Franchising & Distribution Currents

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ADVERTISING AND MARKETING

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***Valdes v. Century 21 Real Estate, LLC*, Bus. Franchise Guide (CCH) ¶ 16,537, 2019 WL 5388162, (D.N.J. Oct. 22, 2019)**

A franchisor failed to have a putative class action under the federal Telephone Consumer Protection Act (TCPA) dismissed after the United States District Court for the District of New Jersey found that the plaintiff had adequately alleged the use of an automatic telephone dialing system, a violation of the Do-Not-Call (DNC) regulations, and an agency relationship between the franchisor and its franchisees.

Century 21 Real Estate LLC (Century 21) is a real estate franchisor with thousands of franchised locations throughout the country. Plaintiff Jorge Valdes (Valdes) alleged that he had registered his cell phone number on the DNC list in 2010, but that in 2018 and 2019, he received twelve unsolicited, autodialed telephone calls from Century 21 franchisees seeking to have him list his property with one of their realtors. Valdes brought a putative class action against Century 21 for violations of the TCPA, 47 U.S.C. § 227, and its accompanying regulations, 64 C.F.R. § 64.1200. He alleged that Century 21 is vicariously liable for the calls by its franchisees because Century 21 created a marketing program for its franchisees to use where franchisees bought certain real estate listing leads and then made cold-calls to those leads using an automated telephone dialing system (ATDS). Valdes further alleged that Century 21 created a workbook for its franchisees to use, that it facilitated the assistance of a preferred vendor to aide its franchisees,

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and that it coached its franchisees at semi-annual franchisee training sessions to implement the marketing plan.

Century 21 first argued that Valdes failed to adequately allege the use of an ATDS, a required element of a TCPA claim. The court disagreed. It explained that while allegations of receipt of similar commercial telephone calls by consumers was not enough to allege use of an ATDS, Valdes had also alleged that franchisees had obtained the telephone numbers at issue from a company known to sell telephone number lists configured for use with an ATDS and that franchisees had been trained to use an ATDS.

Century 21 next attempted to argue that Valdes could not assert a DNC claim, which requires a showing of making prohibited calls to a residential phone number, and that the calls were made by, or behalf of, the same entity. The court concluded that cell phone numbers, absent proof to the contrary, are presumed to be residential.

The court then held that the balance of Valdes's claim turned on whether he had adequately alleged an agency relationship between Century 21 and its franchisees. The court explained that, under the TCPA, a party can be vicariously liable for another party's direct violations of the statute through theories of actual agency, apparent authority, and ratification. Here, the court found that Valdes's allegations about Century 21's active involvement in the creation of the autodialed marketing program was sufficient to allege either actual or apparent agency. The court noted that Century 21 allegedly created the marketing techniques for the collective benefit of itself and its franchisees, instructed franchisees on how frequently to make calls and what to say during the calls, told franchisees to represent that they were calling on behalf of Century 21, told them to offer the Century 21 pledge, and to otherwise solicit expired listings.

ANTITRUST

In re *Papa John's Employee & Franchisee Employee Antitrust Litigation*, Bus. Franchise Guide (CCH) ¶ 16,532, 2019 WL 5386484 (W.D. Ky. Oct. 21, 2019)

In this case, the United States District Court for the Western District of Kentucky held that employees of Papa John's restaurants sufficiently pleaded a conspiracy among Papa John's International, Inc. and Papa John's USA, Inc. (collectively Papa John's) and Papa John's franchisees, by virtue of the no-poach (or no-hire) clause in Papa John's franchise agreements, to unreasonably restrain trade in violation of the Sherman Antitrust Act.

The court first addressed Papa John's motion to compel arbitration for one plaintiff who had signed an arbitration agreement during the hiring process. The court granted the claim, finding that the arbitration agreement required arbitration of any "claims, disputes or controversies arising out of or relating to her employment with Papa John's," including claims of "any violation of any federal, state, or other governmental law, statute, regulation, or ordinance." Siding with Papa John's, the court held that the plaintiff, a

former Papa John's employee, alleged that Papa John's violated antitrust laws and requested damages, including suppressed wages, from her time as an employee. Thus, that plaintiff's action "arises from [her] employment with [Papa John's]" and must be arbitrated.

The court then turned to the Sherman Act claims. To state a claim under Section 1 of that act, a plaintiff must allege (1) an agreement between two or more economic entities, (2) an unreasonable restraint of trade, and (3) that the conspiracy caused an injury. The court found that the plaintiffs had stated a claim under Section 1.

The court explained that the employees stated a claim because there was an agreement between economic entities, the no-poach clause was against the franchisees' best interest, no franchisee would have agreed to the no-hire provision without assurance that all franchisees would agree to the same clause, and franchisees had opportunities to conspire at annual meetings. The court was asked to choose between the per se, quick look, and rule of reason tests, but found that no choice was necessary. The plaintiffs' claim could survive dismissal under all theories because the plaintiffs plausibly pleaded that the no-poach clause restrained horizontal competitors for labor. Finally, by alleging that the no-poach clause had the purpose and effect of depressing wages and diminishing employment opportunities, the plaintiffs had sufficiently pleaded an antitrust injury.

Plaintiffs sought to represent a class. Papa John's tried to limit the scope of the class, arguing that certain claims were time-barred. Plaintiffs alleged that the statute of limitations was tolled because Papa John's fraudulently concealed the existence of the no-poach clause from them. The court found that the plaintiffs had plausibly pleaded tolling. The court pointed to plaintiffs' allegations that Papa John's made public statements claiming that Papa John's franchisees had full control over their employment decisions, when that was in fact not true due to the alleged conspiracy. Next, the court found that the plaintiffs did not fail to exercise due diligence to discover their alleged claims because the franchise agreements were available publicly only through three third-party websites and the plaintiffs would have no reason to look for or read their employer's franchise agreements. Under these circumstances, the court concluded that no reasonable person would conduct such an investigation.

Lastly, Papa John's moved to strike the class allegations because the proposed class was overbroad and could not satisfy the commonality or predominance requirements of Federal Rule of Civil Procedure 23. The plaintiffs' allegations satisfied the commonality requirement of Rule 23(a) because they alleged that proposed class is "congruent with Papa John's No-Hire Agreement, which applies to *all* Papa John's employees," and thus a class-wide proceeding would provide common answers to the issues raised by the plaintiffs. As to the predominance requirement of Rule 23(b)(3), the no-poach (or no-hire) clause was a common cause of injury and resulted in similar types of harm (depressed wages and benefits and a lack of employment opportunities).

***Sitzer v. National Ass'n of Realtors*, Bus. Franchise Guide (CCH) ¶16,529, 2019 WL 5381984 (W.D. Mo. Oct. 16, 2019)**

In this case, the United States District Court for the Western District of Missouri refused to dismiss putative class claims under the Section 1 of the Sherman Antitrust Act, the Missouri Antitrust Law, and the Missouri Merchandising Practices Act (MMPA) brought by the plaintiffs, a group of home sellers who had listed their properties on the multiple listing service (MLS), against real estate trade association National Association of Realtors (NAR) and several national real estate broker franchisors (Corporate Defendants). The plaintiffs alleged that the defendants adopted and imposed anticompetitive restraints that inflated residential real estate commissions throughout Missouri. Plaintiffs focused on the MLS Listing Handbook of NAR, which contained an "Adversary Commission Rule" that "require[d] all seller's brokers to make a blanket, unilateral and effectively non-negotiable offer of buyer broker compensation . . . when listing a property on MLS."

Analyzing the Sherman Act claim first, the court found that the plaintiffs had sufficiently pleaded facts showing a conspiracy through NAR's mandate that all MLS participants comply with the Adversary Commission Rule. NAR invited each Corporate Defendant to agree to, and participate in, this anticompetitive restraint. The Corporate Defendants allegedly not only agreed to these terms, but also required their subsidiaries, franchisees, and associated brokerages to use the MLS and adhere to the Adversary Commission Rule. NAR and the Corporate Defendants conduct, as alleged, raised "a suggestion of a preceding agreement," and not, as the Corporate Defendants argued, "identical, independent action."

Next, the court found that the plaintiffs properly defined the relevant product or market where the competition was suppressed as "the bundle of services provided to buyers and sellers by residential real estate brokers with access to the [MLS]," in particular, in the geographic areas where the MLS exclusively operates. These allegations were enough for the court to apply a rule of reason analysis. To that end, the plaintiffs sufficiently pleaded facts showing anticompetitive conduct that had a detrimental effect on competition in the relevant market. Given the MLS's market power and few available listing alternatives, combined with the Adversary Commission Rule mandate that each MLS participant must adhere to NAR listing rules or face professional sanctions/repercussions, the plaintiffs demonstrated the defendants' significant influence in the market. The court further concluded that the Adversary Commission Rule could create skewed competition and lead to inflated commissions beyond those that would otherwise exist under competitive market conditions.

The court next found that the plaintiffs adequately alleged a legally cognizable antitrust injury by claiming that the anticompetitive activity forced them to pay higher sales commissions when selling their homes and forced them to pay elevated buyer-broker commissions to induce buyer-brokers to market their homes.

Turning to the Missouri law claims, the court refused to dismiss the Missouri Antitrust law claim because the Missouri Antirust Law is interpreted

in harmony with federal antitrust statutes, such as the Sherman Act. The court refused to dismiss the MMPA claim because a relationship "plausibly exist[ed]" between NAR's anticompetitive practices and the plaintiffs' payment of inflated commissions, which caused the plaintiffs an "ascertainable loss" of paying "artificially inflated" commission rates.

ARBITRATION

***Blanton v. Domino's Pizza Franchising, LLC*, Bus. Franchise Guide (CCH) ¶ 16,541, 2019 WL 5543027, (E.D. Mich. Oct. 25, 2019)**

A pizza franchisor was successful in compelling the employees of two franchisees to arbitrate claims against the franchisor.

Domino's Pizza Franchising, LLC (Domino's) is the franchisor of Domino's Pizza restaurants. Plaintiff Henry Blanton (Blanton) is a former employee of a Domino's franchisee. Derek Piersing (Piersing) is a former employee of a different Domino's franchisee. Each had signed an employment agreement with their respective employer, and both agreements had arbitration clauses (though differently worded). After leaving their employment, the two brought a putative class action alleging that Domino's and its franchisees were in a conspiracy to suppress franchisee employee wages, in violation of the Clayton Act, 15 U.S.C. § 15, the Sherman Act, 15 U.S.C. § 4, and the Washington Consumer Protection Act, Wash. Rev. Code § 19.86.030. Domino's filed a motion to compel arbitration.

The court first addressed whether Domino's could enforce the arbitration agreement in Blanton's employment contract. There, the agreement required arbitration with the "Company," a term defined to mean the franchisee and its "parents, franchisors, subsidiaries, affiliates, predecessors, successors, and assigns." Blanton argued that Domino's could not enforce the arbitration clause because it was not a signatory to the agreement. The court rejected this argument because the agreement's plain language said that the franchisor (i.e., Domino's) was covered by the arbitration clause.

The court next addressed Piersing's employment contract, which did not specifically reference the franchisor. Domino's argued that it could enforce the agreement against Piersing under equitable estoppel principles. The court agreed, noting that the relevant state law for making this determination was Washington law. The court explained that, although Washington law does not usually allow a non-signatory to use equitable estoppel to bind a signatory plaintiff, the Ninth Circuit has nonetheless concluded that many courts allow a non-signatory defendant to enforce an arbitration clause against a signatory plaintiff when the claims against the non-signatory are intertwined with the contract containing an arbitration clause. The court further noted that Washington allows a parent to enforce an arbitration clause contained in a contract between a plaintiff and its subsidiary when identical claims are asserted against the parent and the subsidiary. Based on these principles, the court held that any claims Piersing would have against Domino's and its franchisee are inseparable and that equitable estoppel therefore allows Domino's to compel arbitration.

After finding both plaintiffs had agreed to arbitrate, the court then determined that the applicable franchise agreements contained delegation clauses and therefore all gateway issues of arbitrability were for the arbitrator in the first instance. In reaching this conclusion, the court, like many others before it, held that the incorporation of the Commercial Rules of the American Arbitration Association evidences a clear and unmistakable intent to delegate arbitrability issues to the arbitrator.

***Campbell Investments, LLC v. Dickey's Barbeque Restaurants, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,499, 784 F. App'x 627 (10th Cir. 2019)**

The Tenth Circuit held that a franchisor and a subsequent buyer of a franchisee's barbeque restaurant never demonstrated a written intent to arbitrate disputes, and therefore those parties had not entered into an agreement to arbitrate.

Campbell Investments (Campbell) was interested in opening Dickey's Barbeque restaurants in two locations in Utah–Ogden and South Jordan. Campbell signed a franchise agreement with Dickey's Barbeque Restaurants Inc. (DBR), the Dickey's franchisor, for a franchise to be located in Ogden. Campbell and DBR then signed a separate development agreement. For unknown reasons, the Ogden location never opened. Instead, Campbell purchased an existing Dickey's franchise in South Jordan via an asset purchase agreement. Campbell did not sign a separate franchise agreement with DBR for this purchased location. After the business relationship deteriorated, Campbell filed an initial complaint against DBR in Utah state court. DBR removed the case to federal court and filed a motion to compel arbitration. The district court denied the motion to compel arbitration, stating that there was no evidence that Campbell had assumed the prior franchisee's franchise agreement, and therefore there was no agreement to arbitrate between Campbell and DBR relating to disputes about the operations of the South Jordan location.

DBR then filed a second petition to compel arbitration in the United States District Court for the Eastern District of Texas, which relied on the additional theory that the executed development agreement included an arbitration provision. The Texas district court granted the petition to compel arbitration for claims arising from the development agreement, but not from the South Jordan franchise agreement because that issue was not before the court. Neither party appealed that ruling.

DBR also appealed the Utah district court's ruling. The Tenth Circuit held that, although the parties clearly were operating pursuant to some agreement, DBR had no evidence and could not demonstrate that Campbell assented to the written terms of the South Jordan franchise agreement. The court highlighted that there was no mention in the asset purchase agreement of the South Jordan franchise agreement. The absence of any written consent, coupled with an integration clause in that franchise agreement that required any amendments to be in writing, compelled the Tenth Circuit

to conclude that Campbell did not assume the arbitration provision of the South Jordan franchise agreement. The court also highlighted that the franchise agreement required DBR's consent to transfer, and it was not clear that this consent was ever granted, further demonstrating that no agreement to arbitrate was reached. Finally, the Tenth Circuit refused to consider DBR's argument that the development agreement required arbitration because DBR did not raise it with the lower court.

In re *Papa John's Employee & Franchisee Employee Antitrust Litigation*, Bus. Franchise Guide (CCH) 16,532, 2019 WL 5386484 (W.D. Ky. Oct. 21, 2019)

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

***Monster Energy Co. v. City Beverages, LLC*, Bus. Franchise Guide (CCH) ¶ 16,533, 940 F.3d 1130 (9th Cir. 2019)**

The Ninth Circuit vacated and remanded the district court's confirmation of an arbitration award and award of attorneys' fees due to the failure of the arbitrator to disclose his ownership interest in the entity that administered the arbitration.

In 2006, Monster Energy Company's (Monster) and City Beverages, LLC, d/b/a Olympic Eagle (Olympic Eagle), entered into an agreement for Olympic Eagle to promote and sell Monster energy drinks for a term of twenty years in an exclusive territory. Eight years later, Monster exercised its contractual right to terminate the distribution agreement and paid Olympic Eagle the contractually required termination fee.

The parties proceeded to arbitration, conducted by JAMS (as required by Monster's distribution agreement), to determine whether Monster violated the Washington Franchise Investment Protection Act (FIPA) by terminating Olympic Eagle without cause. JAMS provided a list of seven arbitrators, and the parties agreed upon an arbitrator, who made the following disclosure:

> I practice in association with JAMS. Each JAMS neutral, including me, has an economic interest in the overall financial success of JAMS. In addition, because of the nature and size of JAMS, the parties should assume that one or more of the other neutrals who practice with JAMS has participated in an arbitration, mediation or other dispute resolution proceeding with the parties, counsel or insurers in this case and may do so in the future.

After a two-week hearing, the arbitrator found that the FIPA did not apply to Olympic Eagle and awarded Monster its attorneys' fees.

Monster filed a petition to confirm the award with the United States District Court for the Central District of California, and Olympic Eagle, upon discovering that the arbitrator had not disclosed he was a co-owner of JAMS, sought to vacate the award. Olympic Eagle also served JAMS with a subpoena seeking information about the extent of the arbitrator's financial interest in JAMS and JAMS's relationship with Monster. Olympic Eagle later moved to compel JAMS to respond to the subpoena.

The district court affirmed the award, denied Olympic Eagle's motion to vacate, and found its motion to compel moot. It further awarded Monster its attorneys' fees from both the arbitration and the post-arbitration proceedings.

Olympic Eagle appealed and requested that the appellate court conclude that the arbitration award should be vacated based on the arbitrator's failure to fully disclose his ownership interest in JAMS. Monster argued that Olympic Eagle waived its "evident partiality" argument because it failed to timely object when it first learned of the potential "repeat player" bias and, alternatively, that the arbitrator's disclosures were sufficient.

The Ninth Circuit first found that Olympic Eagle did not have constructive notice of the Arbitrator's potential non-neutrality and therefore did not waive its evident partiality argument. The court explained that the arbitrator's ownership interest in JAMS was not unearthed through public sources and there was no evidence that Olympic Eagle could have discovered this information before the arbitration. Additionally, the court refused to find waiver when the arbitrator undoubtedly knew of his ownership interest in JAMS and still failed to disclose it.

Turning to evident partiality, the Ninth Circuit relied on U.S. Supreme Court precedent that supports the vacatur of an arbitration award where the arbitrator fails to disclose any dealings that might create an impression of possible bias. To vacate the award, the court concluded that it must find that an arbitrator's undisclosed interest in an entity was substantial and that the entity's business dealings with a party to the arbitration were non-trivial. The court explained that fundamentally, arbitrator disclosure requirements safeguard the parties' right to be aware of the relevant information needed to assess the arbitrator's neutrality. Clear disclosures, the court noted, are particularly important for one-off parties facing "repeat players."

The Ninth Circuit concluded that the arbitrator's interest in JAMS was substantial because the arbitrator has a right to a portion of profits from *all* of its arbitrations, not just those that he personally conducts. JAMS's business dealings with Monster were non-trivial because Monster's form contracts called for JAMS arbitration in California, which led to JAMS administering almost one hundred arbitrations over the past five years. None of this information, which could have created an impression of bias, was disclosed to the parties. The court cautioned that its ruling did not require automatic disqualification if there had been full disclosure.

Judge Friedland dissented. He explained that the Constitution creates structural protections to ensure that federal judges will decide cases based on the law and facts, not out of concern about remaining popular enough to be selected to decide the next case or to receive the next paycheck. But when parties agree to privately arbitrate their disputes, "whether the arbitration term was desired by both parties or not," they have given up those constitutional protections. Judge Friedland then concluded that because the arbitrator, whether an owner of JAMS or not, would have had an inherent bias in cultivating repeat customers for JAMS, the additional disclosures the

majority found were necessary would not have made a material difference and therefore the award should have been confirmed.

BUSINESS OPPORTUNITY LAWS

***Burger Dynasty v. Bar 145 Franchising, LLC*, Bus. Franchise Guide (CCH) ¶ 16,516, 2019 WL 4757420 (Ohio Ct. App. Sept. 30, 2019)**

A franchisor, Bar 145 Franchising, LLC (Bar 145), was not exempt from the Ohio Business Opportunity Act (BOPA) in connection the sale of a franchise to the franchisee Burger Dynasty, Inc. (Burger Dynasty). Accordingly, on appeal, the Ohio Court of Appeals reversed the lower court decision in favor of Bar 145 and its affiliate, JGCBlock, Inc. (JGCBlock).

The appellate court first analyzed whether the Bar 145 franchise agreement (or business opportunity plan) met the elements necessary to implicate BOPA. The court concluded that it did because there was an agreement in which Burger Dynasty obtained the right to offer and sell services as a Bar 145 franchisee, Burger Dynasty was required to purchase goods and services from Bar 145 (and made a $36,000 initial payment), and Bar 145's representations to Burger Dynasty included a promise of assistance in obtaining a location and of the possible profit from the franchise.

A business opportunity plan, however, may be exempt from BOPA if the transaction "complies in all material respects" with the Franchise Disclosure Rule of the Federal Trade Commission (FTC Rule). Pursuant to the FTC Rule, in Item 21, a franchisor is required to disclose the financial statements of either the seller or an affiliate of the seller in order to inform the prospective franchisee of the fiscal status of the seller. A franchisor may include the financial statements of its affiliate instead of its own statements if the affiliate "absolutely and unconditionally guarantees to assume the duties and obligations of the franchise under the franchise agreement." The franchisor is then required to attach a copy of the guarantee to the FDD. Bar 145 included JGCBlock's financial statements to the FDD that it provided Burger Dynasty, but Bar 145 failed to attach the guarantee from JGCBlock. Having failed to comply with the FTC Rule, the question became whether Bar 145's non-compliance was "material," in which case Bar 145 would not be exempt from BOPA. Relying in part on the "Final Guidelines" released when the original FTC Rule was enacted, and the findings of the FTC in 2007 when revising the FTC Rule, the court ultimately decided that an omission of the guarantee would be material to a prospective franchisee like Burger Dynasty.

Because Bar 145 was not exempt from BOPA, the court found that Bar 145 violated BOPA's notice of cancellation requirements and that Burger Dynasty was entitled to rescission of the parties' franchise agreement. The court reasoned that Burger Dynasty's complaint in the lawsuit was sufficient notice of its intent to rescind within the required three-year timeframe under BOPA and that Burger Dynasty did not waive its right to rescission by opening two additional franchises. Finally, factual issues remained as to

whether, under BOPA, Bar 145's violation was a "bona fide error" that would limit Bar 145's liability and Burger Dynasty's damages.

CLASS ACTIONS

***Gorss Motels, Inc. v. A.V.M. Enterprises, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,506, 2019 WL 4278951 (D. Conn. Sept. 10, 2019)**

In this case, the United States District Court for the District of Connecticut denied plaintiff's motion for class certification, finding that the questions of law or fact common to class members did not predominate over any questions affecting only individual members.

Gorss is a former Wyndham Hotel Group franchisee. To assist franchisees with purchasing items for the motels, Wyndham has an "Approved Supplier Program" through which franchisees can purchase products that conform to Wyndham's standards. A.V.M. Enterprises, Inc. (AVM) is one of these approved suppliers, and some franchisees have asked AVM to send them information on their products and services, sometimes via fax. Gorss's franchise agreement included his fax number as well as language giving permission for vendors to be given his contact information. Gorss alleges that AVM sent two fax advertisements to it that violated the federal Telephone Consumer Protection Act (TCPA) because they were unsolicited. Gorss sought to certify as a class all other entities that received either or both of these two faxes.

Under Federal Rule of Civil Procedure 23, a class action may be certified only if it meets certain elements, one of which is that the questions of law and fact common to class members must predominate over any questions affecting only individual members. This predominance standard is satisfied if some of the questions that qualify each class member can be achieved through generalized proof and if these issues are more substantial than the issues subject only to individualized proof. A fax advertisement violates the TCPA if it is sent without a person's express permission or invitation, whether in writing or otherwise.

The court held that the question of whether each class member consented to receive the faxes at issue are individualized and that these individualized inquiries predominated over questions that could be answered with generalized proof. To determine whether the alleged class members consented to receiving the faxes, the fact finder would have to examine the nature and scope of each putative class member's contractual relationships with, and obligations to, Wyndham to determine whether the alleged class member gave consent to receiving advertisements from approved suppliers. In addition, a fact finder would likely need to examine any written or oral communications between the franchisee and Wyndham regarding the dissemination of advertisements, which conceivably would require every single potential class member to testify about his or her individual experiences. Finally, AVM provided evidence that it had ongoing relationships and specific communications from certain franchisees that could be construed as having given

permission for the faxes. Therefore, the court found that Rule 23 was not satisfied and denied the motion to certify.

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This case is discussed under the topic heading "Advertising and Marketing."

CONTRACT ISSUES

***Aaron's Inc. v. MKW Investments, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,497, 786 F. App'x 190 (11th Cir. 2019)**
This dispute involved the language of an indemnification provision in a franchise agreement. The Eleventh Circuit, reversing the decision of the district court, held that the decision of the franchisor to replace the franchisee's chosen counsel with its own did not extinguish the franchisee's duty in the franchise agreement to indemnify the franchisor under Georgia law.

The franchisor, Aaron's, Inc. (Aaron's), entered into a franchise agreement with MKW Investments, Inc. (MKW). The agreement required the franchisee to indemnify the franchisor from any harms or claims caused by the franchisee's breach of the franchise agreement or the failure to follow operational standards. A former MKW employee brought a lawsuit against both Aaron's and MKW in Missouri state court. In this underlying litigation, the former employee asserted claims based on hostile work environment and retaliation. MKW's insurer retained counsel to defend MKW and Aaron's in the underlying litigation. During the litigation, Aaron's chose to hire its own counsel, and Aaron's eventually reached a settlement. Aaron's then tendered its demand for indemnification for its litigation expenses, but MKW refused to indemnify Aaron's. MKW claimed that the indemnification provision was ambiguous about whether MKW had to indemnify Aaron's when Aaron's first accepted counsel, but then later replaced that counsel. According to MKW, this ambiguous language meant that there was no duty to indemnify. The United States District Court for the Northern District of Georgia agreed and ruled for MKW.

Aaron's appealed, and the Eleventh Circuit reversed, holding the indemnification provision still applied even when Aaron chose to replace counsel. The appellate court reasoned that nothing in the provision conditioned MKW's indemnification obligation on Aaron's decision either to accept MKW's chosen counsel or choose its own, but not do both. Similarly, nothing in the language of the agreement suggested that Aaron's decision to replace counsel chosen by MKW with its own chosen counsel operated as a condition subsequent to MKW's duty to indemnify. Therefore, the agreement

unambiguously required MKW to indemnify Aaron's for and from expenses incurred in the underlying litigation, and this was not extinguished by any choice of Aaron's to replace MKW's counsel.

***Airport Mart Inc. v. Dunkin' Donuts Franchising, LLC*, Bus. Franchise Guide (CCH) ¶ 16,507, 2019 WL 4413052 (S.D.N.Y. Sept. 16, 2019)**

Franchisor Dunkin' Donuts Franchising, LLC (Dunkin') succeeded in obtaining dismissal of a terminated franchisee's non-contractual claims and in striking the franchisee's jury trial demand and certain claims for damages.

The plaintiff Airport Mart Inc. (Mart) had operated a restaurant, coffee shop, and bar at the Westchester Airport in New York. It then entered into a franchise agreement to operate a small Dunkin' location outside of the TSA security area. The franchise agreement included a waiver of jury trial and a waiver of punitive damages and lost profits.

Mart alleged that, after it began operating as a franchisee, it stopped receiving proper support from Dunkin' and the business came to a standstill. In 2011, Dunkin' allegedly required Mart to expand its operations to be a full-service Dunkin' rather than a small coffee bar. Mart agreed, and the parties entered into an amended franchise agreement that required Mart to operate a full-service location. To facilitate this conversion, Mart amended its lease with the airport. Following this amendment, Mart alleged it spent over $500,000 to build the store and train individuals on the operation of a full-service location, which would include baking products. After it expended these funds, Dunkin' allegedly then forced Mart to sign an amendment that required Mart to purchase all baked goods from a competing franchisee rather than bake the products itself.

In 2014, the airport issued a request for proposals for alternative vendors to operate in Mart's leased space. Mart claimed that Dunkin' failed to assist Mart in securing an extension of the lease and refused to meet with airport personnel to discuss this space. Mart ended up losing the location. Mart tried to relocate to another location within the airport, but claimed that Dunkin' unjustifiably refused to allow Mart's store to be moved and terminated the franchise agreement. Mart filed suit alleging a variety of causes of action, including breach of contract, fraud in the inducement, and violations of New York General Business Law § 349 (NYGBL).

Dunkin' filed a motion to strike Mart's jury-trial demand and demand for punitive damages and lost profits based on the waivers contained within the franchise agreement. When considering whether a waiver of a jury trial is knowing and voluntary, the court considers (1) the negotiations of the parties concerning the waiver; (2) the conspicuousness of the waiver; and (3) the relative bargaining power of the parties. The United States District Court for the Southern District of New York upheld the jury-trial waiver in this case. First, Mart's owner was a sophisticated businessman who had experience leasing spaces in the airport to operate other similar businesses. Second, it was advised by counsel throughout the negotiation of the franchise agreement, so the negotiation factor either weighed in favor of Dunkin' or

was neutral. The court found the waiver was conspicuous as it was in bold capital letters immediately above the signature line. Finally, the difference in size (and thus bargaining power) between the parties was not so vast as to require invalidation of the waiver. Therefore, the court struck the request for a jury trial. The court struck the request for punitive damages and lost profits based on the language of the contract for many of the same reasons. The court specifically highlighted that explicit waivers like the one at issue are routinely upheld by the courts and that, as the waiver was knowing and voluntary, it should be upheld.

Dunkin' also filed a motion to dismiss the fraud in the inducement/intentional misrepresentation claim and the claim under NYGBL. For a fraud in the inducement/intentional misrepresentation claim to coexist with a breach of contract claim, it must be sufficiently distinct from the contract claim and must be based on a separate legal duty. The court found that the Mart's allegations regarding misrepresentations related to where it could open the location and its belief that it was establishing a long-term relationship with Dunkin' were sufficient to make the fraud claims sufficiently distinct from the contract claims. Next, Dunkin' asserted a statute of limitations defense. The court rejected the argument, as it did not have sufficient evidence before it to determine when Mart's action accrued. The court next examined Dunkin's argument that Mart had failed to plead fraud with sufficient particularity. After reviewing the alleged facts, the court found that the fraud in the inducement/intentional misrepresentation claim would survive only with respect to Mart's allegations that it was induced into expanding its store, acquiring equipment, and signing certain amendments based on the misrepresentations that it would be baking on premises. All of the other alleged fraud allegations were not sufficiently pleaded.

The court held that Mart's claim under the NYGBL must be dismissed because Mart had failed to plead that the conduct at issue impacted the public. The court explained that all of the acts alleged involved a private dispute between Mart and Dunkin' and not the public at large.

Finally, the court dismissed the claims with prejudice because Mart had already amended its complaint twice; thus dismissal with prejudice was appropriate.

***DC Automotive, Inc. v. Kia Motors America, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,494, 2019 WL 4192112 (D. Colo. Sept. 4, 2019)**

The United States District Court for the District of Colorado denied a car manufacturer's motion for summary judgment on a Colorado Dealer Act (CDA) claim brought by two car dealers after the manufacturer attempted to establish a new dealership in Colorado. The court, however, granted the manufacturer summary judgment on the dealerships' common-law contractual claim.

Defendant Kia Motors America, Inc. (Kia) granted the two plaintiffs Kia dealerships before 2017 and entered into dealer agreements with each entity. The agreements expressly reserved for Kia the unrestricted right to grant

other entities the right to sell Kia products. The agreements further said that plaintiffs were not granted an exclusive right to sell in any specific geographic area and defendant may add new dealers or relocate dealers as permitted under applicable law. In 2018, Kia notified plaintiffs that it intended to appoint a new dealer at a location more than five miles away from plaintiffs' dealerships. The plaintiffs brought an action against Kia seeking to enjoin it from assigning a new dealership, seeking damages under the CDA, and asserting a claim for breach of the implied covenant of good faith and fair dealing. Before the court was Kia's motion for summary judgment.

Under the CDA, an existing dealer may file suit if they are adversely affected by the proposed new dealership. The CDA states an existing dealer is adversely affected if the new dealer is located within the existing dealer's relevant market area. Before August 2017, the CDA defined "relevant market area" as the greater of the geographic area defined by a dealer agreement or within a radius of five miles of an existing dealer if the dealer is located in a county with a population of more 150,000. In 2017, the CDA was amended to state that the relevant market area would be within a radius of ten miles of any existing dealer. The plaintiffs were located more than five miles but less than ten miles from the proposed new dealership.

Kia argued that the CDA's 2017 amendment did not apply, and therefore it had not violated the CDA. The court, however, determined that the amendment did apply. The court first found that applying the 2017 amendment was not a violation of the Contracts Clause of the Constitution. The court found there would not be a substantial impairment of the contractual relationship between the parties because the 2017 amendment is simply an evolution of the existing CDA under which the parties had been operating. Specifically, the CDA had already regulated manufacturers' rights to establish new dealerships, so extending the encroachment radius an additional five miles is not a substantial impairment of the parties' existing contractual relationships. The court further found the 2017 amendment was not an unlawful retrospective statute because it did not impair a vested right or create a new obligation. Once the court determined that the 2017 amendment applied, it denied the Kia's motion for summary judgment because the placement of a new dealership within ten miles of the existing dealerships would violate the CDA. The court, however, did grant the motion for summary judgment on the damages claim under the CDA. The new dealership had not opened, so no damages had occurred.

The court granted summary judgment to Kia on the plaintiffs' claim for breach of the implied covenant of good faith and fair dealing because Kia had express contractual authority to establish new dealerships. The implied covenant only applies to the discretionary power of a contracting party to unilaterally determine performance terms in the contract. In this case, however, the court found that the right was expressly reserved to Kia in the agreement, and the court would not find an implied covenant prohibiting Kia from doing what the agreement expressly permitted it to do.

ENCROACHMENT

***DC Automotive, Inc. v. Kia Motors America, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,494, 2019 WL 4192112 (D. Colo. Sept. 4, 2019)**

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

***GPI-AL, Inc. v. Nissan North America Inc.*, Bus. Franchise Guide (CCH) ¶ 16,535, 2019 WL 5269101 (S.D. Ala. Oct. 17, 2019)**

Nissan of North America (NNA) succeeded in obtaining summary judgment on many, but not all, of its dealer Nissan of Mobile's (Existing Dealer) six claims against it related to the potential opening of a new dealership nearby.

NNA commissioned a consultant to conduct a market study assessing whether a new dealership was called for in the Mobile, Alabama area. Pursuant to their dealership agreement, NNA notified the Existing Dealer of the study. Although the study recommended monitoring the market (as opposed to opening a new dealership), NNA overrode the recommendation in favor of establishing an "open point" for a new dealership in the western portion of the market served by the Existing Dealer. The dealership agreement required NNA to provide the Existing Dealer with notice of the decision, an opportunity to object, and reasonable consideration of such objections. NNA notified the Existing Dealer of the decision. The Existing Dealer then raised various objections. When NNA notified the Existing Dealer of its intent to move forward with the "open point," the Existing Dealer brought suit.

The Existing Dealer first claimed that the open point decision violated a provision of the Alabama Motor Vehicles Franchise Act (MVFA) prohibiting manufacturers from entering into franchises unreasonably and without notice to existing motor vehicle dealers in the relevant market area. The court explained that the manufacturer has the burden of proof to prove that its decision was not unreasonable. NNA submitted an expert report which opined that the Existing Dealer was not adequately servicing the western portion of the Mobile market, leading the court to hold that genuine issues of material fact existed as to whether NNA's decision was reasonable.

Next, the Existing Dealer asserted that NNA's performance metrics constituted an impermissible attempt to coerce it to adhere to unfair, unreasonable, and inequitable performance standards, or standards that are not applied uniformly to similarly situated dealers, in violation of the MVFA. NNA successfully defeated this claim, arguing that the Existing Dealer lacked standing because it was not "injured in [its] business or property" by "any unfair and deceptive trade practice" or because "[it] refuse[d] to accede to a proposal for an arrangement which" would violate the MVFA. The court agreed because a potential future injury is an insufficient basis to sustain a claim. The record contained no evidence that the performance metric at issue caused NNA to establish the open point, and therefore the Existing Dealer could not establish that it was injured. Additionally, the Existing

Dealer could not avail itself of the portion of the statute involving "a proposal for an arrangement" in violation of the MVFA because the performance metric was not a proposal—rather, it had been in use for more than five years without objection from the Existing Dealer.

The Existing Dealer's third and fourth claims contained overlapping allegations that NNA acted in bad faith in violation of two similar provisions of the MVFA. NNA raised three arguments in response to these claims. First, NNA argued that the Existing Dealer's claims were preempted by a more specific statute that provided the sole remedy for violations of a dealership agreement. The court rejected the application of the so-called "specific/general doctrine," explaining that it does not apply in situations where there is no conflict between the specific and general statute. The court further rejected NNA's argument that the Existing Dealer sought an impermissible "obey the law injunction," reasoning that the complaint clearly reflected the Existing Dealer's request for an injunction preventing NNA from establishing an open point. Lastly, the court dismissed NNA's "no injury" argument because the injury alleged—the open-point decision—was sufficient to satisfy the statutory injury requirement, which specifically contemplated "proposed illegal arrangements which are not consummated but are, rather, stopped by the litigation." Because the remaining analysis of whether NNA acted improperly turned on issues of fact, the court declined to grant summary judgment on Nissan's third claim.

The Existing Dealer asserted a breach of the duty of good faith and fair dealing claim. The court found that there was no record evidence to support the allegations that NNA failed to follow internal procedures or that it wrongly rejected the market study recommendation for a "monitored market." Thus, the court granted summary judgment on these particular portions of the claim, but held that the remaining allegations of bad faith involved genuine issues of material fact. In reaching its holding, the court questioned, "[I]n what legal doctrine or analytical principle does Nissan of Mobile find support for equating 'objective' with 'good faith' and 'subjective with 'bad faith'? [L]ogic and common sense confirm that a defendant may reject a consultant's recommendations for subjective reasons, yet still be acting in full compliance with its obligation of good faith and fair dealing."

Finally, the court turned to the Existing Dealer's breach of contract claims. The court acknowledged that if the Existing Dealer made its decision to establish the open point before considering objections from Nissan of Mobile, it would be in breach. Ultimately, however, the court held that genuine issues of material fact precluded a finding for either party. Notably, the only relief sought in connection with the breach of contract claims was an injunction. On the issue of irreparable harm, the court held that any potential harm to the Existing Dealer could be adequately compensated by a monetary award. Left with no remaining claims for damages, the court dismissed the breach of contract claims. The irreparable harm argument could not be applied to defeat the MVFA claims, however, because irreparable harm is not a prerequisite to injunctive relief under the MVFA.

FRAUD

***Airport Mart Inc. v. Dunkin' Donuts Franchising, LLC*, Bus. Franchise Guide (CCH) ¶ 16,507, 2019 WL 4413052 (S.D.N.Y. Sept. 16, 2019)**
This case is discussed under the topic heading "Contract Issues."

INJUNCTIVE RELIEF

***Volvo Group North America, LLC v. Truck Enterprises, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,505, 2019 WL 4344292 (W.D. Va. Sept. 12, 2019)**

This matter arose based on the defendant Truck Enterprises, Inc.'s (TEI) continued efforts to sell its truck dealerships, including those dealerships that sold Volvo vehicles. In a prior case, the court issued an opinion holding that a 2015 business deal that was intended to transfer ownership of the truck dealerships was invalid because it violated Volvo Group North America, LLC's (Volvo's) contractual and statutory rights of first refusal. While an appeal on that decision was pending, TEI entered into a differently structured deal with the same proposed purchaser (2018 deal), and Volvo filed suit, seeking a preliminary injunction to stop the 2018 deal. The court granted the motion for preliminary injunction after the court found that the 2018 deal was not a bona fide offer and therefore violated Volvo's right of first refusal under its agreements with TEI.

TEI later moved to dismiss the case, arguing that the dispute was now moot because it had abandoned the 2018 deal. In federal court, a case must be dismissed as moot if it lacks an injury-in-fact, causation, or redressability. In the order granting the preliminary injunction motion, the court found that Volvo was likely to succeed on the merits of its breach of contract claim, which is not mooted by the abandonment of the deal. The section at issue in the agreement gave Volvo several different remedies, including termination of the dealer agreement with TEI. This remedy does not depend on a currently pending agreement to transfer ownership, and thus Volvo still had a legally cognizable interest in the outcome of the action. Therefore, the action remained a live controversy and was not moot.

JURISDICTION

***Garrett v. Rothschild*, Bus. Franchise Guide (CCH) ¶ 16,551, 2019 WL 5784217 (W.D. Wash. Nov. 6, 2019)**

In this case, the United States District Court for the Western District of Washington denied a motion to dismiss after determining that it had personal jurisdiction over the co-founder of a franchisor based in California.

Hayley Henning (Henning) was the CEO and founder of Rothschild Enterprises, Inc. (Rothschild Enterprises), the franchisor of Party Princess International. Henning contended that she created the franchise concept,

but had no role in the management of the company between 2015–2018. According to Henning, her now ex-husband Morgan Rothschild (Rothschild) was in charge of the company's day-to-day operations. In 2015, a franchise broker put Sean Taylor (Taylor) in touch with Rothschild to discuss a potential Party Princess franchise opportunity in Washington. During the sales process, Henning met with Taylor and his wife. At that meeting, Henning supposedly provided significant amounts of information about the franchise system and made statements suggesting she was actively involved in the franchise system. Henning also provided Taylor's wife with her phone number, and they spoke on multiple occasions. Henning contends that the conversations were purely personal, but Taylor alleges that they related to a potential Party Princess franchise. Ultimately, Taylor entered into a franchise agreement with Rothschild Enterprises for a Party Princess franchise covering a territory in Washington and Oregon.

The franchise lost money, and the Taylors ended up in bankruptcy. The Taylors, through their bankruptcy trustee, then sued Henning, Rothschild, and Rothschild Enterprises. The Taylors asserted causes of action for intentional misrepresentation, negligent misrepresentation, unjust enrichment, violation of the Washington Franchise Investment Protection Act, and violation of the Washington Consumer Protection Act. Henning moved to dismiss for lack of personal jurisdiction. The Court denied the motion to dismiss.

Henning first argued that the Taylors alleged facts that were inconsistent with prior depositions and other allegations. The court rejected this argument, finding that the allegations in the complaint were not "flatly contradicted or inherently incredible." Henning next argued that she did not have sufficient involvement in the sales process to be subject to personal jurisdiction in Washington. The court, however, found that Henning's conversations with the Taylors were intentional acts and that Henning was aware the Taylors were interested in purchasing a franchise. Her statements regarding her involvement in the franchise system therefore were expressly aimed at the state of Washington, as she knew the franchise would be located there and she knew that the Taylors would experience any harm from her representations in Washington. The court concluded by noting that the causes of actions were specifically related to Henning's contacts with Washington and that Henning had not taken the position that the exercise of personal jurisdiction would be unreasonable.

LABOR AND EMPLOYMENT

Salazar v. McDonald's Corp., Bus. Franchise Guide (CCH) ¶ 16,515, 939 F.3d 1051 (9th Cir. 2019)

The employees of McDonald's franchised restaurants filed a class action lawsuit against their franchisee employers and McDonald's, alleging, *inter alia*, that the franchisees denied them overtime premiums, meal and rest breaks,

and other benefits, in violation of the California Labor Code, and that McDonald's was liable as a joint employer. The United States District Court for the Northern District of California granted summary judgment in favor of McDonald's, holding that McDonald's was not a joint employer of the franchisee's employees and that the plaintiff-employees' ostensible agency and negligence claims failed as a matter of law. The Ninth Circuit affirmed.

California Wage Order No. 5-2001, section 2(H), defines an "employer" as one "who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person." The California Supreme Court has provided three alternative definitions for what it means to "employ" someone: (a) to exercise control over the wages, hours or working conditions, or (b) to suffer or permit to work, or (c) to engage, thereby creating a common law relationship. The Ninth Circuit held that McDonald's did not meet any of these definitions.

McDonald's did not exercise sufficient control because any control that it asserted over its franchisees' employees was geared toward quality control; McDonald's did not have a general right of control over the day-to-day aspects of work at the franchised restaurants. The court noted that franchisors, like McDonald's, need the freedom to impose comprehensive and meticulous standards for marketing their brand and ensuring uniformity, and this does not represent control over wages, hours, and working conditions.

McDonald's also did not meet the "suffer or permit" definition. The employees had argued that McDonald's met the definition because McDonald's caused the franchisees to violate wage-and-hour laws by directing franchisees to use certain systems. The court explained that this argument did not satisfy the "suffer or permit" standard because the employees failed to focus on whether McDonald's was in fact an employer. This failure was dispositive, as the "suffer or permit" definition focuses on responsibility for the employment itself, not on the potential to influence behavior.

McDonald's did not meet the common—law definition of employer because it failed the "principal test" of an employment relationship: "whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." In the franchise context, a comprehensive franchise system alone did not constitute "means and manner." Instead, a franchisor must also retain or assume a general right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee's employees. McDonald's exercise of control was designed toward quality control and maintenance of brand standards, and did not meet this definition.

The plaintiff-employees also argued that, pursuant to Wage Order 5-2001, McDonald's was liable for wage-and-hour violations under an ostensible agency theory. The court held that McDonald's could not be held liable under this theory because the reference to "agency" only applies to an entity that actually employs the worker or that actually exercises control over the wages, hours, or working conditions. McDonald's did none of those things.

Finally, the court rejected the plaintiff-employees' claims that McDonald's owed them a duty of care, which it purportedly breached with inadequate supervision of the franchisees' manager and failing to prevent the wage-and-hour violations. Under California law, a statutory remedy is exclusive when the statute creates a right that did not exist at common law and provides a comprehensive and detailed remedial scheme for its enforcement. The court therefore rejected the plaintiffs' negligence argument. It concluded that the negligence claim arose from the same facts as the wage-and-hour claims and that the California Labor Code created new rights not existing at common law. The court also found that the plaintiff-employees could not prove a duty owed because McDonald's had no "supervisory" duties with respect to its franchisee.

NON-COMPETE AGREEMENTS

In re *Roberts*, Bus. Franchise Guide (CCH) ¶ 16,526 607 B.R. 635 (N.D. Ill. Oct. 10, 2019)

The United States Bankruptcy Court for the Northern District of Illinois held that a franchisor (Aire Serv) was not entitled to injunctive relief against a bankrupt former franchisee (Roberts) who was admittedly violating a post-term non-competition clause in the parties' franchise agreement.

Without first seeking a temporary restraining order, and more than a year after terminating the parties' franchise agreement, Aire Serv filed suit seeking an injunction to enforce the covenant's not-to-compete clause in the franchise agreement (and related agreements) against the franchisee entity and the individual owners (and their spouses) of the franchise entity.

By the time the court addressed the request for injunctive relief, the two-year covenant not to compete had already expired. As such, the court concluded that Aire Serv could not succeed on the merits (*i.e.*, obtain a permanent injunction) unless the covenant would nonetheless continue to be enforced because of Roberts's continuing violation of that covenant. While the covenant not to compete extended for a period of two years "immediately following the later of the expiration, termination or non-renewal of this Agreement for any reason whatsoever or the date on which Franchisee actually ceases operation of the business," the court concluded the tolling language was ambiguous about what was meant by "the business." Further, its review of Texas law (which governed the covenant not to compete) cast doubt Aire Serv's argument because Texas courts are reluctant to enforce covenants not to compete for an indefinite duration. The court thus found that Aire Serv was unlikely to succeed in showing that the covenant had not expired.

Aire Serv made a purely equitable argument that it was unfair to permit Roberts to blatantly violate the covenant not to compete. The court rejected this argument, relying on the "old maxim that one who seeks equity must do equity." The court cited Aire Serv's failure to seek a temporary restraining

order, its year-long delay before seeking judicial relief, its month-long request for an extension for briefing the motion, and the eventual inadvertent failure to attach supporting evidence to the injunctive relief motion as reasons why Aire Serv had unreasonably delayed in seeking injunctive relief.

STATUTE OF LIMITATIONS

***Airport Mart Inc. v. Dunkin' Donuts Franchising, LLC*, Bus. Franchise Guide (CCH) ¶ 16,507, 2019 WL 4413052 (S.D.N.Y. Sept. 16, 2019)**
This case is discussed under the topic heading "Contract Issues."

In re *Papa John's Employee & Franchisee Employee Antitrust Litigation*, Bus. Franchise Guide (CCH) ¶ 16,532, 2019 WL 5386484 (W.D. Ky. Oct. 21, 2019)
This case is discussed under the topic heading "Antitrust."

STATUTORY CLAIMS

***A & B Distributing, Inc. v. Heggie's Pizza, LLC*, Bus. Franchise Guide (CCH) ¶ 16,553, 2019 WL 6118718 (W.D. Wis. Nov. 18, 2019)**
In this case, the United States District Court for the Western District of Wisconsin held that even an informal business arrangement can constitute a "dealership" within the meaning of the Wisconsin Fair Dealership Law (WFDL).

Heggie's Pizza, LLC (Heggie's) sells frozen pizzas, both directly to customers and through third party salespersons. From 2004 forward, A & B Distributing, Inc. (A&B) purchased Heggie's pizzas at a discounted rate and sold them at a wholesale price to its customers, including stores, resorts, grocery stores, golf courses, and taverns. Heggie's and A&B never memorialized their arrangement in writing, but nevertheless continued to do business together until 2018. While the nature of their agreement was clear, the parties disputed whether A&B maintained an exclusive territory and whether there were established expectations for issues such as handling customer complaints and revenues.

In July 2018, Vuvicevic, the owner and sole employee of A&B, expressed a desire to retire and sell his territory to Heggie's. Shortly thereafter, a dispute between the parties regarding quality control issues arose. Vuvicevic alleged that during a hostile September 2018 phone call, Heggie's terminated A&B's right to sell Heggie's pizzas. Heggie's disputed that the August 2018 phone call constituted a termination. In September 2018, however, Heggie's sent A&B a formal notice of termination.

A&B brought an action alleging that Heggie's violated the WFDL. On the parties' cross-motions for summary judgment, the court considered whether the WFDL applied to the arrangement. The court considered three elements in making this determination: 1) the existence of a contract

between two or more persons; 2) by which a person is granted the right to sell or distribute goods or services, use a trade name, trademark, service mark, advertising or other commercial symbol; 3) in which there is a community of interest in the business of offering, selling, or distributing goods or services.

For the first and second elements, the court concluded that there was no meaningful dispute that there was an agreement between Heggie's and A&B which granted A&B the right to sell Heggie's pizzas using Heggie's trade name. The court reasoned that the WFDL applies to both formal and informal arrangements. The court further rejected Heggie's argument that the dispute regarding the exclusivity of the agreement rendered the WFDL inapplicable. Similarly, the court explained that, while the parties disputed terms such as revenue expectations and how to deliver pizzas, the essential terms of their agreement were clear—A&B would buy pizzas from Heggie's at a discounted rate to sell to customers at the wholesale price, and regardless of exclusivity, there was a general understanding of A&B's territory.

The court then addressed whether there was a community of interest, or a "continuing financial interest between the grantor and grantee in either the operation of the dealership business or the marketing of such goods and services." Under Wisconsin law, a community of interest requires that "the continuing financial interest and the degree of interdependence must be such that termination of the relationship would have *a significant adverse impact* on the alleged dealer." Heggie's argued that because A&B's sales were a small portion of its revenue, there was no community of interest. The court rejected this argument, reasoning that the financial gain of the grantor is of no importance to this inquiry. The court also rejected Heggie's argument that because A&B could use the equipment it had purchased to sell pizzas for another company, there was no community of interest. Because A&B's financial well-being depended almost entirely on its relationship with Heggie's, the court found that a community of interest had been established as a matter of law. Thus, the court granted summary judgment for A&B on the issue of whether the parties' arrangement constituted a "dealership" within the meaning of the WFDL.

The court next considered whether Heggie's violated the WFDL by terminating the dealership agreement without good cause. Due to issues of fact regarding whether the August phone call or the September notice of termination constituted the true termination of the agreement, and the dispute regarding Heggie's reasoning for terminating the agreement, the court refused to decide this issue on summary judgment. Interestingly, however, the court noted that even if a jury found that the August phone call terminated the dealership agreement, Heggie's might be able to limit A&B's damages to the ninety-day notice and cure period required by statute.

***Airport Mart Inc. v. Dunkin' Donuts Franchising, LLC*, Bus. Franchise Guide (CCH) ¶ 16,507, 2019 WL 4413052 (S.D.N.Y. Sept. 16, 2019)**
This case is discussed under the topic heading "Contract Issues."

***DC Auto., Inc. v. Kia Motors America, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,494, 2019 WL 4192112 (D. Colo. Sept. 4, 2019)**
This case is discussed under the topic heading "Contract Issues."

***GPI-AL, Inc. v. Nissan North America Inc.*, Bus. Franchise Guide (CCH) ¶ 16,535, 2019 WL 5269101 (S.D. Ala. Oct. 17, 2019)**
This case is discussed under the topic heading "Encroachment."

***Money Mailer, LLC v. Brewer*, Bus. Franchise Guide (CCH) ¶ 16,509, 449 P.3d 258 (Wash. 2019)**
The Washington Supreme Court answered two certified questions from the United States District Court for the Western District of Washington regarding the proper interpretation and application of the Washington Franchise Investment Protection Act's (FIPA) prohibition against a franchisor selling a franchisee products or services for more than a "fair and reasonable price." Specifically, those questions were the following: **(1)** For purposes of FIPA's prohibition on selling "to a franchisee any product or service for more than a fair and reasonable price," may the franchisee rely on the price at which the franchisor is able to obtain the product or service in the absence of evidence indicating that the price was not a true market price? and **(2)** Does a franchisor violate FIPA as a matter of law when it charges the franchisee twice what it pays for a product or service? The court answered no to both questions.

The case arose from a dispute between the franchisor Money Mailer, LLC (Money Mailer) and Brewer, its franchisee. Money Mailer requires franchisees to enter into contracts with Money Mailer for certain services related to the printing and inserting of advertisements into shared mail envelopes. Money Mailer charged the franchisee for these services, and the amount charged was at least double what the services cost Money Mailer. Brewer alleged that this practice violated the fair and reasonable price provision of FIPA. The district court initially concluded that Money Mailer had violated FIPA by charging the franchisee more than it paid for various goods and services; however, after first denying Money Mailer's motion for reconsideration, the district court decided to certify the two questions to the Washington Supreme Court.

Before answering either question, the Washington Supreme Court stated that a "fair and reasonable price" was a question of fact "regarding what reasonably prudent franchisors and franchisees in similar circumstances would consider an appropriate price." The court then turned to the first question. Based on the plain language of FIPA and its legislative history, the court found that the intent of the statute was to look at the current market for the products or services being provided to the franchisee by the franchisor. When making this determination, relevant factors for determining what constituted a "fair and reasonable price" include the prices of competitors, what the franchisor charges other franchisees, the price the franchisor pays,

and the price at which the franchisee could have obtained the good or service on the open market. These factors led the court to conclude that a "fair and reasonable" price is not inherently established by the price at which the franchisor obtains goods, or what prices the franchisee might pay if it purchased the products or services from a third party.

Turning to the second question, the Washington Supreme Court held that a franchisor does not violate FIPA as a matter of law by charging a franchisee twice what the franchisor paid for the product or service. The court explained that FIPA does not contain an implicit or explicit requirement that a franchisor can never markup product. Instead, because the determination of a fair and reasonable price is fact dependent, the amount of markup charged, when considered with all of the other market factors, will drive the determination of whether a particular price is or is not fair and reasonable.

***PMT Machinery Sales, Inc. v. Yama Seiki USA, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,542, 941 F.3d 325 (7th Cir. 2019)**

The Seventh Circuit affirmed the dismissal of a lawsuit under the Wisconsin Fair Dealership Law (WFDL) after concluding the plaintiff had acted more like a manufacturer's representative than a dealer.

Yama Seiki USA, Inc. (Yama) is the manufacturer of machining tools. PMT Machinery Sales, Inc. (PMT) is a Wisconsin company that wished to become an exclusive dealer of Yama products. Yama offered an exclusive dealership, so long as PMT agreed to meet a one million dollar or fifteen machine per year quota, stock a machine in its showroom, and develop a marketing plan. PMT rejected the offer, but did offer to stock two machines in exchange for an exclusive dealership. A Yama employee did not address the counter, but said "not sure if you are aware if you are in exclusive" status to sell Yama machines. PMT believed that this meant it had an open-ended exclusive dealership.

PMT never took stock of any machines, but did facilitate sales by soliciting customers, negotiating sale prices, and connecting customers with Yama. After the customer paid Yama and PMT helped install the product, Yama paid PMT the difference between the dealer price and customer price. PMT also spent a few thousand dollars on advertising Yama products. PMT sued for breach of the WFDL after it learned that Yama had allowed others in Wisconsin to sell Yama products. The district court dismissed the claims because PMT could not satisfy the WFDL's definition of a "dealership."

The Seventh Circuit affirmed the dismissal. It explained that to qualify as a dealer, it needed to have the "right to sell or distribute," which is defined as "the unqualified authorization to transfer the product at the point and moment of the agreement to sell" or "the authority to commit the grantor to a sale." The most important factor for determining if this definition is met is whether the dealer transfers the product itself or can commit the manufacturer to a transaction at the moment of agreement. Here, PMT could do neither. It merely submitted orders to Yama. While Yama had not turned down any orders, it was not obligated to accept them. In addition, PMT never took title, never accepted any money for the machines, and never delivered the machines.

PMT further tried to argue that its use of Yama's commercial symbols made it a dealer. The district court rejected this argument, and the Seventh Circuit affirmed this decision. It held the dealer must have sufficiently invested in the symbols, such that the dealer was associated with the marks, and that mere de minimis use is not enough. Here, the investment of less than $4,000 was not enough to show a substantial investment.

***Valdes v. Century 21 Real Estate, LLC*, Bus. Franchise Guide (CCH) ¶ 16,537, 2019 WL 5388162, (D.N.J. Oct. 22, 2019)**
This case is discussed under the topic heading "Advertising and Marketing."

TRADEMARK INFRINGEMENT

***Marco's Franchising LLC v. Marco's Coal Fired Pizza Inc.*, Bus. Franchise Guide (CCH) ¶ 16,514, 2019 WL 4645431 (D. Colo. Sept. 23, 2019)**
Offering its opinion at the summary judgment stage, the United States District Court for the District of Colorado accurately stated that this case "presents multiple claims against multiple defendants based on multiple trademarks." The court granted summary judgment in part in favor of several defendants and denied summary judgment as to others. The court further ordered cancellation of the plaintiff's trademark registration on the grounds that it was a descriptive mark that had not yet acquired distinctiveness at the time of registration. The court reserved ruling on the remaining claims pending further development of the factual record.

Plaintiffs Marco's Franchising, LLC and MP Marks, LLC (collectively, Marco's) operated a national network of franchised pizza restaurants under the brand name Marco's Pizza, and held a word mark consisting of the name "Marco's" and a design mark consisting of the words "Marco's Pizza" in a stylized font with a cartoon of a slice of pizza used in place of the apostrophe. The defendants (Marco's Coal Fired Pizza, Inc. (MCF), and several related entities and the entity owners) operated several Colorado and Wyoming pizza restaurants, some of which, at certain times, operated under the brand name "Marco's Coal-Fired Pizza." Marco's brought suit against the defendants claiming that MCF and the related entities were unfairly competing against Marco's and infringing upon the Marco's trademark.

Four of the MCF defendants—including two entities (Casper and Golden) that operated pizza restaurants under a different brand name (Racca's) and two entities that never operated any restaurants at all (Colfax and RPN)—moved for summary judgment. These entities argued that Marco's could not establish any of its claims against them because Marco's could not show that they used Marco's marks. The court granted summary judgment for Colfax and RPN because Marco's offered no evidence whatsoever to suggest they had ever operated, much less that they made any use of Marco's marks in commerce. For the other two "Racca's" restaurant entities (Casper and Golden), the court found no evidence that one of these entities (Golden) had used the alleged "Powered by Marco's" language. Although there was some evidence

that raccaspizzeria.com had used that language, it was owned by Casper. Thus, the court granted summary judgment to Golden, but not Casper.

The court also addressed MCF's motion for summary judgment on its counterclaims, which sought to cancel the registration of the "Marco's" word and design marks due to Marco's allegedly fraudulent conduct and the Marco's marks lacking distinctiveness.

The court concluded that, while Marco's registration representation that it was unaware of any other person, firm, corporation, or association with superior rights to variants of the "Marco's" mark in 2012 was *false*, there was not clear and convincing evidence that it was *fraudulent*. Thus, the court denied MCF's motion for summary judgment.

To succeed on its lack of distinctiveness argument, MCF had to demonstrate that the Marco's mark was not distinctive in Colorado as a matter of law before 2011. The court found that the mark was not distinct before 2011. The court explained "Marco's" was not inherently distinctive because Marco, a cognate name of Mark, was extraordinarily common and thus descriptive. The court acknowledged that a descriptive mark may acquire distinctiveness through secondary meaning if it has been used so long and so exclusively by one producer with reference to its goods that, in that trade, the word or phrase has come to mean that the good is the producer's product; that was not the case with the "Marco's" mark in Colorado. Thus, the court ordered cancellation of the mark, though not expressing any opinion on the validity of those marks in Colorado after 2011 and outside of Colorado.

Next, the court rejected MCF's argument that it was entitled to summary judgment on all of Marco's claims based upon laches and acquiescence because neither side had conclusively shown when Marco's had a provable claim for infringement or that any delay was unreasonable as a matter of law.

Finally, the court granted MCF's motion for summary judgment on Marco's claims of trademark dilution because the "Marco's" mark simply did not rise to the requisite level of fame required to maintain such a claim. Especially during the relevant time period (2008–2010), "Marco's" was far from a "household name," and there was little evidence presented to show that the mark had become famous.

UNFAIR COMPETITION/UNFAIR AND DECEPTIVE PRACTICES

***Airport Mart Inc. v. Dunkin' Donuts Franchising, LLC*, Bus. Franchise Guide (CCH) ¶ 16,507, 2019 WL 4413052 (S.D.N.Y. Sept. 16, 2019)**
This case is discussed under the topic heading "Contract Issues."

VICAROUS LIABILITY

***Valdes v. Century 21 Real Estate, LLC*, Bus. Franchise Guide (CCH) ¶ 16,537, 2019 WL 5388162, (D.N.J. Oct. 22 2019)**
This case is discussed under the topic heading "Advertising and Marketing."