inc.*, Docket No. CV-06-4021494-S (NAASF lawsuit). DAI also sought to enjoin defendants and NAASF from filing any court action arising out of or related to the franchise agreements between the parties.

The court first held that it had subject matter jurisdiction over DAI's petitions to compel arbitration. Defendants argued that the court lacked subject matter jurisdiction over the franchisor's petition on various grounds, including that the controversy did not meet the $75,000 jurisdictional minimum for diversity jurisdiction. In analyzing this dispute, the court determined the amount in controversy by calculating from DAI's standpoint the cost of winning or losing the desired arbitration. The court concluded that the cost of winning or losing the desired arbitration in this action turned on the value of the relief sought in the NAASF lawsuit. In the NAASF lawsuit, NAASF moved the state court to enjoin DAI from causing defendants' payments to the Subway Franchisee Advertising Fund Trust (SFAFT) to be reduced or redirected elsewhere and to order the placement of all advertising monies collected by DAI pursuant to the parties' 2006 franchise agreement into a constructive trust for the benefit of the SFAFT trustees and NAASF. DAI alleged that defendants' contributions to the SFAFT were approximately $500 million. Because this $500 million could be considered the value of the underlying litigation, the court reasoned that the amount in controversy exceeded the $75,000 jurisdictional minimum for diversity jurisdiction. Also, an order from the court rescinding all 2006 franchise agreements would constitute constructive termination and would cost DAI more than $75,000 given the value of the start-up investments and total gross sales historically earned by each location.

The court then granted DAI's petition to compel arbitration. In doing so, the court identified the following issue: whether the arbitration clause that obligated defendants to pursue their disputes with DAI also obligated NAASF, the membership association representing defendants' interests in the NAASF lawsuit, to do the same. The court held that any arbitration agreement that bound the individual members of the membership association would likewise be binding upon the association suing in a representative capacity. Thus, defendants' obligations to arbitrate disputes with DAI also obligated NAASF to arbitrate with DAI disputes brought on defendants' behalf.

The court also granted DAI's motion for a preliminary injunction. Defendants argued that an injunction against the NAASF lawsuit would not be proper under Federal Rule of Civil Procedure 65 or the Anti-Injunction Act, 28 U.S.C. § 2283. The court disagreed, concluding that the injunction was proper pursuant to Rule 65(d) because NAASF was in sufficient active concert or participation with the parties to the action. As to the Anti-Injunction Act, the court reasoned that because the issues sought to be litigated by NAASF were subject to the arbitration clause, NAASF must be enjoined from prosecuting the NAASF lawsuit to effectuate the judgment compelling arbitration.

BREACH OF CONTRACT

***Zeidler v. A&W Rests., Inc.*, No. 06-3319, 2007 WL 528921, Bus. Franchise Guide (CCH) ¶ 13,557 (7th Cir. Feb. 15, 2007)**

In a "nonprecedential disposition," the Seventh Circuit Court of Appeals affirmed the grant of summary judgment for franchisor A&W Restaurants, Inc., on a franchisee's claims of breach of the license agreement, wrongful termination under the Illinois Franchise Disclosure Act (IFDA), and fraud under the Illinois Consumer Fraud Act, the IFDA, and common law.

The court rejected the franchisee's IFDA claims for termination without good cause and, as argued for the first time on appeal, for failure to give proper notice because the franchisee had abandoned its restaurant, and these IFDA claims cannot survive under those circumstances.

The court criticized the franchisee's contract breach claims as "difficult to parse" but stated that it "appear[ed] to argue" that A&W failed to issue a notice of termination and that the company's unresponsiveness prevented the franchisee from reopening its store. The Seventh Circuit affirmed summary judgment on the breach claim because the franchisee's own complaint acknowledged receiving notice of termination and the franchisee had not demonstrated that A&W's alleged unresponsiveness resulted in its failure to reopen. The court also affirmed summary judgment on the franchisee's claim that A&W committed fraud by failing to warn it that freestanding A&W restaurants were not viable and that A&W

sold the franchise knowing that it would not succeed. The court determined that the franchisee could not show that, at the time of site approval, A&W knew the site was not viable or that the franchisee would have acted differently if A&W had disclosed additional information. The court also noted that when A&W learned that a Dairy Queen was planning to open nearby, it urged the franchisee not to proceed and even offered to refund the franchise fee and equipment orders. The court, agreeing with the district court that it was simply "too late in the day" to raise new claims, refused to consider the franchisee's fraud claim based on the IFDA because it raised the claim at summary judgment.

***Servo Kinetics, Inc. v. Tokyo Precision Instruments Co.*, 475 F.3d 783, Bus. Franchise Guide (CCH) ¶ 13,540 (6th Cir. Jan. 30, 2007)**

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

DAMAGES

Lady of Am. Franchise Corp. v. Arcese*, No. 07-60156-CIV, 2007 WL 1489799, Bus. Franchise Guide (CCH) ¶ 13,561 (S.D. Fla. May 25, 2006)*

Franchisor Lady of America Franchise Corp. sued a franchisee, alleging that the franchisee breached the parties' franchise agreement and seeking payment of royalties and advertising fees for the remaining term of the agreement. The franchisee interposed a counterclaim alleging the franchisor's violation of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). Both parties sought summary judgment on their respective claims.

A Florida district court granted the franchisor's motion for summary judgment on the franchisor's breach of contract claim. The franchisee did not dispute that it closed its store before the ten-year contractual period had lapsed. Thus, the court determined that the franchisee breached the contract. The court also addressed the issues of (1) whether the loss of future royalties and advertising fees was a proximate result of the franchisee's action, (2) whether the loss was or should have been within the reasonable contemplation of the parties, (3) whether the future royalties sought were reasonably certain, and (4) whether the franchisor had a duty to mitigate its damages.

The court held that the loss of future profits was the result of the franchisee's actions because the franchisee voluntarily notified the franchisor of a desire to cease all operations and the franchise agreement stated in plain language that the agreement would automatically terminate if the franchisee voluntarily suspended normal business operations. The court reasoned that the loss was within the reasonable contemplation of the parties where the franchisee's duty to pay future loss profits was within the plain language of the parties' franchise agreement. The court concluded that the future royalties sought were reasonably certain because the amount of royalties that must be paid over the ten-year contract term or upon early termination was calculable from the plain language of the franchise agreement.

Regarding the franchisee's mitigation of damages argument, the court found that the franchise agreement was exclusive in that the franchisor was prohibited from entering into a similar contract with a similar franchisee for the same geographic area. If the franchisor entered into such a new contract with another franchisee, the franchisor would be receiving double profits. The court therefore concluded that a bench trial was necessary to address the franchisee's mitigation of damages defense and to determine whether an offset was necessary against the franchisor's damages for breach of contract.

The court denied the parties' cross-motions for summary judgment as to the franchisee's counterclaim for violation of the FDUTPA. The franchisee alleged that the franchisor violated the FDUTPA by presenting slides with earnings claims to the franchisee during the franchise sales process. The court held that whether the franchisee actually relied on these slides in making its decision to enter into the franchise agreement required an objective analysis of whether a reasonable potential franchisee would likely have been misled by these slides. Accordingly, the court found a clear issue of material fact requiring a trial as to whether this objective standard was met.

***FMS, Inc. v. Volvo Constr. Equip. N. Am., Inc.*, No. 00 C 8143, 2007 WL 844899, Bus. Franchise Guide (CCH) ¶ 13,559 (N.D. Ill. Mar. 20, 2007)**

In post-trial motions after a jury awarded $2.1 million to plaintiff FMS, Inc. (FMS), for wrongful termination under the Maine Franchise Law (MFL), the Illinois federal court denied the motions of defendant Volvo Construction Equipment North America, Inc. (Volvo), for judgment as a matter of law or, in the alternative, for a new trial or remittitur. The court also denied FMS's motions for prejudgment interest and attorney fees but granted, in part, FMS's motion for taxable costs.

FMS and Volvo had a dealer agreement that permitted FMS to sell Samsung excavators with attachments for use in the forestry industry in northern Maine. Volvo had assumed the Samsung Construction Equipment North America Corp.'s obligations under the FMS dealer agreement after acquiring the company. Volvo told FMS that it was discontinuing the Samsung excavator line and was therefore terminating FMS's dealer agreement. Volvo continued, however, to manufacture excavators based on the Samsung platform and to sell them through another Maine dealership under the Volvo brand name. By special verdict form, the jury attributed 50 percent of FMS's lost profits to the sales of attachments sold with Samsung excavators that Volvo manufactured.

In its post-trial motions, Volvo argued that (1) the jury's verdict was unsupported by evidence, (2) the jury instructions concerning the MFL were erroneous, (3) FMS's damage expert's lost profit testimony was unreliable under *Daubert* and impermissibly speculative, and (4) damages should be reduced by 50 percent because the MFL does not permit recovery for lost sales attributable to goods not manufactured by Volvo. FMS, as the prevailing party, requested an award of taxable costs, prejudgment interest, and attorney fees incurred since the U.S. Court of Appeals for the Seventh Circuit remanded the case after reversing an earlier grant of summary judgment for Volvo.

The court concluded that the jury's verdict was supported by evidence and "that the jury chose to believe FMS's version of the facts was neither unreasonable nor against the manifest weight of the evidence" and that both the law of the case, as articulated by the Seventh Circuit, and a plain reading of the MFL supported the jury instructions given. The court rejected Volvo's *Daubert* claim because Volvo failed to raise it until after the close of evidence; and it also disagreed with Volvo's claims that FMS's lost profit calculations were overly speculative or excessive, further noting that Volvo had chosen the "risky strategy" of not proposing an alternative damage calculation.

The court also rejected Volvo's argument that FMS's damages should be reduced by 50 percent, the portion attributable to FMS's lost profits for sales of excavator attachments not manufactured by Volvo, rather than sales of Volvo/Samsung excavators themselves. Evidence at trial established that FMS sold excavators with attachments specially designed for use in the forestry industry, and, without those attachments, the excavators were useless to FMS's customers. Applying Maine law, the court concluded that the attachment-related lost profits arose from the wrongful termination and should have been contemplated by Volvo.

The court denied FMS's request for prejudgment interest because FMS's expert's calculations already included a prejudgment interest component, although less than the amount Maine law allowed, and concluded that FMS's strategic decision not to request the full amount constituted good cause for a partial waiver of prejudgment interest. The court also denied FMS's request for attorney fees under the Maine Unfair Trade Practices Act (MUTPA) because FMS had not asserted a MUTPA claim in its complaint; however, the court awarded taxable costs of $23,082.08.

***Ramada Worldwide Inc. v. Homewood Hotel, Inc.*, No. 06 C11, 2007 U.S. LEXIS 8338, Bus. Franchise Guide (CCH) ¶ 13,545 (N.D. Ill. Feb. 5, 2007)**

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

Lady of Am. Franchise Corp. v. Malone*, Bus. Franchise Guide (CCH) ¶ 13,562 (S.D. Fla. Feb. 13, 2006)*

This case is discussed under the topic heading "Unfair and Deceptive Trade Practices."

FRAUD

***Medallion Ne. Ohio, Inc. v. SCO Medallion Healthy Homes, Ltd.*, No. 23368, 2007 WL 397350, Bus. Franchise Guide (CCH) ¶ 13,548 (Ohio Ct. App. Feb. 7, 2007)**

In *Medallion Northeast*, the Ohio Court of Appeals affirmed the trial court's grant of summary judgment on behalf of defendants, two principals of an indoor home inspection and purification franchisor.

In November 2005, Medallion Northeast filed a complaint against SCO Medallion asserting claims for breach of contract, fraud, negligent misrepresentation, and violation of the Ohio Business Opportunity Act. In that same complaint, Medallion Northeast purported to have asserted claims of fraud and negligent misrepresentation against Harland and Michael Moreland, the principals of SCO Medallion. The Morelands filed a motion for summary judgment in which they alleged that they could not be held personally liable for alleged conduct undertaken in their professional capacity as officers, directors, and shareholders of SCO Medallion. In April 2006, the trial court granted the Morelands' motion for summary judgment.

On appeal, Medallion Northeast argued that the Morelands, in their motion, failed to address their personal liability claims for the individual fraud and negligent misrepresentation and that the grant of summary judgment was, therefore, improper. The Ohio Court of Appeals noted that the trial court appeared to have reached the right result but for the wrong reason. Because the trial court's error was not prejudicial to Medallion Northeast, the appellate court found that affirming the trial court's holding was appropriate. In doing so, the court reasoned that the Morelands were entitled to judgment as a matter of law because the complaint filed by Medallion Northeast never specifically alleged that the Morelands were personally responsible for fraud and negligent misrepresentation. Instead, it alleged only that SCO Medallion was liable for the actions of its employees, and there was no hint that Medallion Northeast was seeking to hold the Morelands personally liable for their alleged conduct. Because Medallion Northeast had failed to specifically plead a cause of action against the Morelands, the appellate court concluded that the grant of the Morelands' summary judgment was appropriate.

***Ratnam v. Blimpie Assocs., Ltd.*, Bus. Franchise Guide (CCH) ¶ 13,582 (D.C. Sup. Ct. Feb. 2, 2007)**

This case is discussed under the topic heading "Unfair and Deceptive Trade Practices."

INJUNCTIVE RELIEF

***Huntington Learning Ctrs., Inc. v. Futuredge, LLC*, Bus. Franchise Guide (CCH) ¶ 13,542 (D.N.J. July 28, 2005)**

A federal court in New Jersey denied plaintiff Huntington Learning Centers' preliminary injunction motion prohibiting Futuredge from operating a learning center located in Poway, California.

Futuredge entered into a franchise agreement with Huntington to operate a remedial education learning center in September 1994. The agreement included (1) a noncompete provision providing that "for three years after the end of the franchise agreement, Futuredge shall not operate or control a business that is the same as or similar to the franchise center within 25 miles of the franchise territory"; (2) a provision requiring that Futuredge execute a general release of claims against Huntington for renewal of the agreement; (3) a provision stating that if Futuredge continued to operate after the agreement had expired without exercising the right to renew, it would be considered to be a month-to-month holdover; and (4) a provision that the franchise agreement should be governed by the laws of the state of New Jersey. Subsequently, Futuredge entered into three other franchise agreements with Huntington for centers to be located in Escondido, Carlsbad, and Irvine, California. Each of these agreements contained similar provisions.

Thereafter, certain Huntington franchisees across the nation alleged Huntington failed to administer an advertising fund in accordance with their franchise agreements. The franchisees pursued these claims in arbitration and settled on behalf of all Huntington franchisees in February 2005. According to Futuredge, however, each individual franchisee maintained claims for consequential damages based on Huntington's failure to administer the advertising fund.

On April 20, 2004, Huntington informed Futuredge that the Poway agreement would soon expire and that Huntington desired to see the agreement renewed. Futuredge informed Huntington that it would not grant the general release as required by the original agreement and that if Huntington maintained that demand, Futuredge would not renew. Futuredge later declared its intent to remain at the Poway location and to continue to operate the Huntington learning center as a holdover without renewing. This prompted Huntington to terminate the agreement by a letter dated September 29, 2004. Futuredge remained at the Poway location and claimed to be fulfilling all obligations under the agreement, including sending royalty checks to Huntington, which were not cashed.

On September 1, 2004, Huntington initiated an action in a federal court in New Jersey in anticipation of Futuredge breaching the franchise agreement, including specifically the covenant not to compete. Huntington subsequently moved for a preliminary injunction seeking to prohibit Futuredge from operating the Poway location. Huntington claimed that such operation violated the post-term covenant against competition, three in-term covenants against competition, and all covenants prohibiting use of Huntington's confidential information.

At the outset, the court noted that it must determine whether the law of New Jersey or California should apply to each issue. Huntington asserted that despite the New Jersey choice of law provision, California law should apply. The court disagreed. In order to override the parties' choice of law provision, the court reasoned, it must find that the application of New Jersey law conflicted with a fundamental public policy of California. The court held that application of New Jersey common law was consistent with California's policy of protecting franchisees because it protected the franchisee from termination without good cause.

The court then turned to the merits of Huntington's preliminary injunction motion. Huntington claimed that the New Jersey good cause requirement did not apply to this case because Huntington did not terminate or refuse to renew the Poway agreement; rather, Futuredge voluntarily allowed the agreement to expire. The court disagreed, holding that Futuredge did not voluntarily allow the Poway agreement to expire. Futuredge believed that it had valid legal claims against Huntington in light of Huntington's alleged failure to make contributions to an advertising fund for the franchisees. The Poway agreement, however, contained a general release of all past claims against Huntington as a condition for renewal. Futuredge found the release to be an unfair prerequisite for renewal, particularly because the release was unilateral. Nevertheless, Huntington refused to waive the general release. Thereafter, Futuredge was forced into choosing one of two options: renew the agreement with the general release, thereby waiving all past claims against Huntington, or allow the agreement to expire and attempt to hold over. Huntington argued that Futuredge's decision to allow the agreement to expire could be distinguished from an explicit termination by Huntington; however, the court found that this was a distinction without a difference. Huntington's insistence on a unilateral release coerced Futuredge into allowing the Poway agreement to expire.

Because Huntington caused the termination of the Poway agreement, the court noted that Huntington must demonstrate good cause for that termination. The court reasoned that Futuredge's refusal to consent to the release did not constitute good cause under New Jersey common law. Only a franchisee's failure to substantially perform its obligations under the agreement constituted good cause. Because Huntington made no allegations that Futuredge had failed to substantially perform its obligations under the Poway agreement, Huntington did not have good cause to force an expiration of the Poway agreement. For these reasons, the court concluded that Huntington could not demonstrate a likelihood of success on the merits of its claims.

Moreover, because Futuredge was operating the Poway location as a holdover franchisee, it could not be operating a competing business, nor could it be misappropriating confidential information. Futuredge continued to operate the Poway location under the Huntington name and in accordance with the Poway agreement and to send royalty payments to Huntington each month. Huntington did not allege that Futuredge had done anything outside of operating the Poway location after the expiration of the franchise agreement, and the Poway agreement explicitly provided for this holdover arrangement. Therefore, a violation of the restrictive covenants not to compete was impossible.

The court then examined the remaining preliminary injunction factors briefly and found that they also did not favor Huntington. Futuredge continued to operate the business under the Huntington name. The trade secrets and confidential information that Huntington hoped to protect were being used by a holdover franchisee under the franchise agreement, not by a competing entity. Futuredge continued to pay its royalty fees, so Huntington could not claim that it was losing money from the arrangement. Huntington, therefore, could not complain it would suffer irreparable injury absent issuance of a preliminary injunction.

The balance of harms also favored Futuredge because the Poway center constituted one-fourth of Futuredge's franchises, and issuance of a preliminary injunction would deprive Futuredge of one-fourth of its revenue at least until the end of the litigation. A preliminary injunction prohibiting the operation of the Poway location also risked permanently damaging the goodwill of Futuredge's customers in the area. Maintenance of the status quo at this stage would allow Futuredge to remain at the Poway location and still provide Huntington with its monthly royalty fees.

Finally, the court reasoned that the public interest would not be harmed by the denial of the injunction. Rather, the denial would serve to maintain the status quo until the completion of litigation.

***Bennigan's Franchising Co. v. Swigonski*, No. 3:06-CV-2300-G, 2007 WL 603370 (N.D. Tex. Feb. 27, 2007)**

This case involved a dispute between a franchisor and franchisees of three Bennigan's restaurants. Bennigan's moved for a preliminary injunction, which the court denied.

In May 2000, defendants contracted with Bennigan's for the exclusive right to open a number of Bennigan's Grill and Tavern Restaurants in New York. Defendants failed to open up their fourth restaurant by a specified date. As a result, Bennigan's sent them a notice of breach, threatening to terminate the agreement if the breach was not cured within thirty days. When defendants failed to cure the breach, Bennigan's sent them a notice of termination. Following termination, defendants continued to operate one of the former Bennigan's locations as Main Street Bar and Grill. In doing so, it was undisputed that defendants had at least partially de-identified the location from the Bennigan's system, including removing all trademarks owned by Bennigan's.

In its preliminary injunction motion, Bennigan's sought to enforce a covenant not to compete to prevent the former franchisees from continuing to operate the Main Street Bar and Grill location. As to plaintiff's likelihood of success, the court observed that under New York law, a covenant not to compete was enforceable against a former franchisee only if it was reasonable in geographic scope and duration. One of plaintiff's witnesses testified at the preliminary injunction hearing that Bennigan's needed to enforce the covenant not to compete in its franchise agreements to prevent former franchisees from continuing to operate restaurants as Bennigan's restaurants but with other names on them. However, the court observed that the evidence showed that defendants' restaurant was no longer operating as a Bennigan's or using the marks owned by Bennigan's. Moreover, no Bennigan's franchise operated a restaurant within 210 miles of Main Street Bar and Grill. In view of these facts, the court concluded that the covenant at issue was more limiting than was required to protect the legitimate business interests of Bennigan's.

The court also noted that the language used in the covenant not to compete, which prohibited defendants from operating or having any involvement with "any casual dining or other restaurant business . . . that is in any way competitive with or similar to a Bennigan's Restaurant," was overly broad. In particular, the court observed that the term *casual dining* was not defined in the franchise agreement. Although the franchise agreement included a list of restaurants that would qualify as casual dining, the court concluded that there did not appear to be a common thread binding all of the examples on the list together. Because the covenant prohibited defendants from operating a casual dining restaurant without defining that term specifically or providing a means to determine that definition by applying recognized canons of construction, the court held that the covenant was unreasonably restrictive and that Bennigan's was not likely to succeed on the merits of its motion.

The court then turned to the issue of irreparable injury and determined that this factor favored defendants as well. In so holding, the court noted that a covenant not to compete should be enforced by injunction only if the likely harm fell into one of two categories: (1) a trade secret or confidential customer information may be disclosed, or (2) the services offered by the would-be competitor are "special, unique or extraordinary." The court noted that the evidence did not support either of these two categories.

The court found the final two factors weighed in favor of defendants as well. If the Bennigan's motion was granted, defendants would be forced to close the restaurant. The court noted that this would constitute a substantial injury to defendants and would result in a number of employees losing their jobs, which would not serve the public interest.

***Miller-Bradford & Risberg, Inc. v. VT LeeBoy, Inc.*, No. 06-C-1308, 2007 WL 218749, Bus. Franchise Guide (CCH) ¶ 13,556 (E.D. Wis. Jan. 26, 2007)**

A Wisconsin district court determined that the parties had a vendor-vendee relationship and that plaintiff was not in a dealership relationship as defined by the Wisconsin Fair Dealership Law (WFDL). The court denied plaintiff's request for injunctive relief against its manufacturer. Plaintiff Miller-Bradford & Risberg (MBR) was a dealer of road-building equipment, and LeeBoy was a manufacturer of such equipment. MBR also sold, serviced, and repaired equipment used in the construction and forestry industries. In 1998, the parties commenced a business relationship, and in 2002, the parties entered into an exclusive dealer agreement for LeeBoy asphalt pavers in a defined territory. After MBR entered into the business relationship with LeeBoy in 1998, MBR also began selling asphalt pavers made by Blaw-Knox. In 2006, LeeBoy notified MBR of its decision to terminate the agreement. Shortly thereafter, MBR sued LeeBoy under the WFDL and moved for a preliminary injunction.

In order to obtain a preliminary injunction, MBR had to demonstrate a likelihood that it would prevail on the merits of its claim under the WFDL. At issue was whether the relationship between MBR and LeeBoy was a dealership. Under the WFDL, if the parties' relationship was a dealership, then there was a community of interest in the business of selling goods at retail by agreement. In *Central Corp. v. Research Products Corp.*, 681 N.W.2d 178, 187–88 (Wis. 2004), the Wisconsin Supreme Court laid out two guideposts that, if met, lead to the conclusion that the parties shared a community of interest: (1) whether the parties shared a continuing financial interest; and (2) whether the parties shared an interdependence as evidenced by the extent to which the parties cooperate, coordinate their activities, and share common goals in the business relationship. Further, the Wisconsin Supreme Court outlined ten factors to help guide a court's inquiry into whether the two guideposts were satisfied. The court found that MBR did not demonstrate a likelihood that it had a community of interest with LeeBoy. Thus, MBR could not show that its relationship with LeeBoy was a dealership pursuant to the WFDL. As such, MBR failed to meet

the first prong for granting a preliminary injunction: MBR did not have a greater than negligible chance of prevailing on the merits of its lawsuit.

Moreover, even if MBR were to demonstrate some likelihood of winning on the merits of its lawsuit, MBR could not meet the requirements of the subsequent prongs of the test for granting a preliminary injunction. MBR could neither show that there was an inadequate remedy at law nor that it would suffer irreparable harm if the injunction was denied. MBR was unable to meet these requirements because it did not demonstrate that monetary damages would be inadequate compensation for its lost sales and profits resulting from the loss of the LeeBoy product line. Further, although the court recognized that MBR would suffer some financial loss, the financial loss would be contained to a small portion of MBR's business because MBR had a diverse business with other sources of revenue. Accordingly, the court denied MBR's motion for preliminary injunction.

***Techmaster, Inc. v. Compact Automation Prods., LLC*, 462 F. Supp. 2d 932, Bus. Franchise Guide (CCH) ¶ 13,579 (W.D. Wis. Nov. 27, 2006)**

A distributor of a specialized actuator to a particular customer sued the manufacturer for damages and injunctive relief to prevent the manufacturer from selling actuators directly to the customer rather than through the distributor.

The Wisconsin federal court granted the distributor's requested preliminary injunction. The court concluded that the distributor had shown sufficient likelihood of success on the merits because (1) although it was a close question, it was "at least likely that a reasonable jury would find . . . the existence of a community of interest" for the Wisconsin Fair Dealership Law (WFDL) to apply; (2) a jury could find that the manufacturer's actions constituted a substantial change in competitive circumstances requiring ninety days' prior written notice and a sixty-day opportunity to cure; and (3) it was undisputed that the manufacturer never provided notice and an opportunity to cure.

The court found the distributor's irreparable harm showing "scanty but sufficient." The court then balanced the anticipated harm to the parties if the injunction issued and concluded that, unlike the distributor, the manufacturer was unlikely to suffer any losses because it would continue in the same manner as it had in the past. The court further found that an injunction would serve the public interest because it would carry out the purposes of the WFDL.

The court concluded its injunction decision with a settlement recommendation: "From a purely economic standpoint, [the parties] would be well served in putting their resources into an effort to resolve their business disputes rather than into litigation that might be destructive to their shared interests."

JURISDICTION

***Best W. Int'l, Inc. v. Govan*, No. CIV 05-3247-PHX RCB, 2006 WL 2523460, Bus. Franchise Guide (CCH) ¶ 13,541 (D. Ariz. Aug. 29, 2006)**

In *Best Western*, a federal court in Arizona denied the franchisees' motion to dismiss or transfer an action instituted by their former franchisor.

In 2001, the franchisees entered into a membership agreement with Best Western and were authorized to use Best Western's trademarks in connection with the operation of a hotel they owned in Madera, California. The membership agreement included a choice of forum clause providing that Phoenix, Arizona, was the most convenient locale for actions. In April 2005, Best Western notified defendants that their membership was terminated. Thereafter, Best Western demanded that defendants pay certain amounts allegedly owed to Best Western. After Best Western learned that defendants were continuing to use Best Western's trademarks following the termination of their membership, it brought an action against defendants in Maricopa County Superior Court. Defendants promptly removed the action to federal court and then moved to dismiss the action for improper venue or, alternatively, for a transfer of venue to the Eastern District of California.

After considering the arguments of the parties, the court concluded that venue was proper in the District of Arizona. In so holding, the court observed that venue in cases removed from state court was governed by 28 U.S.C. § 1441(a), rather than 28 U.S.C. § 1391 as argued by defendants. Under § 1441(a), venue was proper in the judicial district encompassing the state court where the action was brought.

As to the motion to transfer, the court observed that it had broad discretion based on individualized considerations of convenience and fairness for each party. The court noted that the party moving for transfer of venue must establish (1) that venue was proper in the transferor district, (2) that the transferee district is one where the action might have been brought, and (3) that the transfer will serve the convenience of the parties and witnesses and will promote the interest of justice.

In their motion, defendants argued that venue was only proper in California because they were California residents, the hotel at issue was located in California, and all of the alleged actions/inactions took place in California. Defendants also argued that the transfer would serve the convenience of their witnesses.

The court denied the request to transfer. In so ruling, the court noted that Best Western was an Arizona corporation and most of its employees were in Arizona. It was also undisputed by the parties that the membership agreement, which was at the crux of the lawsuit, was executed in Arizona. Finally, the court noted that it must give weight to Best Western's choice of forum and that defendants had agreed to this forum and venue pursuant to the terms of the membership agreement. Upon consideration of all of these factors, the court determined that defendants' motion to transfer should be denied.

***Best W. Int'l, Inc. v. 1496815 Ontario, Inc.*, No. CV 04-1194-PHX-SMM, 2007 WL 779699, Bus. Franchise Guide (CCH) ¶ 13,574 (D. Ariz. Mar. 13, 2007)**

In April 2002, defendants entered into a membership agreement with Best Western for a hotel located in Parry Sound, Ontario, Canada. As in *Best Western International, Inc. v. Govan*, the membership agreement included a choice of forum clause that identified Phoenix, Arizona, as the most convenient locale for actions between Best Western and defendants.

On March 9, 2004, Best Western notified defendants that their membership was terminated for failure to timely pay their account. Best Western advised defendants that they needed to discontinue use of Best Western's trademarks; however, defendants failed to remove the Best Western signs and collateral items containing the Best Western trademarks and continued to effectively hold out their hotel to the public as a Best Western member. As a result, Best Western filed a complaint for breach of contract, federal trademark infringement, and unfair competition and moved for a preliminary injunction. Defendants answered the complaint. The parties then stipulated to entry of a preliminary injunction by which defendants were enjoined from displaying and advertising Best Western's trademarks. The parties also participated in a two-day settlement conference before a magistrate judge.

Defendants thereafter filed a motion to dismiss, contending that (1) the Arthur Wishart Act applied to the case to render the forum selection clause void, (2) the court lacked personal jurisdiction, and (3) the claims of Best Western should be dismissed on the ground that the Lanham Act should not be applied extraterritorially in this case.

As a preliminary matter, the court disagreed with defendants' assertion that the Arthur Wishart Act applied in this case. In so holding, the court noted that defendants had not provided the court with any authority to support the application of the act to the case at hand and that their arguments were based on sources outside of the pleadings.

The court then held that defendants had waived their right to object to personal jurisdiction by (1) failing to validly raise personal jurisdiction as a defense in either their answer or a motion to dismiss filed prior to the answer, (2) making a general appearance, and (3) inferring through their conduct their acquiescence to the exercise of the court's jurisdiction (the court pointed to defendants entering into a preliminary injunction by consent and participating in a court-ordered settlement conference).

The court then examined whether there was subject matter jurisdiction over Best Western's trademark infringement claims. The court identified three criteria that must be satisfied to pursue such claims originating extraterritorially. First, the alleged violations must create some effect on American foreign commerce; second, the effect must be sufficiently great to present a cognizable injury to Best Western; and, third, the interest of and links to American foreign commerce must be sufficiently strong in relation to those of other nations to justify an assertion of extraterritorial authority. After careful consideration of these factors, the court concluded that they weighed in favor of the exercise of jurisdiction in this case and that extraterritorial application of the Lanham Act was proper. Consequently, the court denied defendants' motion to dismiss.

***Kehm Oil Co. v. Texaco, Inc.*, No. 2:06-cv-785, 2007 WL 626140, Bus. Franchise Guide (CCH) ¶ 13,571 (W.D. Pa. Feb. 26, 2007)**

Plaintiffs, companies not permitted to operate as Texaco dealers in western Pennsylvania, sued a number of corporate defendants for monetary damages under various tort and contract theories and for declaratory and other relief under the Petroleum Marketing Practices Act (PMPA). Defendants Chevron Corp. and ChevronTexaco Corp. moved to dismiss for lack of personal jurisdiction; and defendants Texaco, Inc., Texaco Refining and Marketing (East), Inc., Star Enterprise, and Chevron USA Inc. (collectively, remaining defendants) moved for summary judgment.

The court granted Chevron's motion to dismiss for lack of personal jurisdiction, concluding that the Pennsylvania long-arm statute, which authorizes jurisdiction to the fullest extent that the U.S. Constitution permits, did not allow the court to exercise jurisdiction over Chevron. Chevron was remaining defendants' parent corporation and one of the world's largest multinational corporations. Mere ownership of subsidiaries, however, did not automatically subject the parent to personal jurisdiction wherever the subsidiaries have jurisdictional contacts. After considering the evidence, the court concluded that Chevron's subsidiaries operated as separate and independent entities, and Chevron's own informational website (which was not interactive) was not enough to establish sufficient contacts for the court to exercise jurisdiction.

The court granted summary judgment for remaining defendants on plaintiffs' state law claims because the PMPA expressly preempted those claims. The court also granted summary judgment on the PMPA claims because there was no franchise relationship between plaintiffs and remaining defendants and because the PMPA's one-year statute of limitations barred the claim.

***Precision Franchising, LLC v. Coombs*, No. 1:06cv1148 (JCC), 2006 WL 3840334, Bus. Franchise Guide (CCH) ¶ 13,543 (E.D. Va. Dec. 27, 2006)**

Plaintiff Precision Franchising, LLC, was the successor in interest to Precision Tune Auto Care, Inc. (PTAC). Both companies' principal places of business were in Leesburg, Loudon County, Virginia. Defendants were franchisees that lived and had operated a PTAC franchise in the Richmond, Virginia, area. After expiration of defendants' franchise agreement (which PTAC elected not to renew), defendants allegedly violated their post-termination obligations under the franchise agreement, and PTAC sued for breach of contract, trademark infringement, unfair competition, common law service mark and trade dress infringement, and tortious interference with contract. Defendants moved to dismiss for failure to state a claim and to transfer venue to the Richmond Division of the Eastern District of Virginia.

The court denied defendants' motion to dismiss for failure to state a claim because they relied on information in their answer rather than confining their arguments to the allegations in the complaint. The court also denied defendants' motion to dismiss for improper venue because plaintiff had filed suit in accordance with the franchise agreement's forum selection clause, which provided that venue was proper in the judicial district where plaintiff's principal place of business was located. The court also considered (1) plaintiff's choice of venue, (2) witness convenience and

access, (3) convenience of the parties, and (4) the interest of justice, concluding that none of these factors weighed in favor of venue transfer.

STATUTORY CLAIMS

***Esber Beverage Co. v. InBev USA, LLC*, No. 2006CA00113, 2007 Ohio App. LEXIS, Bus. Franchise Guide (CCH) ¶ 13,569 (Ohio Ct. App. Mar. 5, 2007)**

InBev USA, LLC, appealed the denial of its motion for summary judgment and the granting of Esber's motion for partial summary judgment.

InBev is "an importer and brewer with exclusive rights to import, market, distribute, and sell certain brands of beer such as Becks, Labatt's, Bass, Stella Artois, and Rolling Rock to distributors [] throughout the United States." For more than forty years, Esber was an exclusive distributor in certain Ohio counties of certain alcoholic beverage products brewed by InBev.

InBev today is a merger of Labatt USA, LLC, and Beck's North America into Latrobe Brewing Co. Previously, Labatt, Beck's, and Latrobe were separate legal entities owned by InBev. Shortly after the merger, InBev told Esber that due to the merger, it would conduct a review to determine which wholesalers to retain; InBev concluded that under Ohio law, and specifically the Ohio Alcoholic Beverages Franchise Act, InBev could terminate its franchise agreements for the Labatt and Beck's brands "because those brands were now owned by a 'successor manufacturer,' i.e., Latrobe, now doing business as InBev." Thus, InBev notified Esber that its franchise agreement would be terminated with respect to the Labatt and Beck's brands and that Esber would be duly compensated. Esber filed an action to enjoin InBev from terminating Esber's distribution rights. The parties ultimately filed cross-motions for summary judgment.

The Ohio Court of Appeals noted that the key issue in both parties' motions was whether InBev was a successor manufacturer under the Ohio Alcoholic Beverages Franchise Act. "If the answer to [the] query [was] negative," InBev could not "terminate the subject franchise without just cause." Although the Ohio legislature had not defined the term *successor manufacturer*, the court noted, "in a virtually identical case, *InBev USA, LLC v. Hill Distributing Co.*, Case No. 2:05-cv-00298 (S.D. Ohio, April 3, 2006)," a federal district court granted summary judgment to the defendant distributors on their claims that InBev's termination of their franchise agreements would violate the Ohio Alcoholic Beverages Franchise Act, holding that the defendant distributors were entitled to injunctive relief prohibiting the termination of those agreements. The court, "in determining the legislative intent behind the use of the term 'successor manufacturer,'" noted that the Ohio Alcoholic Beverages Franchise Act specifically provided that the "'restructuring . . . of a manufacturer's business organization' [was] not just cause for termination of a franchise." The district court reasoned that is exactly what had taken place in that case as "no assets, liabilities, products, or brands were transferred to any new ownership group. [InBev's] own documents admitt[ed] as much by calling the merger a 'reorganization by InBev of Belgium of its United States operations' and a 'streamlining of [its] U.S. corporate structure.'"

InBev argued that the merger was not a restructuring; rather, Labatt and Beck's were eliminated by the merger. The district court responded that "this argument ignore[d] the realities of the transaction," i.e., that Labatt and Beck's were still a part of the same business organization, and the merger merely resulted in a restructuring and renaming of U.S. business operations.

The Ohio Court of Appeals found that, with the exception of the identity of the franchisee, the facts of this case were identical to those addressed by the district court, and for the same reasons it also found that the InBev merger was "more accurately defined as a restructuring and renaming of its U.S. business operations, with no products changing ownership control." The appellate court, therefore, found that "[InBev's] actions fit squarely within the conduct prohibited" by the Ohio Alcoholic Beverages Franchise Act.

Lady of Am. Franchise Corp. v. Arcese*, No. 07-60156-CIV, 2007 WL 1489799, Bus. Franchise Guide (CCH) ¶ 13,561 (S.D. Fla. May 25, 2006)*

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

***New Eng. Surfaces, Inc. v. E.I. DuPont de Nemours & Co.*, Bus. Franchise Guide (CCH) ¶ 13,555 (D. Me. Oct. 20, 2006)**

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

***R&A Small Engine, Inc. v. Midwest Stihl, Inc.*, 471 F. Supp. 2d 977, Bus. Franchise Guide (CCH) ¶ 13,566 (D. Minn. Dec. 20, 2006)**

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

***Sound of Music Co. v. Minn. Mining & Mfg. Co.*, 477 F.3d 910, Bus. Franchise Guide (CCH) ¶ 13,553 (7th Cir. Feb. 13, 2007)**

The U.S. Court of Appeals for the Seventh Circuit affirmed summary judgment for defendant Minnesota Mining and Manufacturing Co. (3M) on a nonexclusive dealer's claims for breach of contract, equitable recoupment, and violation of the Illinois Franchise Disclosure Act (IFDA) and the Minnesota Franchise Act (MFA). The court also affirmed the district court's denial of plaintiff's motion for leave to amend its complaint to add an Illinois Consumer Fraud Act (ICFA) claim because the claim would not survive a motion for summary judgment.

Defendant 3M was in the background music business, where it supplied prerecorded and other background music and related equipment; it gave plaintiff and its other background music dealers twelve months' advance notice of its intention to exit the business.

The court concluded that termination did not violate the parties' contract because the contract provided for unilateral termination under the circumstances. The court also concluded

that the statute of limitations in the IFDA, which requires suits to be brought within one year "after the franchisee becomes aware of facts or circumstances reasonably indicating that he may have a claim for relief," barred plaintiff's claim that 3M lacked good cause to terminate as the act requires. The court also rejected plaintiff's claim that 3M violated the MFA, noting that plaintiff was not a franchisee under the act because it never paid a franchise fee. The court additionally concluded that the district court properly denied plaintiff's request for leave to amend its complaint to add an ICFA claim because plaintiff could not, as a matter of law, establish the requisite deceptive conduct.

***Techmaster, Inc. v. Compact Automation Prods., LLC*, 462 F. Supp. 2d 932, Bus. Franchise Guide (CCH) ¶ 13,579 (W.D. Wis. Nov. 27, 2006)**

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

***Zeidler v. A&W Rests., Inc.*, No. 06-3319, 2007 WL 528921, Bus. Franchise Guide (CCH) ¶ 13,557 (7th Cir. Feb. 15, 2007)**

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

Lady of Am. Franchise Corp. v. Malone*, Bus. Franchise Guide (CCH) ¶ 13,562 (S.D. Fla. Feb. 13, 2006)*

This case is discussed under the topic heading "Unfair and Deceptive Trade Practices."

***Kehm Oil Co. v. Texaco, Inc.*, No. 2:06-cv-785, 2007 WL 626140, Bus. Franchise Guide (CCH) ¶ 13,571 (W.D. Pa. Feb. 26, 2007)**

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

TERMINATION AND NONRENEWAL

***Servo Kinetics, Inc. v. Tokyo Precision Instruments Co.*, 475 F.3d 783, Bus. Franchise Guide (CCH) ¶ 13,540 (6th Cir. Jan. 30, 2007)**

This case arose from an exclusive distribution agreement between a distributor and a manufacturer. Plaintiff is Michigan company Servo Kinetics, Inc. (SKI). Since 1990, SKI has been exclusively distributing in North America servo valves manufactured by a Japanese company, defendant Tokyo Precision Instruments Co., Ltd. (TSS). Defendant Moog, Inc., is a Japanese manufacturer of servo valves that distributed servo valves in North America through distributors other than SKI.

"[I]n 2000, Moog began to consider acquiring a controlling interest in TSS." During the due diligence process, "Moog learned that SKI was TSS's largest foreign customer" and that the two parties had a one-year agreement for SKI's exclusive distribution of TSS servo valves in North America. In January 2002, with knowledge that Moog would be buying TSS, SKI and TSS entered into a five-year agreement in which the parties agreed that SKI would be the exclusive distributor of TSS servo valves in North and South America. The agreement stipulated that it was governed by Japanese law and that either party could terminate the agreement for good cause provided that the terminating party gave the other party six months' notice. In February 2002, Moog acquired the majority of stock in TSS, and Moog employees replaced TSS's directors. In April 2002, TSS sent a letter to SKI putting SKI on notice that TSS would be terminating the agreement.

In August 2003, SKI filed suit against defendants alleging, among other things, breach of contract against TSS and tortious interference with a contract against Moog. There was no dispute among the parties that Japanese law governed the breach of contract claims and that Michigan law governed the tortious interference claim. The district court granted summary judgment in favor of defendants and dismissed the case. SKI appealed, and the Sixth Circuit reversed the district court's dismissal of the breach of contract claims and affirmed the district court's dismissal of the tortious interference claim.

Regarding the breach of contract claims, the Sixth Circuit agreed that whether TSS could terminate the agreement was governed by Japanese law. The choice of law provision in the agreement provided that "such right of termination shall not be exercised without good reason." Accordingly, the Sixth Circuit stated that its task was to determine what constitutes good reason under Japanese law. A Japanese law expert opined that good reason depends on factual determinations, among other things, "whether the manufacturer/seller [here, defendants] had commercially legitimate motives for termination." Using this framework, the Sixth Circuit found that the inquiry into determining TSS's motive should be a subjective one that looks at defendants' actual motives. The district court inappropriately inquired whether, objectively considering the facts and circumstances, TSS could have a commercially legitimate motive. The Sixth Circuit determined that an objective inquiry, rather than a subjective inquiry, would be inconsistent with Japanese law because "Japanese notions of trust and good faith," as "mandated by the Japanese legal system," would be "at least inconsistent, if not incompatible, with a legal system that only examine[d] the objective circumstances [of] the parties' actions."

Further, the Sixth Circuit determined that a jury could conclude from the proffered evidence that TSS terminated the agreement "for the purpose of benefiting Moog by depriving its competitor of its sole source of supply." The Sixth Circuit determined that given the "highly dependent relationship between SKI and TSS, a contractual termination motivated by [TSS's desire] to suppress competition from SKI would not constitute [a] 'good reason'" under the terms of the agreement.

As to the tortious interference claim, the Sixth Circuit found that Moog was "not legally a third party vis-à-vis TSS." SKI argued that "Moog's actions were for the benefit of Moog" and not TSS and that Moog can be liable for the alleged tort, but the Sixth Circuit found this argument to be without merit. The court reasoned that Moog and TSS are essentially the same entity because Moog is the controlling

shareholder of TSS, and such a controlling shareholder cannot be considered a third party that could interfere with its own company's contracts. Because, as a matter of law, Moog could not commit the alleged tort, the Sixth Circuit affirmed the district court's grant of summary judgment in favor of Moog.

***FMS, Inc. v. Volvo Constr. Equip. N. Am., Inc.*, No. 00 C 8143, 2007 WL 844899, Bus. Franchise Guide (CCH) ¶ 13,559 (N.D. Ill. Mar. 20, 2007)**

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

***New Eng. Surfaces, Inc. v. E.I. DuPont de Nemours & Co.*, Bus. Franchise Guide (CCH) ¶ 13,555 (D. Me. Oct. 20, 2006)**

E.I. DuPont de Nemours and Co., which produces high-end countertop products, terminated its long-term business relationship with New England Surfaces, Inc. (NES) pursuant to a thirty-day termination provision in the parties' distribution agreement. At the time of termination, NES's authorized distribution area included Maine and parts of Connecticut, Massachusetts, New Hampshire, Rhode Island, and Vermont. DuPont moved to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), NES's claims for, among other things, unconscionability and violation of the Connecticut Unfair Trade Practices Act (CUTPA), the Massachusetts Unfair Trade Practices Act (93A), the New Hampshire Unfair Trade Practices Act (New Hampshire act), and the Vermont Consumer Fraud Act (Vermont act).

Even though NES did not attach or incorporate the parties' distribution agreement, the court considered its terms without converting DuPont's motion to dismiss into a motion for summary judgment because of a narrow exception allowing courts to consider, on a motion to dismiss, "documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint." The court further noted that "[w]hen [as here] a document is central to the plaintiff's complaint, the document merges into the pleadings and may be properly considered by a court in determining a motion to dismiss."

Accordingly, the court considered the distribution agreement's Delaware choice of law clause and its thirty-day termination provision. It also assumed as true, however, for purposes of deciding the motion to dismiss, that DuPont had orally represented it would terminate NES only for cause.

The court concluded that the distribution agreement's Delaware choice of law provision applied to NES's contract claims and that either Maine or Delaware law applied to NES's tort claims. The court therefore dismissed the CUTPA claim as a tort claim not raised under Maine or Delaware law and the 93A and New Hampshire act claims as "embroidered breach of contract claims" not raised under Delaware law. It also rejected application of the Vermont act, which covers only consumer claims. The court further refused to find that the contract termination provision was unconscionable under Maine or Delaware law because NES was a sophisticated business that did not lack meaningful choice despite DuPont's alleged superior bargaining power.

***Akshayraj, Inc. v. Getty Petroleum Mktg., Inc.*, No. 06-2002 (NLH), 2007 WL 708852, Bus. Franchise Guide (CCH) ¶ 13,568 (D.N.J. Mar. 6, 2007)**

This case resulted from the franchisor's conversion of franchisee-operated gas stations from Mobil stations to Lukoil stations. The franchisees alleged that the franchisor's conversion constituted constructive termination of their franchise agreements and brought claims against the franchisor for violation of the Petroleum Marketing Practices Act (PMPA), New Jersey Franchise Practices Act (NJFPA), and Pennsylvania's franchise laws and for breach of contract. The franchisees also sought injunctive relief.

The franchise agreements at issue were assigned to defendant Getty, which bought the franchise rights from Mobil and retained the right to use the Mobil name through 2010. In 2005, Getty instituted a renaming program in which the franchisees' Mobil stations were renamed as Lukoil stations.

The franchisees alleged that the effect of the renaming program was to take their stations from recognizable, identifiable, and sought-out branded stations to generic stations. They further contended that even though the stations were now generic with no brand loyalty, they were still being charged the same high price for wholesale gasoline. The franchisees claimed that the conversion caused them to sell less gas and lose customers loyal to the Mobil brand.

The primary issue that surrounded most of the franchisees' claims was whether the conversion constituted a constructive termination. This issue was first addressed by the court in the context of the franchisees' motion for a preliminary injunction. There, the court held that (1) the franchisees had not demonstrated that their franchises were actually terminated; (2) there was insufficient evidence to conclude that the Lukoil brand was generic; and (3) because Getty continued to provide the franchisees with a branded product, there was no termination, constructive or otherwise, of the franchise agreements.

This determination on the injunction motion presented a peculiar procedural posture for the court to consider the franchisor's motion to dismiss. The court addressed the issue of whether the court's order on a preliminary injunction hearing could be considered a "matter of judicial notice" and to what extent the court should rely on that order in deciding the motion to dismiss. Relying on the Third Circuit's holding in *Lum v. Bank of America*, 361 F.3d 217, 222 n.3 (3d Cir. 2004), the court concluded that it would analyze the motion to dismiss as follows: If the court wished to rely on the findings from the preliminary injunction hearing in deciding the motion to dismiss, the motion to dismiss must be converted into one for summary judgment. If such conversion occurs, then the court would provide the parties with sufficient time to respond.

The court dismissed the franchisees' claim for breach of contract for failure to supply Mobil products because the parties' franchise agreements clearly allowed such conduct. The court denied the motion to dismiss as to the breach of contract

for failure to price in good faith. Getty argued that the franchisees fatally failed to include the words *bad motive* in their complaint. The court disagreed, concluding that it was sufficient that the franchisees made a showing of a bad motive in their complaint.

The motion to dismiss the franchisees' claims for Getty's violation of the NJFPA, for violation of the PMPA, and for breach of their franchise agreements related to whether Getty constructively terminated their franchise agreements. The court converted the motion to dismiss to a motion for summary judgment and deferred ruling to allow the franchisees additional time to submit their proofs in opposition to the summary judgment motion.

***Cent. Sports, Inc. v. Yamaha Motor Corp.*, 477 F. Supp. 2d 503, Bus. Franchise Guide (CCH) ¶ 13,573 (D. Conn. Mar. 15, 2007)**

A franchisee's inability to maintain floor plan financing constituted good cause for franchise termination. Plaintiff franchisee was a Connecticut-based dealer of Yamaha motorcycles and other products. The franchisee initially financed its floor inventory through its Yamaha authorized wholesale lender, Deutsche Financial Services (DFS). After DFS terminated its financing agreement with the franchisee in January 2002, the franchisee made several unsuccessful efforts to secure alternative financing. After providing multiple termination warnings to the franchisee over four years, defendant franchisor Yamaha terminated the franchise, alleging the franchisee's material breach of its obligation to maintain adequate credit lines to finance its inventory of Yamaha's products. After termination of the franchise, the franchisee brought an action against Yamaha for breach of contract, breach of the implied covenant of good faith and fair dealing, violation of the Connecticut Franchise Act (CFA), and violation of the Connecticut Unfair Trade Practices Act (CUTPA). Yamaha interposed counterclaims of tortious interference and violation of the CUTPA.

The franchisee argued that it violated its wholesale credit obligations because Yamaha unreasonably rejected a fully conforming $500,000 line of credit from People's Bank, a lender not authorized by Yamaha. The court found no evidence that the franchisee had obtained credit in this amount. Instead, the proffered evidence indicated that the franchisee had only a $100,000 standby letter of credit from People's Bank, an amount that violated the franchisee's minimum credit requirement. Because Yamaha allowed the franchisee to operate without the requisite financing while the franchisee unsuccessfully pursued alternative credit arrangements, the court found no evidence that Yamaha acted in bad faith.

Thus, the court found that Yamaha had good cause for terminating the franchise, satisfied the statutory termination notice requirement, and acted in good faith. Accordingly, the court held that Yamaha was entitled to summary judgment on all four counts of the franchisee's complaint.

***Matrix Group Ltd. v. Rawlings Sporting Goods Co.*, 477 F.3d 583, Bus. Franchise Guide (CCH) ¶ 13,565 (8th Cir. Feb. 20, 2007)**

On July 31, 1996, Rawlings granted Matrix an exclusive license to use Rawlings' trademarks in producing equipment bags. The agreement was to continue as long as certain conditions were satisfied. Among other things, "Matrix agreed to use its 'best efforts to foster and develop the products' and to maximize sales." For its part, "Rawlings agreed not to produce or sell bags that competed with those of Matrix or to sell bags over a certain size."

A section entitled "Breach" provided that a party must give to the breaching party written notice of any breach of the license agreement provisions. The breaching party had thirty days to cure the breach, after which the other party was entitled to terminate the license agreement if the breach was not cured. In addition, a separate section entitled "Immediate Termination" provided that if Matrix became insolvent, Rawlings could, upon notice to Matrix, immediately terminate the license agreement. In March 2003, K2 purchased Rawlings; later that year, K2 purchased Worth, Matrix's competitor in the sporting equipment bag industry, and "made plans to consolidate parts of the sales forces of Rawlings and Worth." After learning of the planned consolidation, Matrix wrote to Rawlings complaining that the "consolidation would violate the noncompete clause of the agreement between Matrix and Rawlings." At the same time, Rawlings was "concerned with the decline in its bag sales and believed that Matrix . . . was not using its best efforts to foster and develop [these] products." Rawlings and Matrix met to discuss these concerns but were unable to address them to Rawlings' satisfaction.

On January 30, 2004, Matrix sued Rawlings in federal court in Maine for breach of the license agreement's noncompete provision. In response to the action, Rawlings wrote Matrix that it was terminating the license agreement effective thirty days from the date of the letter as a result of "Matrix's failure to use [its] best efforts." The letter further stated that the agreement's thirty-day period for cure of breach did not apply because Matrix had failed to comply with Rawlings' earlier requests that Matrix use its best efforts. On the day the letter was written, Rawlings sued Matrix in federal court in Missouri for breach of Matrix's duty to use its best efforts. The parties' respective actions were eventually consolidated in federal court in the Eastern District of Missouri.

Additional claims were asserted: Matrix alleged that Rawlings, by not allowing thirty days for cure of the breach, had wrongfully terminated the license agreement; and that K2, in combining the sales forces of Rawlings and Worth, "had caused Rawlings to breach the license agreement's noncompete clause and tortiously interfered with that agreement in violation of Florida common law." Rawlings and K2 then moved for "summary judgment on Matrix's contract and common law tort claims. . . . Matrix in turn moved for summary judgment both on its claim that Rawlings [] wrongfully terminated the license agreement and on Rawlings' breach of contract claim."

The district court granted summary judgment to Rawlings on the tortious interference claim against it but denied the claim as to K2. In addition, the district court granted summary judgment to Matrix for wrongful termination, holding that Rawlings violated the thirty-day cure provision in the license agreement. "The parties then went to trial on Matrix's claims against Rawlings for breach of the license

agreement's noncompete clause and against K2 for tortious interference." The jury ruled in favor of Matrix, awarding damages against Rawlings and K2.

On appeal, Rawlings argued "that the district court erred in granting summary judgment to Matrix on its wrongful termination claim;" because Matrix had breached the agreement by failing to use its best efforts, Rawlings argued, Rawlings did not have to adhere to the notice and cure provisions of the agreement. Rawlings also argued that it was entitled to terminate Matrix under the license agreement because, it claimed, Matrix was insolvent. The Eighth Circuit rejected both of these arguments. First, it held that Matrix's alleged prior material breach did not excuse Rawlings' failure to comply with the notice and cure requirement of the termination provision as that provision was unambiguous. The court also concluded that Matrix was not equitably insolvent and that summary judgment was properly granted to Matrix on that issue.

K2's arguments on appeal were similarly rejected. K2 contended that Matrix did not establish tortious interference with a business relationship because it failed to prove that K2 "intentionally and unjustifiably interfered with the license agreement between Matrix and Rawlings." K2 argued that "its interest in its own business and its competitive position in the sporting goods industry" justified its consolidation of the Rawlings and Worth sales forces. The court disagreed, finding that there was sufficient evidence for the jury to conclude that K2 "used improper means of interference and . . . intentionally and unjustifiably interfered with the license agreement." In particular, it pointed to evidence "that K2 was aware of the [license agreement] between Rawlings and Matrix" and of Matrix's objection to the consolidation with Worth. Because K2 went ahead with the consolidation, the Eighth Circuit held that "the jury was entitled to infer that K2 'intended to procure a breach of the [license agreement].'"

Finally, K2 challenged the damages awarded at trial on the grounds that they were duplicative. The court found this argument unavailing, noting that it was entirely appropriate for damages to be awarded for breach of contract and tortious interference because they were not coextensive. The court observed that the acts committed by Rawlings and K2 were different and concluded that the jury "intended to apportion damages between [] defendants for these separate acts."

***Sound of Music Co. v. Minn. Mining & Mfg. Co.*, 477 F.3d 910, Bus. Franchise Guide (CCH) ¶ 13,553 (7th Cir. Feb. 13, 2007)**

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

***Techmaster, Inc. v. Compact Automation Prods., LLC*, 462 F. Supp. 2d 932, Bus. Franchise Guide (CCH) ¶ 13,579 (W.D. Wis. Nov. 27, 2006)**

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

***Huntington Learning Ctrs., Inc. v. Futuredge*, Bus. Franchise Guide (CCH) ¶ 13,542 (D.N.J. July 28, 2005)**

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

***Esber Beverage Co. v. InBev USA, LLC*, No. 2006CA00113, 2007 Ohio App. LEXIS, Bus. Franchise Guide (CCH) ¶ 13,569 (Ohio Ct. App. Mar. 5, 2007)**

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

***Miller-Bradford & Risberg, Inc. v. VT LeeBoy, Inc.*, No. 06-C-1308, 2007 WL 218749, Bus. Franchise Guide (CCH) ¶ 13,556 (E.D. Wis. Jan. 26, 2007)**

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

TORTIOUS INTERFERENCE

***R&A Small Engine, Inc. v. Midwest Stihl, Inc.*, 471 F. Supp. 2d 977, Bus. Franchise Guide (CCH) ¶ 13,566 (D. Minn. Dec. 20, 2006)**

A multiline retail equipment store sued an exclusive distributor of handheld power equipment in Minnesota state court for terminating the store's right to sell the distributor's products, alleging tortious interference with business expectancy, negligent infliction of emotional distress, and violation of the Minnesota Franchise Act (MFA) and the Minnesota Heavy and Utility Equipment Dealer Act (HUEDA). Following removal to federal court and the store's voluntary dismissal of its HUEDA and negligence claims, the Minnesota federal court granted summary judgment for the distributor on the remaining claims, and the distributor moved for Rule 11 sanctions based on the store's continued prosecution of its remaining claims.

The court denied the distributor's request for Rule 11 sanctions with respect to the store's MFA claim because there was no evidence that the store's counsel filed the MFA claim for dilatory or improper purposes, and the store's counsel had colorable, nonfrivolous (albeit unsuccessful) arguments for the modification or reversal of existing law. The court criticized the store's counsel for opposing summary judgment on the tortious interference claim "in two sentences bereft of any substantive legal argument" and then "belatedly" providing additional arguments after summary judgment was entered. The court nonetheless refused to sanction counsel for pursuing the claim because the conduct "did not rise to the level of unprofessional conduct that might warrant Rule 11 sanctions."

***Matrix Group Ltd. v. Rawlings Sporting Goods Co.*, 477 F.3d 583, Bus. Franchise Guide (CCH) ¶ 13,565 (8th Cir. Feb. 20, 2007)**

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

TRADEMARK INFRINGEMENT

***Ramada Worldwide Inc. v. Homewood Hotel, Inc.*, No. 06 C 11, 2007 U.S. Dist. LEXIS 8338, Bus. Franchise Guide (CCH) ¶ 13,545 (N.D. Ill. Feb. 5, 2007)**

Ramada, a hotel franchisor, filed an action in a federal court in Illinois against a former franchisee alleging several trademark infringement and various breach of contract claims and then moved for summary judgment. The former franchisee

challenged only two issues in Ramada's motion: (1) that it did not timely de-identify its facility and (2) that the liquidated damages provision should apply.

The former franchisee argued that the removal of the exterior Ramada sign after termination was sufficient to satisfy the de-identification requirements of the franchise agreement and that once the exterior Ramada sign was replaced with a noninfringing sign, there was no infringement. Ramada, however, introduced evidence of many items at the former franchisee's facility still carrying the Ramada marks after termination, including everything from signage from interior public areas to ice buckets and trays. Although a prospective guest might not believe that there was an association between Ramada and the former franchisee based on the new exterior Homewood Hotels sign, the court reasoned that once prospective guests saw products such as shampoos and soaps and other items with the Ramada marks, the guests would have a mistaken impression of a relationship between Ramada and the former franchisee, which raised a likelihood of confusion. The court also agreed with Ramada's argument that the proper calculation of damages for the former franchisee's infringement was a reasonable royalty based on the royalty fees originally negotiated in the franchise agreement, trebled as a result of the former franchisee's willful conduct.

The court next addressed the issue of liquidated damages. The former franchisee admitted that it had breached the franchise agreement with Ramada by failing to pay fees owed and failing to submit monthly revenue reports to Ramada and that Ramada substantially performed all of its obligations under the agreement. The only dispute between the parties regarding the former franchisee's breach of the agreement was whether the liquidated damages provision should be applied to satisfy the damages owed to Ramada.

The court concluded that the liquidated damages provision should be enforced in this case. In so holding, the court noted the former franchisee's admission that it had successfully negotiated a lower liquidated damages amount in the franchise agreement and that the provision amount was "the result of an informed common negotiated compromise between the parties." Based on that admission, the court found that the provision was entitled to a presumption of validity and that the former franchisee bore the burden of proving the provision was unenforceable. After considering both the reasonableness of the probable damages estimation and the difficulty of calculating the amount of damages at both the execution of the franchise agreement and at the time of the breach, the court concluded that the liquidated damages provision was valid and enforceable. In making this determination, the court relied on the former franchisee's additional admission that the liquidated damages amount was set because actual damages would be difficult or impossible to ascertain and that the amount was a reasonable estimate of the damages that would be incurred and was not a penalty.

UNFAIR AND DECEPTIVE TRADE PRACTICES

***Fed. Trade Comm'n v. Transnet Wireless Corp.*, No. 05-61559-CIV, 2007 WL 842140, Bus. Franchise Guide (CCH) ¶ 13,563 (S.D. Fla. Mar. 20, 2007)**

A Florida district court granted the Federal Trade Commission's summary judgment on its claims that two defendant corporations and three individual defendants who had the authority to control the defendant corporations violated § 5 of the Federal Trade Commission Act and the Franchise Rule in the sale of business ventures. Defendants in this action include Nationwide Cyber Systems, Inc. (Nationwide), Transnet Wireless Corp. (Transnet), and three individual defendants. Both Nationwide and Transnet promoted and sold business ventures involving public-access Internet kiosks or terminals.

The court found that there was no issue of material fact as to whether the defendant corporations made misrepresentations concerning both potential income and assistance with locations for the kiosks. Regarding the defendant corporations' income misrepresentations, there was substantial evidence indicating the defendant corporations made representations that were likely to mislead reasonably prudent consumers. Moreover, such representations did mislead reasonably prudent consumers, resulting in over $47 million dollars in sales of kiosks to the consumers. The evidence included a sharp discrepancy between the promised monthly minimum income and the actual monthly minimum income consumers could reasonably expect from the kiosks. As to the defendant corporations' promises for location assistance, there were indisputable material representations that were likely to, and actually did, mislead reasonably prudent consumers. The defendant corporations made promises to consumers that were unequivocal, consistent, and backed up by guarantees; and all the evidence in the record showed that reasonably prudent consumers did rely on such misrepresentations to their detriment.

The court also found that there was no issue of material fact as to whether the three individual defendants were individually liable. There was clear evidence that the three individual defendants exercised control over the defendant corporations and had knowledge of their deceptive practices.

Lady of Am. Franchise Corp. v. Malone*, Bus. Franchise Guide (CCH) ¶ 13,562 (S.D. Fla. Feb. 13, 2006)*

A fitness center franchisor, Lady of America Franchise Corp. (LOA), sued a Michigan franchisee for breach of contract. The franchisee counterclaimed, alleging fraudulent inducement and concealment; negligent misrepresentations and omissions; and violations of the Florida Franchise Act (FFA), the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), and the Michigan Franchise Investment Law (MFIL). The franchisee's counterclaims were premised upon misleading statements allegedly made by the franchisor regarding the success rates of franchisees, average profits, and expected outcomes. The franchisee contended that it relied on those statements when deciding to open an LOA franchise.

The Florida federal court found that the Michigan franchisee had standing to sue under the FFA because it was "doing business in Florida." A Florida choice of law clause in the franchise agreement, along with the franchisee's continuous relationship with LOA in Florida, established that both parties did business in Florida. Nevertheless, the court dismissed the franchisee's counterclaim alleging misrepresentation in violation of the FFA because it could not establish justifiable reliance in light of an unambiguous disclaimer clause

contained in the franchise agreement that directly addressed all the alleged statements at issue. There was no evidence that the franchisor attempted to conceal the importance of the disclaimer, which appeared in capital letters. Moreover, the disclaimer gave the franchisee the opportunity to list any representations it received from the franchisor. The court determined that the franchisee's failure to list any representations further evidenced its lack of reliance on those statements.

This determination also allowed the court to dismiss the franchisee's common law counterclaims alleging fraudulent inducement and concealment and negligent misrepresentations and omissions.

The court also dismissed the franchisee's MFIL counterclaim because the Florida choice of law clause barred the franchisee from bringing a claim for violation of Michigan law.

The court concluded that the franchisee had, however, successfully pleaded its counterclaim for violation of the FDUTPA and that it had standing to sue under the act because it had demonstrated sufficient contacts with Florida in connection with the alleged misrepresentations. The franchisee had contacted LOA in Florida, was given an Internet presentation designed by LOA employees in Florida, was given franchise information by LOA employees in Florida, and had an in-person meeting with LOA in Florida. Additionally, the court determined that the franchisee's counterclaim under the FDUTPA was valid because it unambiguously referenced the franchisor's alleged violations of the Federal Trade Commission's rules governing disclosure to prospective franchisees, and the FDUTPA expressly provides that such violations allow for a claim under the act. The court also determined that the franchisee was not required to define specifically how its interactions with the franchisor fell within the definition of trade and commerce because the franchisee's counterclaim was replete with such examples.

***Ratnam v. Blimpie Assocs., Ltd.*, Bus. Franchise Guide (CCH) ¶ 13,582 (D.C. Sup. Ct. Feb. 2, 2007)**

Blimpie Associates, Ltd., and other defendants were granted summary judgment on all claims alleged by the plaintiff franchisees arising from the contention that defendants acted deceptively by making fraudulent or negligent misrepresentations. Plaintiffs, which subleased a property from a Blimpie subfranchisor, alleged that defendants failed to disclose a zoning restriction and local opposition to the establishment of a fast-food restaurant when the franchisees entered into the sublease.

The court concluded that these alleged omissions did not amount to misrepresentations as to a material issue or fact and that even if Blimpie had a duty to disclose, plaintiffs had the means to acquire the information and therefore could not claim to have been adversely affected by the alleged omissions. The court determined that zoning restrictions and local opposition were both pieces of information readily available as matters of public record. The court opined that any prudent individual, even without business experience, would ensure that his business complied with local regulations. Despite the availability of the information and the terms in the sublease and franchise agreement, which strictly placed on the franchisees the responsibility of ensuring local compliance, plaintiffs failed to determine the zoning of the property and to inquire if it was fit for the purposes of their franchise.

The court also found that the franchisees could have avoided zoning and local opposition if they it had operated the franchise as a restaurant rather than as a fast-food restaurant. This fact was also a determining factor for the rejection of plaintiffs' claim that Blimpie failed to conduct a site analysis as indicated in its UFOC. The court also rejected plaintiffs' claim that Blimpie failed to timely deliver a UFOC and made earnings claims in violation of the Federal Trade Commission Act because the act does not give rise to a private cause of action.

* Ms. Appleby's firm, Wiggins and Dana LLP, are counsel for DAI in this matter.

** Mr. Einhorn's firm, Zarco, Einhorn Salkowski & Brito, P.A., represented Lady of America in this case.