

Franchising (& Distribution) Currents

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ANTITRUST

IQ Dental Supply, Inc. v. Henry Schein, Inc., Bus. Franchise Guide (CCH) ¶ 16,110, No. 17-cv-4834 (BMC), 2017 WL 6557482 (E.D.N.Y. Dec. 21, 2017) IQ Dental Supply (IQ) sued Henry Schein, Inc. (Schein) and others alleging that Schein and other dental supply distributors engaged in an antitrust conspiracy by boycotting and attempting to destroy an online distribution platform. The distribution platform was run by nonparty Source One Dental (Source One). IQ used Source One's platform to sell dental products to dentists. IQ asserted claims against Schein for restraint of trade in violation of the Sherman Act and corresponding state laws, as well as other common law claims. Schein and the other dental distributors moved to dismiss and the U.S. District Court for the Eastern District of New York granted their motion to dismiss.

IQ is a nationwide distributor of dental supplies and equipment and Schein and the other dental supply distributors are major distributors of dental supplies that accounted for 80 percent to 90 percent of the market. Schein and the other supply distributors sold directly to dentists. Distributors have the advantage of being able to serve as the one-stop shop for dentists because they can provide supplies and equipment from any manufacturer.

Source One operated an online distribution platform through various e-commerce websites. IQ and other suppliers sold to dentists through various e-commerce platforms. Source One simply provided a mechanism for suppliers and dentists to interface but did not actually sell products. IQ alleged that Schein and others pres-



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sured dental product manufacturers not to sell to IQ or through the Source One platform and that Schein and the others agreed to threaten and implement a boycott of state dental associations that worked with Source One. Finally, IQ alleged that Schein and others boycotted dentists who purchased supplies through Source One websites.

The court first examined antitrust standing and held that an antitrust plaintiff must meet not only the general requirements of constitutional standing, but also demonstrate at the pleading stage that it satisfies antitrust standing. The Second Circuit has held that an antitrust plaintiff must allege: (1) that it suffered a special kind of antitrust injury; and (2) that it was a suitable plaintiff to pursue the alleged antitrust violations and was an efficient enforcer of the antitrust laws. An antitrust injury is an injury attributable to the anticompetitive aspects of the practice under scrutiny. Thus, the first inquiry involves determining whether or not the complaint has sufficiently alleged anticompetitive conduct. The second inquiry involves determining whether the plaintiff has adequately alleged antitrust injury by looking to the ways in which the plaintiff claims to be in a worse position as a consequence of the defendant's conduct.

The court held that, although IQ may have alleged anticompetitive conduct with respect to the price-fixing scheme, IQ did not assert an injury because it could not claim to be a competitor of Schein and simultaneously claim to have been injured by Schein's imposition of supracompetitive prices on the market. IQ only stood to benefit from any price increases imposed by Schein and the other distributors. With respect to the alleged boycott schemes, IQ again could not show injury because IQ sought to work with Source One only as a result of Schein's boycott tactics that resulted in Source One terminating two other distributors. IQ was a replacement seller and therefore was in a better position as a result of the alleged boycott.

IQ also could not demonstrate that it would be an efficient enforcer of the antitrust laws. To determine whether a plaintiff is an efficient enforcer, courts look to the directness or indirectness of the asserted injury; the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest and antitrust enforcement; the speculative nature of the alleged injury; and the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries. Here, the court held that Schein and the other distributors' anticompetitive conduct could have directly injured Source One, but they did not direct such alleged conduct at IQ; instead, Schein and the other distributors directed the conduct at Source One. To the extent IQ suffered harm as a result, it was secondary. Additionally, others had a greater incentive to sue for the alleged anticompetitive conduct, such as the manufacturers that were threatened if they did business with IQ.

IQ alleged that its damages turned on lost business opportunities and such damages were conjectural because there was no reasonable way to re-create the many possible permutations of each alleged lost sale. The speculative nature of its purported damages weighed strongly against holding it to be an

efficient enforcer. Because IQ could not allege standing under the antitrust laws, the court granted the motion to dismiss IQ's claims.

***Roxul USA, Inc. v. Armstrong World Indus., Inc.*, Bus. Franchise Guide (CCH) ¶ 16,137, No. CV 17-1258, 2018 WL 810143 (D. Del. Feb. 9, 2018).**

The U.S. District Court for the District of Delaware found that an acoustic ceiling tile manufacturer with a smaller market share adequately pleaded anti-competitive conduct by a manufacturer with a much larger share through exclusivity agreements with distributors in the relevant market in the United States. The court also found that the smaller manufacturer failed to state claims for anticompetitive conduct in Canada and for tortious interference with contractual relationships.

Plaintiff Roxul USA (Roxul) and Defendant Armstrong World Industries (Armstrong) manufacture and sell ceiling tiles in the United States and Canada. Armstrong holds at least a 55 percent share of the ceiling tile market in both countries. Three firms, including Roxul, compete against Armstrong. In the ceiling tile industry, manufacturers sell 85 percent of their products through distributors. Distributors play an important role in the industry because building contractors, the vast majority of ceiling tile consumers, rely on distributors' services, resources, and networks. Market forces have resulted in only a limited number of distributors capable of servicing Roxul and Armstrong.

Armstrong took action to protect its market share by executing exclusivity agreements with distributors. Armstrong's exclusive distributors cannot carry Roxul or other competing firms' tiles. Armstrong actively polices these agreements and retaliates against violators. Some of the agreements extend the exclusivity nationally or throughout the United States and Canada. Roxul alleged that these actions allowed Armstrong to increase prices and to charge 5 percent above competitive prices, despite an overall decline in ceiling tile sales since 2011. Roxul brought suit alleging that Armstrong's exclusivity agreements with distributors in the United States and Canada violated the Sherman Act and the Clayton Act and amounted to tortious interference with business relations. Armstrong moved to dismiss.

The court found that Roxul adequately stated various claims for anticompetitive conduct in the United States based on monopolization under the Sherman Act. In analyzing whether Armstrong possessed a monopoly in the ceiling tile industry, the court noted that 55 percent market share typically is insufficient to demonstrate monopoly power. But, in the presence of other factors, 55 percent market share may suffice. The court found that other factors did show that Armstrong possessed monopoly power. Specifically, the court noted that Armstrong has only three competitors, that only a few distributors can service those competitors, and that Armstrong has raised its prices above competitive prices despite an overall market decline. The court found that by alleging these facts and the 55 percent market share, Roxul sufficiently alleged monopoly power.

The district court also found that Roxul sufficiently alleged Armstrong willfully acquired this monopoly power through anticompetitive conduct. In determining that the exclusivity agreements resulted in anticompetitive conduct, the court again noted the limited number of distributors capable of servicing the competitive ceiling tile firms. This, coupled with Armstrong's active enforcement of its exclusivity agreements, sufficiently foreclosed competition in the ceiling tile market. Notably, the court determined that Armstrong's arguments regarding Roxul's alternative channels of distribution and Armstrong's own valid business justifications for the agreements were issues best reserved for summary judgment or trial. Finally, the court found that Roxul's allegations that the exclusivity agreements foreclosed the ceiling tile market to it and other competitors adequately pleaded an antitrust injury.

The Delaware district court applied the same reasoning to find that Roxul pleaded attempted monopolization under the Sherman Act and concerted action in restraint of trade under the Sherman Act and the Clayton Act. The court held Roxul's allegations of Armstrong pursuing exclusivity agreements and of actively policing those agreements sufficient to allow a reasonable inference that Armstrong acted with the intent to monopolize. Additionally, the relatively few players involved, on both the competitor and distributor sides, allowed these exclusivity agreements to foreclose competitors from a significant portion of the market.

The court dismissed Roxul's two other claims. First, Roxul failed to state a claim for antitrust violations based on Armstrong's use of the exclusivity agreements with distributors in Canada. The court found that Roxul's challenge to Armstrong's Canadian conduct was prohibited under the Foreign Trade Antitrust Improvements Act. Although the claim could have proceeded if it fell within that Act's domestic commerce exception, the court found that it did not. Specifically, the court found that Roxul did not meet the exception's "direct effects" requirement because it failed to allege how foreclosure from the Canadian market because of Armstrong's exclusivity agreements directly affects United States commerce. Finally, Roxul failed to state claims for tortious interference with business relationships under Delaware law because Roxul failed to adequately allege interference with an existing contractual relationship with a distributor or interference with a reasonably probable business opportunity.

ARBITRATION

***Nygaard v. Property Damage Appraisers, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,109, Case No. 16-cv-02184-VC, 2017 WL 8793228 (E.D. Cal. Dec. 28, 2017)**

Franchisee Brian Nygaard (Nygaard) sued his franchisor Property Damage Appraisers, Inc. (Property Damage) in the U.S. District Court for the Eastern District of California. In response, Property Damage moved to compel

arbitration pursuant to the parties' franchise agreement. The court denied Property Damage's motion to compel arbitration on the grounds that the California addendum to the franchise agreement rendered the arbitration provision unenforceable.

The only question the court had to answer was whether Nygaard and Property Damage entered into a valid agreement to arbitrate. The court first looked to the California addendum attached to the franchise agreement, which provided that the arbitration provision "may not be enforceable under California law." Property Damage argued that the mere statement that a particular provision may not be enforceable under California law should not necessarily signify that there was no meeting of the minds as to that provision. The court held that although Property Damage may be correct, the California Court of Appeal and the Ninth Circuit have both held that similar provisions to the one in the California addendum show that there was no meeting of the minds as to the respective arbitration provisions. As a result, governing law compelled the court to hold that the parties never entered into an enforceable arbitration agreement and thus deny Property Damage's motion to compel.

ATTORNEYS' FEES

***Sumanth v. Essential Brands, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,129, No. CV MJG-17-2450, 2018 WL 558612 (D. Md. Jan. 25, 2018)**

The U.S. District Court for the District of Maryland declined to award attorneys' fees to a franchisor under a franchise agreement without provisions explicitly providing for attorneys' fees where the franchisee initiates a suit alleging invalidity of the agreement and tort claims. The court noted that the parties were sophisticated businesspersons who knew how to negotiate attorneys' fees provisions, so it declined to read a provision into the agreement. The court also declined to award attorneys' fees as sanctions because it found that the plaintiffs' act of voluntarily dismissing their claim two days after defendants moved to dismiss did not unreasonably and vexatiously multiply the proceedings.

Defendant Essential Brands, Inc., which does business as Kiddie Academy Domestic Franchising, negotiated the sale of a daycare franchise to Plaintiffs Supriya Sumanth and Sumanth Nandagopal. Between 2011 and 2016, the parties engaged in business discussions, the sale and purchase, and the construction of the daycare facility. Throughout this period, the plaintiffs encountered numerous problems, including construction delays, trouble securing loans, and budgeting mistakes. The plaintiffs claimed they acted upon false information provided by the defendants, including false and misleading projections of success and promises of business support.

The plaintiffs filed suit alleging intentional and negligent misrepresentation, fraud in the inducement, and defamation. The defendants moved to

dismiss the plaintiffs' complaint for failure to state a claim. Two days later, the plaintiffs voluntarily dismissed their action. The franchisor-defendants then moved for attorneys' fees and costs under two theories. The defendants argued that the franchise agreement provided for attorneys' fees and that plaintiffs should be sanctioned for a meritless lawsuit. The court declined to award attorneys' fees under either theory.

In addressing whether the franchise agreement justified attorneys' fees awards, the court noted that Maryland law strictly construes contractual attorneys' fees provisions to avoid inferring duties the parties did not intend to create. The franchise agreement here included provisions requiring the franchisee to indemnify the franchisor for attorneys' fees if the franchisee violated the agreement and the franchisor was forced to pursue an enforcement action. The agreement also covered fees incurred by the franchisor related to a franchisee's asserted defenses, counterclaims, and crossclaims. However, the agreement did not explicitly cover attorneys' fees in the event that the franchisee initiated a claim against the franchisor for misrepresentation and fraud. Moreover, because the parties were sophisticated businesspersons and because the agreement contained numerous other sections with attorneys' fees provisions, the court concluded that the failure to include a provision providing for attorneys' fees was not an oversight and that the agreement did not provide for attorneys' fees in this situation.

The court then considered whether to award attorneys' fees as sanctions against the plaintiffs or their counsel under 28 U.S.C. § 1927 and Federal Rule of Civil Procedure 11. The plaintiffs stated they voluntarily dismissed their case because they wanted to seek advice from counsel in Texas, where they lived. They filed their dismissal two days after the defendants moved to dismiss. The court found that by acting quickly and with reasonable motives, the plaintiffs did not commit the sanctionable conduct of multiplying the proceedings in an unreasonable and vexatious way.

CLASS ACTIONS

***Lomeli v. Jackson Hewitt, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,147, No. 2:17-CV-02899-ODW (KSx), 2018 WL 1010268 (C.D. Cal. Feb. 20, 2018)**

A customer of a Jackson Hewitt franchisee asserted claims for fraud and negligence, among others, against the franchisee tax preparer and its franchisor Jackson Hewitt, Inc. (JH). JH moved to dismiss on October 19, 2017, and the U.S. District Court for the Central District of California granted that motion but provided Lomeli with leave to amend to comply with Federal Rule of Civil Procedure 9(b)'s heightened pleading standards. Upon Lomeli's submission of an amended complaint, JH moved to dismiss for failure to comply with the requirements of Rule 9(b) and moved to strike certain class allegations in the amended complaint. The court denied JH's motion to dis-

miss with respect to Lomeli's fraud and negligence claims, granted it with respect to Racketeer Influence and Corrupt Organizations Act (RICO) claims, and denied it with respect to JH's motion to strike class allegations.

Generally, Lomeli alleged that JH was directly liable for fraudulent statements it made to consumers regarding the accuracy of its tax preparation services and that, given its level of control over franchisees, JH was vicariously liable for fraud and other derivative claims for its franchisees' actions in preparing fraudulent tax returns. The basis for his claims revolved around the fraudulent preparation and submission of his 2014, 2015, and 2016 tax returns that included additional expenses claimed without his approval, resulting in an unwarranted fraudulent tax refund, and his enrollment in an assisted refund program that charged him fees without his approval.

'Allegations of fraud require a heightened pleading standard pursuant to Federal Rule of Civil Procedure 9(b), which provides that an allegation of fraud must state with particularity the circumstances constituting the fraud. The fraud allegation must set forth the "who, what, when, where, and how" of the fraudulent activity as well as the basis for asserting that the representation was false or misleading and why it was false. When, however, there are several defendants sued in connection with an alleged fraudulent scheme, a plaintiff need not identify false statements made by each and every defendant but it may not simply lump all defendants together without any differentiation as to the defendants' alleged role in the fraudulent scheme.

With respect to direct allegations of fraud, Lomeli alleged that JH reviewed and approved tax returns that it knew to be fraudulent, and that it wrote a letter to Lomeli telling him that the return he authorized for filing was sent to the IRS Processing Center when, in fact, JH sent a different return to the IRS. JH argued that Lomeli still lumped all defendants together instead of parsing the allegations as to each defendant. The court, however, noted that Lomeli alleged in the amended complaint that JH knew of the fraudulent scheme because on each occasion, the tax preparer prepared two versions of Lomeli's return using the software and electronic systems that JH controlled. He also alleged that even though a tax return with markedly different information had been submitted for the same tax year just days before, JH approved of the submission of the subsequent fraudulent return and caused it to be transmitted to the IRS using its software. In other words, JH received and approved multiple returns for Lomeli for the same year that contained significantly different amounts of wage-related expenses claimed. Considering that allegation, when paired with JH's assurances of 100 percent accuracy in its advertising, the court held the circumstances surrounding the submission of his returns were pleaded with sufficient particularity to withstand a motion to dismiss. There was enough in the allegations to allow a court to reasonably infer a fraudulent intent.

Additionally, Lomeli argued that JH committed fraud by advertising a 100 percent guarantee for accurate returns and the "preparers' pledge" to handle customers' tax returns like their own. JH argued that Lomeli never

alleged that he relied on the statements or JH knew the statements were false when made. The court disagreed with JH and pointed to allegations in the amended complaint asserting reliance on the alleged fraudulent statements. Additionally, Lomeli alleged that JH knew of the falsity of its 100 percent guarantee because JH had received thousands of complaints that tax returns it prepared were inaccurate. The court held that JH could not convince consumers to use Jackson Hewitt tax preparation services by promoting a 100 percent guarantee on accuracy and then simply turn tail when the consumer actually relies on those statements. Therefore, Lomeli's fraud claims with respect to JH's advertising was sufficient to survive JH's motion to dismiss.

Additionally, Lomeli asserted that he relied on a letter addressed to him dated April 15, 2015, that was on Jackson Hewitt letterhead and stated that Lomeli's 2014 tax return had been completed and filed electronically with the IRS. He alleged that the statement was false at the time because the return that JH submitted was materially different from the return he had approved and included fake deductions leading to an undeserved tax refund. The court held that although a letter bearing the JH letterhead did not necessarily prove that JH, as opposed to its franchisee, sent the letter the allegation was sufficient at the motion to dismiss stage and denied JH's motion to dismiss the direct fraud claims against it.

In the previous complaint, Lomeli failed to meet his burden to plead a level of control required to establish vicarious liability of JH. In the amended complaint, he alleged additional controls over the processing and submission of tax returns that were directly related to the fraudulent conduct of which Lomeli complained. For example, he alleged that JH exercised direct control over franchisees' employees, including hiring, direction, supervision, discipline, or discharge; that it required the tax preparer to report directly to JH's chief tax compliance officer; that the code of conduct for franchisee employees referred to the reader as an employee of JH, not the specific franchisee; that JH tracked franchisee employees on the returns they worked on through unique identifiers; that it distributed a compliance manual outlining JH's control over fraud prevention training; that it controlled training related to tax fraud, including fraud by taxpayers; that it required franchisees to certify that their employees complied with JH's directives, including training regarding fraudulent tax returns; that it required franchisee employees to take a tax preparer readiness test; and that JH set forth grounds wherein franchisees are required to terminate employees and operated a program known as the Red Flag Report that tracked tax return filing trends to identify questionable tax situations. The court held that these facts were sufficient to plead fraud on a vicarious liability theory against JH. The court held that Lomeli sufficiently alleged that JH controlled the instrumentality that caused the harm—the hiring and training of tax preparers who then fraudulently prepared his returns and opened a bank account without his consent. He also alleged that JH reviewed, approved, and submitted tax returns through its mandatory computer systems and the court held that these alle-

gations sufficiently alleged a theory of vicarious liability because JH retained a high level of control over its franchisees and franchisees' employees' actions. Thus, the court denied JH's motion with respect to Lomeli's fraud claim on a vicarious liability theory.

Lomeli also asserted claims under the RICO statute. The court held that to sufficiently allege a RICO claim, a plaintiff must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. The enterprise must be a distinct entity from the defendant and the common purpose the enterprise pursues must be distinct from the enterprise's or members' primary business activities. The court held that Lomeli's allegations of an enterprise between JH and its franchisees failed to properly and sufficiently allege an enterprise because the allegations of the relationship between JH and its franchisee were to further their primary business of processing tax returns. Thus, the court granted JH's motion to dismiss Lomeli's RICO claims.

With respect to Lomeli's claims for negligence, he alleged that JH failed to implement adequate controls to identify and prevent fraudulent submission of franchisees' customers' tax returns. JH argued that the negligence claim was contradictory to the fraud claim and therefore must be dismissed. The court, however, disagreed, noting that Lomeli had the right to plead in the alternative and that contradictory allegations of the pleading stage do not warrant dismissal. JH also argued that Lomeli failed to allege the elements of a negligence claim, but the court held that he had sufficiently alleged: (1) JH owed a general duty of care, supported by its guarantee to consumers of a 100 percent accurate tax return; (2) JH breached that duty by negligently failing to implement controls to detect and prevent the submission of fraudulent tax returns; and (3) JH's breach proximately caused Lomeli's harm and damages. Therefore, the court denied JH's motion to dismiss Lomeli's negligence claims.

Although JH also moved to strike Lomeli's class allegations, the court held that it is rare that a court will strike out class allegations prior to the class certification stage. Although the court noted that it could see problems at the class certification stage in light of the individual modes of proof that would likely be required, it declined to address those issues now without the benefit of discovery and briefing on the issue. Therefore, the court also denied JH's motion to strike the class allegation claims.

***In re: Jimmy John's Overtime Litig.*, Bus. Franchise Guide (CCH) ¶ 16,105, 877 F.3d 756 (7th Cir. 2017)**

The Seventh Circuit, reversing the U.S. District Court for the Northern District of Illinois, held that plaintiffs asserting putative class actions against Jimmy John's franchisees can proceed independently and apart from the three consolidated class actions against franchisor Jimmy John's pending in the Northern District of Illinois. Readers may be familiar with this long-running dispute, in which three employees—Emily Brunner, Alexander Whiton, and Scott Watson—have asserted violations of the Fair Labor Stan-

dards Act (FLSA) against Jimmy John's in several collective and class action lawsuits on behalf of all assistant store managers nationwide. Their complaints, now consolidated in the Northern District of Illinois, allege that Jimmy John's, as a joint employer with their franchisee employers, is liable for unpaid overtime following the misclassification of assistant managers as exempt from federal and state wage-and-hour laws.

Approximately 660 individuals opted into the FLSA collective action following notice to the potential class members. The district court then bifurcated discovery into two phases, with the first phase focused on issues of joint employer status, and the second phase focusing on the merits of the dispute. After the close of joint-employer discovery, three opt-in plaintiffs filed collective actions against their franchisee employers, without naming franchisor Jimmy John's, in federal district courts outside the Northern District of Illinois. The franchisee plaintiffs argued that the FLSA statute of limitations compelled them to preserve their claims against the franchisee defendants, which, operating outside the Northern District of Illinois, could not be joined in the consolidated Illinois action for lack of personal jurisdiction and venue.

Jimmy John's moved for an anti-suit injunction barring the franchisee plaintiffs from pursuing their claims prior to the resolution of the consolidated Illinois action. The district court agreed that an injunction would be fair and economical, given the fact that the plaintiffs' interests would be protected in the Illinois action and the "interest of harmony and delaying expense and overlapping work for judges doing the same kind of thing." 877 F.3d at 760. The franchisee plaintiffs appealed the district court's grant of the injunction, and the Seventh Circuit reversed. The Court of Appeals held that the district court abused its discretion by failing to analyze the injunction under the All Writs Act and by failing to consider the requirements for a traditional preliminary injunction under Federal Rule of Civil Procedure 65.

The Seventh Circuit first analyzed the district court's authority to enjoin actions against the franchisees—not parties to the Illinois action—in other federal district courts. Jimmy John's contended that the district court's inherent powers authorized the injunction against parallel duplicative litigation. The Seventh Circuit disagreed, concluding that a district court's inherent powers are limited to parallel federal actions involving the same parties and issues. Because Jimmy John's was not a party to the non-Illinois actions, and the defendant-franchisees in those actions were not parties to the Illinois action, the lawsuits were not parallel proceedings subject to the district court's inherent ant-suit powers.

Nor did the All Writs Act support the district court's injunction. The All Writs Act authorizes courts to "issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). As the Seventh Circuit explained, the Act is rarely invoked by a district court to enjoin another federal court. District courts more commonly invoke the Act to enjoin a parallel state-court action.

Such federal-state injunctions, however, must meet the narrow standards of the Anti-Injunction Act, which would prohibit the injunction “except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.” 28 U.S.C. § 2283. Though the Anti-Injunction Act’s “in aid of jurisdiction” language did not directly apply, the Seventh Circuit nevertheless deemed cases interpreting that language instructive.

Courts, moreover, interpret the “in aid of jurisdiction” clause narrowly. The clause does not authorize an injunction based on the potential effect of one suit on another. Thus, the Seventh Circuit rejected Jimmy John’s argument that the injunction was necessary to prevent conflicting interpretations of written policies that overlap across the different cases—what the Seventh Circuit considered simply a fear that the disparate franchisee litigations would reach final judgment or resolve disputed fact issues before the consolidated Illinois actions. The Seventh Circuit likewise was unconvinced that the injunction was necessary to protect the Northern District of Illinois’ pretrial orders regarding discovery and notice. The court emphasized that the “in aid of jurisdiction” clause applies only to in rem actions, school desegregation cases, and Multi-District Litigations. Thus, the Seventh Circuit refused to apply the “in aid of jurisdiction” clause of the All Writs Act to the three consolidated class actions.

In the second part of its analysis, the Seventh Circuit confirmed that the district court had erred in failing to apply the traditional factors for preliminary injunctions under Rule 65. Although circuits are split on the issue, the Seventh Circuit requires district courts issuing anti-suit injunctions to make findings of fact and conclusions of law sufficient to show that the party seeking the injunction is likely to succeed on the merits; that there is no adequate remedy at law; that the party is likely to suffer irreparable harm absent injunctive relief; that the balance of equities favors the injunction; and that the injunction is in the public interest. The court’s order must state the reasons for issuing the injunction. The district court’s explanation that there were “all kinds of reason[s] that justif[y] the stay as to the parties” in the Illinois action failed to meet those standards. Thus, even if the injunction had been supported by the All Writs Act, the Seventh Circuit reversed for failure to establish the requisite elements of a preliminary injunction.

CONTRACT ISSUES

***Cajun Global LLC v. Swati Enters., Inc.*, Bus. Franchise Guide (CCH) ¶ 16,118, 283 F. Supp. 3d 1325 (N.D. Ga. Dec. 13, 2017)**

The U.S. District Court for the Northern District of Georgia found that a nonsignatory may be bound to noncompetition and other post-termination restrictions in an agreement for the operation of a Church’s Chicken franchise. The nonsignatory, who had purchased the franchised restaurant

from the contracting party shortly after the franchise agreement was executed, had operated the restaurant for the ten-year term, receiving the benefits of the franchise agreement, and therefore could be preliminarily enjoined from use of the trademarks and other protected information, as well as from operating a quick-service fried chicken restaurant in violation of the noncompete provisions of the franchise agreement.

Plaintiff Cajun Global, which does business as Church's Chicken, entered into a franchise agreement in 2007 with defendant Swati Enterprises (SEI) with respect to a franchised Church's Chicken restaurant in Orange, Texas. The franchise agreement contained post-termination restrictive covenants precluding the franchisee from owning or operating any quick-service fried chicken restaurant within twenty-five miles of any franchised location or any other Church's restaurant in existence at the time of expiration or termination of the agreement. The agreement also contained personal jurisdiction and forum selection clauses requiring the franchisee to resolve disputes in the Northern District of Georgia.

SEI, consistent with the agreement, could not transfer or sell the franchise without the franchisor's written knowledge and consent. Nevertheless, only two months after executing the agreement, SEI transferred the franchised restaurant to defendant Rahman without the plaintiff's knowledge. Rahman contended that he had never seen or signed the franchise agreement, but the defendants conceded that Rahman had thereafter operated the franchised restaurant, used the Church's Chicken trademarks and other protectable information, received training from Global, and worked with SEI to remit royalties and other fees to plaintiff.

When the franchise agreement expired in 2017, Rahman continued to operate the restaurant, rebranding the same quick-service fried chicken concept as "Orange Fried Chicken." Rahman continued to use a logo and other identifying marks that the court called confusingly similar to Church's marks. After sending an unsuccessful cease and desist letter, plaintiffs Cajun Global and Cajun Funding LLC filed suit to enjoin the defendants from infringing on the plaintiffs' trademarks and violating the noncompete restrictions in the franchise agreement. Relevant to the court's preliminary injunction order, Rahman contended that, as a nonsignatory, he was not bound by either the substantive provisions or the jurisdictional provisions of the franchise agreement and moved to dismiss on jurisdictional grounds. Rahman did not challenge the enforceability of the noncompete covenants or jurisdictional terms themselves.

The primary issue in deciding to enter a preliminary injunction was whether the court could bind a nonsignatory to the post-termination covenants and jurisdictional terms of the franchise agreement. The court concluded that Rule 65 of the Federal Rules of Civil Procedure contained language broad enough to reach a nonsignatory on these facts. Further, although first noting that contacts generally do not bind nonsignatories, the court cited multiple state law grounds under which a nonparty to a con-

tract might be bound to its terms, including (among other things) assumption and estoppel. Because Rahman performed under the franchise agreement for ten years and received all the benefits thereunder, he was estopped from disclaiming the franchisee's post-termination obligations on grounds that he did not sign the agreement.

For similar reasons, the court dismissed Rahman's motion to dismiss for lack of jurisdiction and venue. Just as he was bound to the post-termination restrictions of the agreement, Rahman was bound by the agreement's jurisdictional and forum selection clauses. In any event, the court found that Rahman had purposefully availed himself of the benefit of doing business with plaintiffs in Georgia sufficient to justify jurisdiction in Georgia.

Ultimately, the court entered a preliminary injunction in the plaintiffs' favor barring the defendants, including Rahman, from using the Church's Chicken trademarks, service marks, and trade dress, or any "colorable imitation" thereof; leading customers to believe that the defendants and their restaurant were affiliated with Church's; and violating the noncompetition and other post-termination restrictions of the agreement. The court further ordered the defendants to return all Church's signs and marketing materials (or any imitations thereof) to the plaintiffs, return all copies of the Church's manual to the plaintiffs, and refrain from disclosing any of the plaintiffs' confidential business information or trade secrets.

BP West Coast Prods., LLC v. Crossroad Petroleum, Inc., Bus. Franchise Guide (CCH) ¶ 16,112, No. 12-CV-665 JLS (JLB), 2018 WL 264120 (S.D. Cal. Jan. 2, 2018)

BP West Coast Products (BP) moved for partial summary judgment on certain claims against a number of defendants for failure to pay money owed for fuel purchased. Specifically, BP moved for summary judgment with respect to its claim for breach of franchise agreements against defendants Khaja Ansari, NP Petroleum Corp., Sharina Alloush, Daisie Enterprises, Inc., and Hadaf, Inc. (Dealer Defendants). BP also moved for summary judgment with respect to its claim against Khaja Ansari, Fazilath Ansari, Nader Sahih, Payam Sahih, Rajesh Arora, Anup Patel, Tarun Maitra, and Soma Prasad (Guarantor Defendants) for failing to comply with the terms of the guarantees they entered into. The U.S. District Court for the Southern District of California granted summary judgment with respect to the claims against the Dealer Defendants and granted in part and denied in part the motion for summary judgment against the Guarantor Defendants.

The Dealer Defendants operated gas stations under franchise agreements with BP. BP sold and delivered motor fuel to the Dealer Defendants for them to resell at their respective stations. Pursuant to the parties' agreements, the Dealer Defendants were required to pay BP for the fuel. BP alleged that it delivered fuel to the Dealer Defendants, but they defaulted on payment in breach of the franchise agreements, and that the Guarantor

Defendants failed to pay BP the amounts owed by the Dealer Defendants and personally guaranteed in breach of the personal guarantees.

The breach of contract claim against the Dealer Defendants was straightforward. BP proved the existence of valid franchise agreements, its performance pursuant to the franchise agreements, the Dealer Defendants' breach based on their failure to pay for the fuel, and BP's resulting damages. Therefore, the court granted BP's motion for summary judgment with respect to its breach of contract claims against the Dealer Defendants.

To meet its burden on the motion for summary judgment with respect to the Guarantor Defendants, BP had to show: (1) there was a valid guarantee; (2) the borrower defaulted; and (3) the guarantor failed to perform under the guarantee. The Guarantor Defendants argued that the guarantees were "sham guarantees" and thus illusory. Under California law, to collect a deficiency from a guarantor, the guarantor must be a true guarantor and not merely the principal debtor under a different name. Thus, where a principal obligor purports to take on additional liability as a guarantor, nothing is added to the primary obligation, and the guarantee must be considered ineffective.

In determining whether a guarantee is a sham, courts must determine whether the guarantor is actually the principal obligor, which occurs when: (1) the guarantor personally executes the underlying loan agreements or deed of trust; or (2) the guarantor is, in reality, the principal obligor under a different name by operation of trust or corporate law or some other applicable legal principle. When there is sufficient legal separation between the borrower and the guarantor, for example, through appropriate use of the corporate form, the sham guarantee defense will not apply.

With respect to Khaja Ansari, BP claimed that Khaja Ansari and Fazilath Ansari entered into a guarantee, thereby personally guaranteeing the obligations with respect to Khaja Ansari's franchise agreement with BP. BP failed to provide any information as to why the guarantee was effective, despite the fact that Khaja Ansari was guaranteeing his own franchise agreement. Therefore, BP failed to show the absence of a question of fact as to the validity of the guarantee because Khaja Ansari was both principal debtor and guarantor, which could render the guarantee a sham guarantee. Thus, the court denied BP's motion for summary judgment with respect to its claim against Guarantor Defendant Khaja Ansari.

Soma Prasad and Tarun Maitra signed agreements guaranteeing the debt of Hadaf, Inc. BP failed to address, however, the issue of whether there was adequate legal separation between Tarun Maitra and the principal debtor Hadaf, Inc. It was not enough that the names on the franchise agreement and guarantee were different because there was still a question of fact as to whether there was adequate legal separation between Tarun Maitra and Hadaf, Inc. to avoid rendering the guarantee a sham guarantee. Thus, the court denied BP's motion for summary judgment with respect to Guarantor Defendant Tarun Maitra.

In addition to the sham guarantee doctrine, a guarantee must be supported by consideration. When a guarantee is made coincidentally with the principal agreement, the guarantee is supported by the same consideration as the principal agreement and is enforceable. If, however, the guarantee is signed at a different time, it must be supported by its own consideration. Therefore, the dates of signatures were particularly relevant as to whether the remaining Guarantor Defendants' guarantees were enforceable. Fazilath Ansari, for example, executed a guarantee in 2006 but the principal debtor for which Fazilath Ansari was entering into a guarantee did not execute the principal agreement until 2008. BP failed to provide information as to why the guarantor entered into the agreement two years prior to the principal contract and therefore had no support for the existence of consideration with respect to that guarantee. Accordingly, the court denied BP's motion for summary judgment with respect to Guarantor Defendant Fazilath Ansari.

The same was true of Soma Prasad. Soma Prasad signed the guarantee almost a year before her respective principal debtor executed its franchise agreement. BP failed to provide any information to explain this discrepancy and therefore failed to meet its burden of showing no genuine issue of material fact as to the validity of the guarantee. Thus, the court denied BP's motion for summary judgment with respect to Guarantor Defendant Soma Prasad.

With respect to Payam Sahih, who entered into a guarantee in 2010 at around the same time as the principal debtor agreement, the court found the underlying consideration to be sufficient to enforce the guarantee although the guarantor entered into a guarantee approximately one week before the franchisee entered into the principal franchise agreement. The court held that this was close enough that consideration for the franchise agreement was sufficient to constitute consideration for the guarantee. The same was true for Anup Patel, who signed the guarantee agreement around the same time as his respective principal debtor. Thus, the court granted BP's motion for summary judgment with respect to Guarantor Defendants Payam Sahih and Anup Patel but denied BP's motion for summary judgment with respect to Guarantor Defendants Khaja Ansari, Fazilath Ansari, Tarun Maitra, and Soma Prasad.

Mrs. Fields Franchising, LLC v. MFGPC, Bus. Franchise Guide (CCH) ¶ 16,111, 721 F. App'x 755 (10th Cir. Jan. 8, 2018)

On January 8, 2018, the Tenth Circuit reversed the U.S. District Court for the District of Utah's dismissal of a licensee's breach of contract claim. The Tenth Circuit did, however, affirm the district court's dismissal of the licensee's account-stated claim. In so holding, the Tenth Circuit demonstrated the importance of the specific allegations in a licensee's complaint for purposes of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).

In 2003, MFGPC's predecessor-in-interest entered into a license agreement with Mrs. Fields Franchising, LLC, which gave MFGPC's predecessor-in-

interest the right to sell popcorn under the brand “Mrs. Fields.” In exchange, Mrs. Fields Original Cookies, a third-party defendant, would receive 5 percent of net sales as “running royalties” and a certain amount of royalty payments for the first five years under the agreement as “guaranteed royalties.” The running royalties could be paid by shipment of licensed popcorn to Mrs. Fields Original Cookies and having the price received for the popcorn reduced by any outstanding running royalties. After the agreement was signed, Mrs. Fields Original Cookies transferred its rights under the agreement to Mrs. Fields Franchising. Though the license agreement had an initial term of five years, it would automatically renew for successive five-year terms unless MFGPC failed to pay the guaranteed royalties. In 2014, Mrs. Fields Franchising terminated the license agreement for MFGPC’s failure to pay guaranteed royalties. Mrs. Fields Franchising filed for a declaratory judgment against MFGPC in federal court in Utah stating that the termination had been proper. In response, MFGPC brought claims against Mrs. Fields Franchising for breach of contract and for an account stated, alleging that MFGPC owed no outstanding royalties and was in fact owed \$26,660.43 for popcorn that had been shipped to Famous Brands, another third-party defendant.

The district court dismissed MFGPC’s breach of contract and account-stated claims. In dismissing MFGPC’s breach of contract claim, the district court considered a declaration by MFGPC’s president, which MFGPC had filed earlier in the case when it sought a preliminary injunction. MFGPC appealed, specifically asserting that the district court erred in relying on the president’s declaration without converting Mrs. Fields Franchising’s motion to dismiss into a motion for summary judgment. However, MFGPC did not raise the foregoing argument in the district court.

The Tenth Circuit reversed the dismissal of MFGPC’s breach of contract claim but upheld the district court’s dismissal of MFGPC’s account-stated claim. Though MFGPC waived its argument that the motion to dismiss should have been converted to a motion for summary judgment, the Tenth Circuit nonetheless held that the president’s declaration should not have been considered for two reasons: (1) if the district court relied on the declaration, it was required as a matter of law to convert the motion to dismiss into a motion for summary judgment, and (2) consideration of a motion to dismiss under Federal Rule 12(b)(6) is based solely upon MFGPC’s allegations in its complaint.

The Tenth Circuit concluded that MFGPC clearly stated a plausible breach of contract claim based on the allegations in its complaint—specifically, MFGPC alleged that Mrs. Fields Franchising’s termination of the license agreement and failure to pay for the licensed popcorn amounted to a contractual breach. The court held that the result of Mrs. Fields Franchising’s termination of the agreement was that MFGPC could no longer sell popcorn under the Mrs. Fields brand. Indeed, “[w]hy would MFGPC continue making popcorn and shipping it to a licensor that believed there was no valid license agreement?” Mrs. Fields Franchising argued that MFGPC suffered no

damages because the agreement allowed MFGPC to continue selling Mrs. Fields popcorn for six months after the agreement was terminated. The appeals court, however, was not persuaded because: (1) the agreement allowed MFGPC to sell popcorn that had already been manufactured and packaged, not to continue manufacturing and selling the popcorn as if the agreement was not terminated, and (2) six months of selling popcorn was insufficient to remedy the fact that the agreement would have allowed MFGPC to sell popcorn for an additional two-and-a-half years if the agreement was not terminated. Accordingly, MFGPC adequately alleged a breach of contract claim.

With regard to the account-stated claim, the Tenth Circuit held: “An agreement on the amount owed is an essential element of an account stated, and MFGPC has not alleged such an agreement.” Although MFGPC alleged that it shipped licensed popcorn to Famous Brands, which approved an invoice for \$70,222.60, MFGPC only alleged an account stated for \$26,600.43, which was the amount invoiced minus the amount of running royalties that MFGPC regarded as due. However, MFGPC did not allege that Famous Brands agreed to such an offset. As such, the court held that “MFGPC has not adequately alleged an account-stated claim.”

***Lokhandwala v. KFC Corp.*, Bus. Franchise Guide (CCH) ¶ 16,130, No. 17-cv-5394, 2018 WL 509959 (N.D. Ill. Jan. 23, 2018)**

The U.S. District Court for the Northern District of Illinois held that a franchisor has the absolute right to control its franchisees’ advertising of the products and services offered under a franchise. The decision is particularly instructive for two reasons: (1) it assures franchisors that language in the franchise agreement can control the advertising for the entire franchise system; and (2) it cautions franchisees to fully understand the franchisor’s ability to control advertising under the franchise agreement before implementing their own advertising initiatives.

Franchisee Afzal Lokhandwala sued franchisor KFC Corporation, alleging that KFC breached the franchise agreement by unreasonably attempting to prevent him from telling customers that his KFC franchises offer Halal chicken (food prepared in accordance with Islamic law and traditions). Lokhandwala brought claims for breach of contract and promissory estoppel and sought declaratory and injunctive relief. In response, KFC moved to dismiss Lokhandwala’s complaint and brought counterclaims for injunctive and declaratory relief and attorney’s fees, asserting that the franchise agreement’s plain language gave KFC the “absolute right” to approve or prohibit any advertising or promotional claims regarding its products.

Lokhandwala opened his first KFC franchise in 2002, at which point he entered into a franchise agreement with KFC. According to Lokhandwala, from 2003 to late 2016 or early 2017, KFC approved the sale of Halal chicken in Lokhandwala’s stores. However, in late 2016 or early 2017, pursuant to a 2009 KFC policy that prohibits franchisees from making religious

dietary claims about KFC products, KFC required Lokhandwala to stop marketing products as Halal. The 2009 policy prohibited KFC franchises from offering Halal or Kosher foods because: (1) there are different interpretations for what satisfies certain processing requirements; and (2) KFC cannot certify that such practices would not lead to cross contamination between Halal and non-Halal, or Kosher and non-Kosher, foods. The franchisee asserted that the 2009 policy contradicts representations made to it by KFC when he negotiated for and opened new stores in 2010 and 2012. Lokhandwala also said the policy was incompatible with KFC's permission to allow Lokhandwala to continue advertising Halal products after the 2009 policy took effect.

After a detailed review of the franchise agreement, which provided that Kentucky law governs any disputes regarding the agreement, the court held that the agreement was unambiguous and that KFC had every right to bar Lokhandwala from advertising products as Halal, even if KFC had allowed such advertising in the past. Specifically, the franchise agreement required that franchisees "strictly comply" with KFC's requirements and gave KFC full control over advertising and promotional material. Moreover, the agreement contained waiver provisions that allow KFC to enforce the franchise agreement at any time, regardless of past contradictory practices or past failures to enforce the agreement. Finally, the agreement specifically stated that it constituted a complete agreement that supersedes any other agreements between the parties. The specific foregoing provisions relied upon by the court include the following:

- Section 3.7—"Franchisee will strictly comply with the requirements and instructions of KFC regarding the use of the trademarks, trade names and service marks in connection with the Approved Products and the Outlet."
- Section 5.3(h)—"Franchisee will take such action and precautions as necessary to assure that: . . . (h) only signs and menuboards, advertising and promotional material, equipment" and other supplies "which meet KFC's standards and specifications (as established from time to time) are used at the Outlet or in connection with its business."
- Section 20.4—"No failure, forbearance, neglect or delay of any kind or extent on the part of KFC in connection with" enforcing and exercising rights under the franchise agreement "shall affect or diminish KFC's right to strictly enforce and take full benefit of each provision of this Agreement at any time . . . No custom, usage, concession or practice with regard to this Agreement, the Franchisee or KFC's other Franchisees shall preclude at any time the strict enforcement of this Agreement (upon due notice) in accordance with its literal terms . . . No waiver by KFC of any performance of any provision of this agreement shall constitute or be implied as a waiver of KFC's right to enforce such provisions at any future time."

- Section 20.5—“This Agreement constitutes the [parties]’ entire understanding and agreement” and “supersedes all prior and contemporaneous understandings and agreements of the parties.”

Despite Lokhandwala’s argument that the court should consider extrinsic evidence because the franchise agreement was either silent or ambiguous as to whether he may make “truthful disclosures” about Halal products, the court held that such truthful statements made to customers could in fact constitute advertising. Because the franchise agreement was unambiguous, the court declined to consider extrinsic evidence. Lokhandwala also argued that KFC’s refusal to allow him to display signs about his Halal food products would cause him to violate the Illinois Halal Food Act. The court, however, held that if Lokhandwala ceased advertising Halal products, the Illinois Halal Food Act would no longer apply to him. Last, the court held that KFC’s demands were not unreasonable, as the agreement did not impose any specialized or overarching reasonableness requirement to KFC’s decisions regarding advertising.

Finally, the court held that KFC’s counterclaims for injunctive relief, declaratory relief, and attorney’s fees failed under the “mirror image rule” because the counterclaims, like Lokhandwala’s claims, sought to enforce the agreement, thereby making KFC’s counterclaims “repetitious and unnecessary.” Further, KFC was not entitled to attorney’s fees under the agreement because it did not institute the action.

***Sumanth v. Essential Brands, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,129, No. CV MJG-17-2450, 2018 WL 558612 (D. Md. Jan. 25, 2018)**

This case is discussed under the topic heading “Attorneys’ Fees.”

***DZ Bank AG Deutsche Zentral-Genossenschaftsbank v. McCranie*, Bus. Franchise Guide (CCH) ¶ 16,136, 720 F. App’x 576 (11th Cir. 2018)**

In an unpublished opinion, the Eleventh Circuit affirmed the ruling of the U.S. District Court for the Middle District of Florida, following a bench trial, enforcing a promissory note entered into by an insurance agency franchisee in connection with the financing of its purchase of the franchise. Disagreeing with the district court, the Eleventh Circuit concluded that the note was not a negotiable instrument, but otherwise agreed with the district court that the franchisee’s obligation to pay was not conditioned on the absence of breach by any other party to the franchise agreement, nor was payment conditioned on the commercial success of the franchise endeavor.

Defendant-Debtor McCranie is an insurance agent with substantial experience buying and selling independent insurance agencies. Brooke Corporation (Brooke), prior to its failure, bought independent agencies and sold them as franchises to agents, like McCranie, who financed the purchase through Brooke Credit Corporation (Brooke Credit). McCranie purchased

a Brooke franchise in Florida in 2000. In connection with that purchase, he signed two promissory notes in favor of Brooke Credit, as well as a Security Agreement and an Agreement for Advancement of Loan (Advancement Agreement). In 2002, McCranie executed a new promissory note with Brooke Credit to refinance the two earlier loans (the Note). The Note stated that it was separately secured by the already existing Security Agreement and also stated in a separate section: “ADDITIONAL TERMS: See Agreement for Advancement of Loan dated October 30, 2000.”

In 2004, Brooke Credit entered a series of agreements with third parties, ultimately transferring interest in certain loans entered into by Brooke Credit after 2004 to Brooke Funding. Plaintiff-Creditor DZ Bank took a security interest in the transferred loans in exchange for providing the funding for the purchase of the loans. The purchase contracts also allowed Brooke Credit to offer and Brooke Funding to purchase or reject loans entered into prior to 2004. As such, although McCranie’s loan was technically non-qualifying under the purchase agreements, the loan was sold to Brooke Funding and DZ Bank held a security interest in the loan.

In 2008, relationships among the Brooke entities and related contractual parties broke down. DZ Bank stopped providing funding to Brooke Funding. Franchisor Brooke stopped paying McCranie commission payments as provided in the franchise agreement—payments McCranie needed in order to meet his obligations under the Note. McCranie therefore terminated the franchise agreement and demanded that Brooke have insurers transfer “agent of record” status to McCranie so he could continue to sell policies with those insurers. Neither Brooke nor Brooke Credit took steps to make McCranie the agent of record with the insurers, which then pulled their business from McCranie’s agency.

In October 2008, DZ Bank notified McCranie that payments on the Note should be directed to DZ Bank rather than Brooke Credit. Brooke filed for bankruptcy in October 2008, and by the end of the month DZ Bank, Brooke Credit, and Brooke Funding formalized a transfer of ownership of collateral (including McCranie’s Note) to DZ Bank. DZ Bank then filed suit against McCranie to recover on the Note.

At a bench trial, the district court found that the Note was a negotiable instrument, that DZ Bank was a holder in due course, and that holder-in-due-course status defeated McCranie’s defenses to enforcement. On appeal, McCranie argued that the Note was not a negotiable instrument and that, because the Note was part of a single integrated agreement for the franchise endeavor, Brooke’s breach of the franchise agreement relieved McCranie from his obligation to pay under the Note.

In the first portion of its discussion, the Eleventh Circuit agreed with McCranie that the Note was not negotiable. The court explained that a negotiable instrument must be complete on its face, such that a holder need not look to any other documents to determine the parties’ rights and obligations. Although mere references to other documents do not defeat negotiability,

the suggestion that another document contains terms applicable to the instrument renders the instrument non-negotiable. Importantly, whether the ancillary document in fact contains applicable terms is irrelevant—the question was whether the ancillary document must be consulted in the first place. The Note, which stated: “ADDITIONAL TERMS: See Agreement for Advancement of Loan dated October 30, 2000,” could not be considered a self-contained document. Although the Advancement Agreement in fact contained no conditions on McCranie’s obligation to pay, the reference in the Note to “additional terms” defeated negotiability.

A related issue concerned whether title to the Note in fact transferred to DZ Bank. At trial, McCranie had offered evidence of a competing claim to title in the Note. Further, the purchase agreements under which DZ Bank claimed title only referenced loans made by Brooke Credit after 2004. The trial court had ultimately ruled that DZ Bank had shown proof of title as to defeat the competing claim. On appeal, the Eleventh Circuit held that McCranie lacked standing to challenge the transfer of a non-qualifying loan under the terms of the purchase agreements, to which he was not a party.

The court then considered McCranie’s various contractual defenses and concluded that none applied to defeat enforcement of the Note. The court rejected McCranie’s argument that the franchise agreement arose under Article 2 of the U.C.C. and that he was not obligated to pay under the Note because he ultimately did not receive the “goods” under the arrangement. At best, the franchise agreement was a mixed agreement for the sale of goods and services, with its predominant purpose being the establishment of the franchise relationship as a joint service endeavor.

Lastly, the court held that McCranie’s defenses of commercial frustration and impossibility were inapplicable. Those defenses are available only when the event allegedly causing frustration or impossibility of performance was unforeseeable at the time of contracting. The agreements in question, moreover, contained substantial protections for Brooke in the event of various defaults by McCranie. McCranie, however, despite having legal counsel, failed to negotiate for protections in the event of a breach of the franchise agreement by Brooke. The court concluded that if Brooke could anticipate McCranie’s breaches, McCranie could have guarded against Brooke’s breaches.

Taylor Inv. Partners II, LLC v. Moe’s Franchisor, LLC, Bus. Franchise Guide (CCH) ¶ 16,150, 811 S.E.2d 62 (Ga. Ct. App. 2018).

The Georgia Court of Appeals reversed the ruling of the trial court that purported to grant a temporary restraining order (TRO) in favor of the franchisor. Although the trial court’s order was called a TRO, in effect, the order actually granted a declaratory judgment in favor of franchisor on the issue of whether the franchisee breached the terms of the franchise agreements by filing for bankruptcy. Because the trial court granted such relief without

complying with the procedures of Georgia's Declaratory Judgments Act, the Court of Appeals reversed the order.

Taylor Investment Partners II and its affiliates (Taylor) operated two Moe's franchises pursuant to franchise agreements with Moe's Franchisor (Moe's). When Taylor filed for bankruptcy, Moe's alleged the filing violated the terms of the franchise agreements. Moe's filed suit seeking an interlocutory injunction and a TRO and asserting trademark infringement claims. Taylor then filed its own TRO motion and requested an emergency hearing. Taylor, through counsel, sent an e-mail to trial court staff and opposing counsel stating that its TRO motion was intended to "simply seek to preserve the status quo until the termination dispute is resolved on the merits."

After the hearing, the trial court granted Taylor's TRO motion and asked the parties to brief the issue of whether Taylor's filing of the bankruptcy petition terminated the franchise agreement. The parties filed the briefs. Taylor also filed its answer and counterclaims, which included a declaratory judgment counterclaim seeking a declaration that the bankruptcy termination clauses in the franchise agreements were unenforceable. Then, the trial court issued an order purporting to grant a TRO in favor of Moe's. The order explicitly found that the termination of the franchise agreements was proper and that the termination-upon-bankruptcy clauses were enforceable. The trial court ordered Taylor to shut down the franchises and to remove all Moe's identifying marks from the restaurants.

On appeal, the Court of Appeals addressed the trial court's order in light of the principle that substance, not nomenclature, controls the construction of a document. The Court of Appeals found that because the order directed action giving Moe's all the relief it sought, it did not merely preserve the status quo. Additionally, the order resolved the ultimate issue of the enforceability of the franchise agreements' bankruptcy clauses. So, despite calling it a TRO, the substance of the order granted a declaratory judgment in favor of Moe's.

The Court of Appeals then found that the trial court's order failed to comply with the required procedures of Georgia's Declaratory Judgments Act. Specifically, Georgia law requires that a declaratory judgment action may not be tried earlier than 20 days after service is perfected, unless the parties consent in writing to an earlier date. The hearing in the case was held only one day after service. The Court of Appeals rejected Moe's argument that the e-mail from Taylor's counsel requesting the emergency hearing operated as consent in writing to an earlier trial date. The Court of Appeals noted that the e-mail indicated that the purpose of the hearing was to preserve the status quo and that Taylor had not even filed its declaratory judgment counterclaim at the time of the e-mail. The Georgia appellate court ultimately held that because the trial court's order was substantively a declaratory judgment issued after a procedurally improper hearing, the trial court committed reversible error.

***Rayco Mfg., Inc. v. Beard Equip. Co.*, Bus. Franchise Guide (CCH) ¶ 16,121, No. 5:17-CV-84, 2018 WL 692091 (N.D. Ohio Feb. 2, 2018)**

This case involved a Dealership Agreement between a manufacturer and dealer that contained certain indemnification provisions in the event of a dispute. On February 2, 2018, the U.S. District Court for the Northern District of Ohio determined the ripeness of such indemnity provisions under a unique set of facts.

In 2006, Rayco Manufacturing, Inc. (Rayco) and Beard Equipment Company (Beard) entered into a Dealership Agreement whereby Rayco allowed Beard to serve as its exclusive dealer in the territory set forth in the agreement. The agreement provided that: (1) Rayco would indemnify and hold harmless Beard from and against all lawsuits and damages arising out of the design and manufacture of the product sold to Beard; (2) Beard would indemnify and hold Rayco harmless from and against all claims and damages arising out of the sale, rental, lease, modification, or servicing of the product by its employees or agents; and (3) if Rayco and Beard were contributory causes to a claim, each party would cover its own expenses and cooperate in the resolution of litigation. Further, the agreement stated that Beard was not Rayco's agent and could not create any obligation on behalf of Rayco. The agreement had a forum selection clause under which all disputes had to be resolved in the Northern District of Ohio and a choice of law provision under which the agreement would be construed in accordance with Ohio law.

In December 2016, Rayco brought an indemnity action against Beard in an Ohio state court, which was removed to federal court. The timeline and relevant factual background preceding the indemnity action are as follows:

- In 2008, Josh Akridge (Akridge), individually and d/b/a Hen-Ridge Dirt Works, LLC, filed suit in Alabama against Rayco, Beard, and several Beard employees in connection with Beard's sale of a forestry mower to Akridge, alleging fraud and breach of warranty claims. Under the Dealership Agreement, Beard was required to provide the buyer with a warranty registration certificate to be completed and returned to Rayco in order for the customer to obtain warranty coverage. Akridge claimed that Beard did not provide him with a warranty registration.
- In 2010, while the Alabama litigation was still pending, Rayco brought suit in an Ohio state court, alleging that Beard had breached the Dealership Agreement by failing to defend and indemnify Rayco in the Alabama litigation.
- In 2011, Akridge filed an amended pleading in the Alabama litigation, alleging design and manufacturing defect claims under the Alabama Extended Liability Manufacturing doctrine. Rayco filed a motion to dismiss, which was granted.
- Later in 2011, the Ohio district court granted Rayco summary judgment against Beard, finding that Beard was contractually obligated to

defend and indemnify Rayco under the Dealership Agreement. Beard appealed, and the decision was reversed in 2014 because the agreement did not include a duty to defend; thus, Rayco's right to indemnification would only ripen if Beard was found liable and Rayco was absolved of liability in the Alabama litigation.

- In 2014, Akridge settled its claims against Beard in the Alabama litigation, and he specifically reserved the right to any remaining claims against Rayco.
- In January 2016, the Alabama state court dismissed the remaining claims against Rayco as being governed by the forum selection clause in the Dealership Agreement.

The indemnity action filed by Rayco involved two breach of contract claims: (1) indemnification from Beard, pursuant to the Dealership Agreement, for Rayco's costs in defending the Alabama litigation; and (2) violation of the Dealership agreement by Beard for encouraging Akridge to amend his complaint and pursue design and manufacturing defect claims against Rayco. Beard moved for summary judgment, contending that Rayco's request for indemnification was not ripe.

The Ohio district court denied Beard's motion for summary judgment, finding that all three factors of the ripeness test for judicial review were satisfied. First, the harm to Rayco had already occurred because (1) Rayco incurred expenses in defending the Alabama litigation; and (2) the expenses were finally determined because the statute of limitations had run on any of Akridge's remaining claims against Rayco. Second, delaying a determination of indemnification would significantly prejudice Rayco because (1) Akridge's claims against Rayco were time-barred, thereby precluding a determination of liability under another tort action; and (2) Beard's settlement with Akridge similarly precluded a tort action whereby Beard's liability could be determined. Third, the factual record was sufficiently developed because the Alabama litigation concluded and thus the factual record in the underlying tort action was as complete as it ever would be. As such, because there was no tort action under which the parties' liabilities for the underlying tort injury would be resolved, it would be up to the Ohio district court to determine the factual basis for the parties' duties and rights under the Dealership Agreement. Accordingly, the indemnification action was ripe for resolution and Beard's motion for summary judgment was denied.

Interim Healthcare Inc. v. Health Care@Home, LLC, Bus. Franchise Guide (CCH) ¶ 16,149, No. 17-CV-61378, 2018 WL 830113 (S.D. Fla. Feb. 12, 2018)

The U.S. District Court for the Southern District of Florida found that a franchisor may state a claim for lost future royalties for a franchisee's breach of franchise agreement. Denying a motion to dismiss, the court concluded that the franchisor sufficiently stated breach of franchise contract claims

for both past due royalties and future royalties. Because the franchisor's lost future royalties calculation was based on the average weekly fees and the remaining weeks in the franchise agreement, the court found that the damages were not too speculative to warrant dismissal for failure to state a claim.

Plaintiff Interim Healthcare Inc. (Interim) operates a franchise that provides healthcare staffing through over 300 franchisees throughout the United States. In 2013, Interim entered into a ten-year franchise agreement with Defendant Health Care@Home (HCH), under which HCH agreed to pay certain weekly service charges based on a percentage of sales. The agreement allowed Interim to terminate the contract in the event of HCH's default by failing to perform and to abide by the terms of the agreement.

In 2015, Interim served HCH with a notice of default, claiming HCH owed Interim over \$70,000 under the agreement. In 2017, because HCH failed to cure the default noticed in 2015, Interim terminated the agreement. Interim then filed suit for breach of the franchise agreement and sought to recover certain royalties. In the complaint, Interim alleged not only that HCH owed it almost \$400,000 in past due royalties, but that it was due close to \$1.5 million in "future royalties." Interim calculated this future royalties figure by multiplying the number of weeks remaining on the franchise agreement by the average weekly service charge due from HCH. HCH moved to dismiss both claims for failure to state a claim.

Applying Florida law, the court held that both claims survived dismissal. First, the court found that to state a claim for breach of a franchise contract, a plaintiff must allege: (1) a valid contract; (2) a material breach of that contract; and (3) damages resulting from the breach. The court found Interim's allegations of a valid agreement, HCH's breach by failing to make required payment, and damages amounting to almost \$400,000 in past royalties sufficient to state a claim for breach of contract for past due royalties. Moreover, the court found, despite HCH's contention, Interim specifically alleged that it performed all its obligations under the agreement.

In addressing Interim's claim for future royalties, the court found that because a non-breaching party can choose to be placed in the position it would have been in had the contract been fully performed by seeking an award of lost profits, a party may be entitled to expectation damages for breach of a franchise agreement. To recover such damages, a claimant must prove: (1) a breach of contract; (2) loss was a proximate result of the breach; (3) the loss was, or should have been, within the reasonable contemplation of the parties; and (4) the loss is not remote, contingent, or conjectural, and the damages are reasonably certain. Applying this standard, the court found that Interim sufficiently stated a claim for breach of contract for future royalties. Specifically, the court found that because the future royalties damages were based on the average weekly fees and the remaining weeks in the agreement, the alleged losses were not too speculative. The court noted that, although Interim would be required at trial to specifically demonstrate its anticipated lost profits with reasonable certainty by competent proof, at

the pleading stage Interim's damages calculation was sufficiently certain to survive dismissal.

***Bella & Rosie Rock, LLC v. We Rock the Spectrum, LLC*, Bus. Franchise Guide (CCH) ¶ 16,152, No. CV173628MCAMAH, 2018 WL 844398 (D.N.J. Feb. 13, 2018).**

The U.S. District Court for the District of New Jersey held that one party's unilateral claim of rescission of a franchise agreement is not sufficient to invalidate a forum selection clause within that agreement. The court also rejected challenges to the validity of the forum selection clause based on fraud and New Jersey statutory law, and it found the clause valid, mandatory, and enforceable. Ultimately, after finding that the factors at issue warranted transfer, the court transferred the case to the U.S. District Court for the Central District of California pursuant to 28 U.S.C. § 1404(a).

Defendant We Rock The Spectrum, LLC (WRTS), a California company, sells franchises to operate children's gyms under the name We Rock The Spectrum. In 2016, Plaintiff Bella and Rosie Rock, LLC (BRR) and WRTS entered into a franchise agreement to operate a We Rock The Spectrum gym in New Jersey. The agreement contained a mediation clause where the parties pledged to attempt to resolve any dispute through mediation to be conducted in Los Angeles County, California. The agreement also contained a forum selection clause that designated California as the forum for any litigation and provided that California law would govern any dispute.

The New Jersey gym location opened in August 2016. Disputes between the parties quickly arose. In September 2016, WRTS served BRR with notices claiming default and numerous breaches of the agreement. In October 2016, BRR sent WRTS a notice of rescission and demanded damages. WRTS did not actively contest the rescission letter, but it petitioned the American Arbitration Association to pursue mediation, as consistent with the agreement. In lieu of engaging in mediation, BRR filed suit in the District of New Jersey alleging numerous claims, including breaches of the agreement, false representations, and violations California and New Jersey franchise statutes. WRTS then moved to transfer the matter to California under the forum selection clause. BRR opposed the motion on the grounds that the forum selection clause was unenforceable.

The primary issue in deciding to transfer the matter was whether the agreement's forum selection clause was enforceable. BRR's main argument opposing the transfer was that the forum selection clause was unenforceable because BRR rescinded the agreement and that WRTS agreed to the rescission by seeking mediation instead of contesting the rescission letter. The court rejected BRR's argument on numerous grounds. The court noted that finding that BRR effectively rescinded the agreement and invalidated the forum selection clause would have been premature. Such a finding essen-

tially would have granted BRR the relief it sought without requiring it to prove its case. Additionally, the court reasoned that BRR could not credibly assert that the agreement and its forum selection clause were no longer operative while simultaneously basing some of its claims for damages on alleged breaches of the agreement. Finally, the court found that WRTS's pursuit of mediation did not amount to acquiescence to BRR's rescission. On the contrary, by seeking mediation, WRTS acted consistently with the agreement.

The court also rejected BRR's two other arguments that the forum selection clause was invalid. BRR argued that the forum selection clause was unenforceable because the agreement was allegedly fraudulent. But, the court noted, for fraud to render a forum selection clause unenforceable, the forum selection clause itself must have been procured by fraud. BRR made no such showing. Additionally, BRR argued that the forum selection clause was invalid because it brought a claim under the New Jersey Franchise Practices Act (NJFPA), which disfavors forum selection clauses. But the NJFPA covers only franchises meeting certain required elements, including the requirement that the gross sales covered by the franchise exceed \$35,000 for the 12 months preceding the action. Because BRR only generated \$7,116.61 in sales during its fewer than sixty days of operation, it fell below the threshold amount necessary to receive protection under the NJFPA. Importantly, because BRR failed to provide any supporting authority, the court rejected BRR's argument that it should consider whether BRR's projected sales would have exceeded \$35,000 had it remained in operation for 12 months.

After dismissing all BRR's arguments against enforcement, the court found the forum selection clause valid, mandatory, and enforceable. Then, the court analyzed whether transfer was appropriate under § 1404(a). Unlike a typical § 1404(a) analysis, because the parties agreed to a forum selection clause, BRR bore the burden of establishing that the transfer to the agreed upon forum was unwarranted, and the court considered only public interest factors, not the parties' private interests. Ultimately, the court found that the public interest factors were neutral and that BRR failed to meet its burden to show that transfer to California was unwarranted. As a result, the court granted WRTS's motion to transfer venue to the Central District of California.

DAMAGES

Interim Healthcare Inc. v. Health Care@Home, LLC, Bus. Franchise Guide (CCH) ¶ 16,149, No. 17-CV-61378, 2018 WL 830113 (S.D. Fla. Feb. 12, 2018)

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

DISCOVERY

***Machinery Solutions, Inc. v. Doosan Infracore Am. Corp.*, Bus. Franchise Guide (CCH) ¶ 16,116, No. 3:15-cv-03447-JMC (D.S.C. Jan. 11, 2018)** Plaintiff Machinery Solutions, Inc. (MSI) filed a lawsuit seeking damages from defendant Doosan Infracore America Corporation (Doosan) for terminating its dealership contract with MSI. During discovery, MSI moved to compel Doosan to provide responses to a number of interrogatories and requests for admission, and the U.S. District Court for the District of South Carolina granted in part and denied in part the motions to compel.

The lawsuit between MSI and Doosan arose from Doosan's termination of its distributor agreement with MSI in August 2015. Doosan replaced MSI with Ellison Technologies, Inc. (Ellison). MSI responded by asserting claims against Doosan and Ellison for conspiracy and against Doosan for breach of contract; violation of the South Carolina Unfair Trade Practices Act; and violation of the Fair Practices of Farm, Construction, Industrial, and Outdoor Power Equipment Manufacturers, Distributors, Wholesalers, and Dealers Act (FPA). On July 31, 2017, MSI filed a motion to compel seeking to compel full and proper answers by Doosan in response to its various discovery requests, including interrogatories, requests for admission, and requests for production.

Amended Rule 26 of the Federal Rules of Civil Procedure provides that parties may obtain discovery regarding "any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Thus, courts look to three factors to determine whether information sought is within the scope of discovery: (1) privilege; (2) relevance to a claim or defense; and (3) proportionality to the needs of the case. A request is relevant if there is any possibility that the information sought might be relevant to the subject matter of the action. Whether a discovery request is proportional is determined by considering several factors, including the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to the relevant information, the parties' resources, the importance of discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. If a party fails to make a required disclosure, the other party may move to compel after it has conferred or attempted to confer with the party purportedly failing to make required disclosures. Federal Rule of Civil Procedure 37(a).

The court first addressed the interrogatories at issue. Several interrogatories sought "all facts" concerning or relating to various allegations made by Doosan. The court held that by asking Doosan to provide "all facts" relating to Doosan's legal claims or defenses, MSI's requests were overly broad and unduly burdensome. The court held that interrogatories may seek opinions or contentions that call for application of law to facts but that contention interrogatories are overly broad and unduly burdensome if they asked for "all facts" supporting a claim or defense such that the answering party would be

required to provide a narrative account of its case. To render such contention interrogatories not overly broad, a party must ask for only the “principal or material” facts that support an allegation or defense. Therefore, the court granted MSI’s motion to compel with respect to its contention interrogatories but directed Doosan to provide only the “principal and material” facts supporting its defenses rather than “all facts.”

MSI also sought information via interrogatory about in-person meetings occurring between Ellison and Doosan between January 2014 and August 2015. Doosan objected on the grounds that the interrogatory was overly broad, unduly burdensome, not proportional, and that it sought irrelevant information. Finally, Doosan argued that, pursuant to Federal Rule of Civil Procedure 33(d), it produced documents containing information that MSI sought in response to MSI’s request for production. The court disagreed with Doosan, noting that the information was relevant and that identifying meetings and providing information about them would not be overly burdensome. Finally, the court held that Doosan’s reliance on Rule 33(d) was improper because Doosan failed to specify the records that must be reviewed in sufficient detail to enable MSI to locate and identify them as readily as Doosan could. Federal Rule of Civil Procedure Rule 33(d)(1). By failing to provide Bates numbers in which the relevant information could be found, Doosan failed to meet its obligations under Rule 33(d)(1). Thus, the court granted MSI’s motion to compel.

MSI also asked Doosan to provide all facts that would support Doosan’s contention that it would qualify as a dealer under the FPA. Doosan objected on the grounds that the interrogatory called for a legal conclusion. The court held, however, that this was a proper contention interrogatory, asking Doosan to apply facts to the law and granted MSI’s motion to compel but limited the requests to “material or principal” facts, rather than “all facts.”

MSI sought a request for admission asking Doosan to admit that MSI was a “dealer or equipment dealer” for purposes of South Carolina Code Section 36–6–20. Doosan objected on the grounds that the request for admission improperly called for a legal conclusion on a matter of law. The court held that under Federal Rule of Civil Procedure 36, parties may request admissions regarding purely factual matters or the application of law to facts, but not matters of law. MSI’s request was improper under Rule 36 because it asked Doosan to admit a legal conclusion by requesting Doosan admit that MSI was a dealer under the FPA. Thus, the court denied MSI’s motion to compel a response to this request for admission.

In response to another request for admission, Doosan argued that it was vague and ambiguous and that it assumed facts not in evidence. Rule 36, however, requires the answering party to specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. Thus, Doosan’s standard form objections were insufficient to meet its obligations under Rule 36, and therefore, the court

granted MSI's motion to compel a response to this particular request for admission.

MSI also sought an order from the court requiring Doosan to produce documents identified in its privilege log that it refused to produce based on unsubstantiated claims of attorney-client privilege. The court held that to comply with the Federal Rule of Civil Procedure 26, a party asserting privilege must produce a log that identifies each document withheld, information regarding the nature of the privilege claimed, the name of the person making and receiving the communication, the date and place of communication, and the document's general subject matter. The court held that Doosan's privilege log did not allow MSI or the court to test the applicability of the attorney-client privilege as to each document it sought to withhold, and, therefore, the court ordered Doosan to provide a revised privilege log that would allow MSI and the court to determine whether the claimed privilege applied.

Finally, MSI made a general request for an order requiring Doosan to produce documents that it withheld on the grounds of relevancy but the court denied this motion to compel. It held that MSI did not point to a specific disclosure that Doosan failed to make as required by Rule 26.

Complete Nutrition Franchising, LLC v. J. Howell, LLC, Bus. Franchise Guide (CCH) ¶ 16,138, No. 8:17-CV-3170, 2018 WL 1174206 (D. Neb. Mar. 6, 2018)

Complete Nutrition, a retailer of nutritional supplements, approved two franchised stores in Tennessee for J. Howell, one in Alcoa and another in Knoxville. In the franchise agreement, franchisee agreed to the following: (1) the stores would be used for no other purpose other than operation of Complete Nutrition stores; (2) neither it nor its owners would directly or indirectly compete with Complete Nutrition; (3) for two years after termination of the agreement, neither it nor its owners would directly or indirectly have an interest in a competing business within a twenty-five-mile radius of each store; and (4) neither it, nor its owners or families, would employ or seek to employ any person who was at the time employed by Complete Nutrition.

Following the closure of the Alcoa location in early 2017, the Knoxville Complete Nutrition store was rebranded as "Alpha Nutrition" in late October 2017. The majority of Complete Nutrition's trade dress was removed from the store, and the franchisee began representing itself solely as Alpha Nutrition. Additionally, while continuing to sell all Complete Nutrition products, the Knoxville location sold them at a steep discount. After the Knoxville location ignored Complete Nutrition's demand letter, Complete Nutrition brought suit against the franchisee seeking a preliminary injunction.

When deciding whether to issue a preliminary injunction, the court weighed the four *Dataphase* factors: "(1) the threat of irreparable harm to

the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties; (3) the probability that the movant will succeed on the merits; and (4) the public interest.” *Johnson v. Minneapolis Park & Recreation Bd.*, 729 F.3d 1094, 1098 (8th Cir. 2013) (citing *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc)). As to the first factor, a preliminary injunction cannot issue without a showing of irreparable harm. The movant must show that there is a clear and present need for equitable relief, and that the harm is actual and not theoretical. Further, if the harm can be compensated, it is not considered irreparable.

The court concluded that Complete Nutrition showed a threat of irreparable harm in this case. The court noted that Alpha Nutrition was built, “at least in part, on Complete Nutrition’s goodwill, which Alpha Nutrition is now arguably misappropriating.” Alpha Nutrition’s business was also partially built on “education and instruction provided to its employees by Complete Nutrition, as consideration for services that are no longer provided.” Further, the sale of Alpha Nutrition products with its new trade dress alongside Complete Nutrition products and trade dress “creates a likelihood of confusion that has often been held to establish an irreparable injury.” Evidence suggested that Complete Nutrition’s efforts to “reestablish a franchise in the market will be impaired by the presence in the market of a former franchise.” Accordingly, it is “difficult to quantify the degree to which the defendants will be unjustly enriched by their use of the support they received from Complete Nutrition.” The court found that these damages could not be remedied with money damages; therefore, Complete Nutrition sufficiently showed irreparable harm.

With respect to the “likelihood of success on the merits” factor, the court noted that this is the most important factor in deciding whether or not to grant a preliminary injunction. In this case, the court had to determine if the Knoxville location violated the franchise agreement, related to the restrictive covenants. The court agreed that the noncompete provisions were enforceable under Nebraska law.

With respect to the last two factors, the court agreed with Complete Nutrition that public interest was not implicated in this case, but disagreed that the harm the franchisee might suffer from an injunction “is slight by comparison” to the harm sustained by Complete Nutrition. The court acknowledged that franchisee was a small business and that moving the competing operations outside the twenty-five-mile area proscribed by the franchise agreements would hardly be an inconsequential undertaking.

However, the court found that a preliminary injunction was appropriate. The court recognized that although the injunction would impose a severe burden on the franchisee, it was a burden the franchisee contracted for and was warranted considering the flagrant breach of those contracts as evidenced here. Further, the court noted that the franchisee took no corrective action, nor did it offer any defense for its ongoing conduct.

Tesla Motors, Inc. v. Johnson, Bus. Franchise Guide (CCH) ¶ 16,139, Nos. 17-2525 & 18-1010, 2018 WL 1479438 (6th Cir. Mar. 5, 2018)

Plaintiff Tesla Motors, Inc. (Tesla) served third-party subpoenas on three car dealers, who are also members of the Michigan Automobile Dealers Association (MADA), in connection with Tesla's challenge of a Michigan statute that prohibits car manufacturers from selling vehicles directly to consumers. Through the third-party subpoenas, Tesla requested communications between the dealers and MADA involving lobbying efforts in favor of legislation that subsequently prevented Tesla from obtaining a dealership license in Michigan. MADA filed a motion to quash the third-party subpoenas, which the trial court partially denied. MADA then appealed the trial court's partial denial of its motion to quash, alleging that the third-party subpoenas infringed upon the First Amendment associational privilege. Tesla moved to dismiss the appeal for lack of jurisdiction, claiming that the discovery order was not appealable.

The Sixth Circuit dismissed MADA's appeal for lack of jurisdiction. As a general rule, discovery orders are not immediately appealable "unless the trial court enters a final judgment disposing of all claims." The Perlman Doctrine provides that discovery orders directed at disinterested third parties are immediately appealable because a disinterested third party "presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance." Here, the dealers were not disinterested third parties because they were closely affiliated with MADA and expressed opposition to complying with the third-party subpoenas. Further, similar to MADA, the dealers asserted the First Amendment associational privilege in opposition to the subpoenas. As such, because the dealers were not disinterested parties who could not be expected to submit to a contempt order to preserve a claim of privilege, the denial of the trial court's motion to quash the third-party subpoenas was not immediately appealable.

Further, contrary to MADA's assertions, the trial court's discovery ruling was not a "collateral order" or an order that effectively amounted to an injunction. First, a collateral order (1) conclusively determines a disputed issue, (2) decides an issue separate from the merits of the action, and (3) is effectively unreviewable on appeal after final judgment. However, the collateral-order doctrine does not make an "individualized jurisdictional inquiry" regarding the particular order at issue but rather considers whether similar orders in that context would satisfy the collateral-order doctrine. With regard to discovery orders involving privilege, the Supreme Court has previously held that the collateral-order doctrine does not include discovery rulings addressing the attorney-client privilege. Similarly, here the Sixth Circuit declined to apply the collateral-order doctrine to a discovery order involving the First Amendment associational privilege.

Finally, the trial court's ruling was not the functional equivalent of an injunction. Under Supreme Court precedent, a federal court order that relates

only to the progress of litigation ordinarily is not considered an injunction. Accordingly, the trial court's partial denial of MADA's motion to quash third-party subpoenas was not immediately appealable under the Perlman Doctrine.

FORUM SELECTION

***Bella & Rosie Rock, LLC v. We Rock the Spectrum, LLC*, Bus. Franchise Guide (CCH) ¶ 16,152, No. CV173628MCAMAH, 2018 WL 844398 (D.N.J. Feb. 13, 2018)**

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

FRAUD

***Bella & Rosie Rock, LLC v. We Rock the Spectrum, LLC*, Bus. Franchise Guide (CCH) ¶ 16,152, No. CV173628MCAMAH, 2018 WL 844398 (D.N.J. Feb. 13, 2018)**

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

***Lomeli v. Jackson Hewitt, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,147, No. 2:17-CV-02899-ODW (KSx), 2018 WL 1010268 (C.D. Cal. Feb. 20, 2018)**

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

INJUNCTIVE RELIEF

***Cajun Global LLC v. Swati Enters., Inc.*, Bus. Franchise Guide (CCH) ¶ 16,118, 283 F. Supp. 3d 1325, No. 1:17-CV-04504-TWT (N.D. Ga. Dec. 13, 2017)**

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

***In re: Jimmy John's Overtime Litig.*, Bus. Franchise Guide (CCH) ¶ 16,105, 877 F.3d 756 (7th Cir. 2017)**

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

***Tesla Motors, Inc. v. Johnson*, Bus. Franchise Guide (CCH) ¶ 16,139, Nos. 17-2525 & 18-1010, 2018 WL 1479438 (6th Cir. Mar. 5, 2018)**

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

***Taylor Inv. Partners II, LLC v. Moe's Franchisor, LLC*, Bus. Franchise Guide (CCH) ¶ 16,150, 811 S.E.2d 62 (Ga. Ct. App. 2018)**

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

LABOR AND EMPLOYMENT***Boone v. Clark Foods, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,115, No. 7:16-CV-160 (HL) (M.D. Ga. Dec. 28, 2017)**

A restaurant employee alleged age discrimination against Clark Foods, Inc. (Clark), Sunshine Partners (Sunshine), and IHOP Corporation (IHOP). IHOP and Sunshine moved for summary judgment on the grounds that neither IHOP nor Sunshine exercised any control over employment-related matters with respect to franchisee Clark's business, which was an independent, third-party entity. The U.S. District Court for the Middle District of Georgia agreed with IHOP and Sunshine that the only relationship relevant to Boone's age discrimination claims was the relationship between her and Clark, her direct employer.

Boone filed her action against Clark, Sunshine, and IHOP for claims of discrimination in violation of the Age Discrimination and Employment Act (ADEA), 20 U.S.C. § 621. IHOP and Sunshine took the position that they never employed Boone and were not involved in her discharge or in any events forming the basis for her ADEA claim. The claim itself was based on conduct committed by Clark's manager, Jessica Pitts, who made a number of comments regarding Boone's age and purportedly treated her differently from other employees based on her age. Boone asked the court to deny the motion for summary judgment because it was premature and she sought the opportunity to first conduct discovery. The court held that discovery may result in the production of a franchise agreement entered into between IHOP and Sunshine, and between Sunshine and Clark, but those documents would not change the fact that Clark was the sole employer as defined by the ADEA.

The court held that when determining whether a party other than a direct employer can be liable for employment claims, courts consider two factors: (1) how much control the purported employer exerted on the employee; and (2) whether the alleged employer had the power to hire, fire, or modify the terms and conditions of the employee's employment. The court found three circumstances in which two or more separate entities should be treated as a single, integrated enterprise when determining whether both entities can be deemed employers. First, where two ostensibly separate entities are highly integrated with respect to ownership and operations, courts may count them as a single entity or a "single employer" or "integrated enterprise." Second, where two entities contract with each other for the performance of some task, and one company retains sufficient control over the terms and conditions of employment of the other company's employees, the two entities can be treated as joint employers. Finally, where an employer delegates sufficient control of rights over employees to a third party, courts may treat the third party as an agent of the employer and aggregate the two into a single entity for purposes of employment-related claims.

The court held that Boone presented no evidence that IHOP or Sunshine could be included in a single entity with Clark. Although IHOP and Sun-

shine both conducted periodic inspections, those inspections were limited to ensuring that franchisees were in compliance with branding, advertising, menu specifications, and other contract specifications. The only connection between Clark and IHOP and Clark and Sunshine was the existence of a sub-franchise or license agreement, and courts have consistently held that a franchise relationship does not create an employment relationship between a franchisor and a franchisee's employees. Here, there was also no evidence that IHOP or Sunshine employed Boone or those who discriminated against her, and there was no evidence that either IHOP or Sunshine exercised any authority in the decision to fire Boone. Because IHOP and Sunshine did not exercise control over Clark—Boone's direct employer—with respect to daily operations and employment practices, and because there was no evidence that IHOP or Sunshine were directly involved in the hiring or firing of Clark's employees, the court granted Sunshine and IHOP's motion for summary judgment.

Tangas v. Int'l House of Pancakes, LLC, Bus. Franchise Guide (CCH)
¶ 16,151, 298 F. Supp. 3d 116 (N.D. Ohio Feb. 8, 2018)

Defendant International House of Pancakes, LLC (IHOP) hired plaintiff Autumn Lee Tangas (Tangas) as a franchise bureau consultant to act as a liaison between IHOP corporate and various franchisees. Among the franchisees Tangas oversaw was Tarek Elkafrawi (Elkafrawi), who operated IHOP franchises in Ohio and Indiana. Tangas became increasingly concerned about Elkafrawi's "poor business structure and weak management skills" and even told her supervisor that she questioned whether Elkafrawi was under-reporting sales. IHOP corporate ignored Tangas's concerns.

In 2004, several years after Tangas met Elkafrawi, Tangas's domestic partner, Lisa Ross (Ross), loaned Elkafrawi \$50,000 from her and Tangas's joint bank account. Though there was a dispute as to whether it was merely a loan from Ross or an investment by Ross and Tangas, eventually Elkafrawi returned the money to Ross. Tangas never disclosed these events to IHOP or her supervisor.

In September 2011, the FBI raided five IHOP restaurants that were overseen by Tangas and operated by Elkafrawi. Initially, at the request of IHOP's parent organization, DineEquity, Tangas cooperated with the FBI's investigation. When asked about Elkafrawi during an interview with two FBI agents, Tangas disclosed Ross's loan to Elkafrawi. This led to an internal investigation by IHOP. Soon after speaking with IHOP's in-house counsel, Tangas hired an attorney at her own expense. IHOP's legal department asked Tangas to travel to California to participate in an interview, but, on the advice of counsel, Tangas declined. In March 2012, IHOP terminated Tangas for violating the IHOP Code of Conduct and refusing to participate in the California interview.

In May 2012, a federal grand jury indicted Tangas, Elkafrawi, and more than fifteen others on charges arising from Elkafrawi's operation of his

IHOP franchises. In May 2014, after Tangas incurred more than \$130,000 in legal fees, the charges against Tangas were dismissed with prejudice.

In 2015, Tangas filed suit against IHOP, alleging: (1) wrongful termination in violation of Ohio's public policy favoring the right to consult with counsel, and (2) indemnification for the legal fees she incurred in the criminal case. Though IHOP moved to dismiss both claims, the court held that Tangas stated a plausible cause of action for wrongful discharge. However, the court dismissed Tangas's indemnification claim with leave to amend as to whether Ohio or Delaware law applied. After Tangas amended her complaint, both IHOP and Tangas filed motions for summary judgment regarding the indemnification claim. The parties' motions addressed two issues: (1) whether Tangas had the right to indemnification under DineEquity's bylaws, and (2) whether Tangas had the right to indemnification under IHOP's LLC agreement.

The court granted IHOP's motion for summary judgment and denied Tangas's motion. First, the court found that Tangas did not have the right to indemnification under DineEquity's bylaws because (1) Delaware law only requires corporations to indemnify officers and directors, not employees, and (2) Tangas was an employee of IHOP, not DineEquity. Second, Tangas did not have the right to indemnification under IHOP's LLC agreement because (1) Tangas was no longer a "covered person" under IHOP's operating agreement after her employment was terminated, and (2) IHOP was relieved of its duty to indemnify a "covered person" who engaged in "fraud, willful misconduct, bad faith or gross negligence." Specifically, IHOP reasonably determined that Tangas engaged in fraud by failing to disclose her conflict of interest with respect to Ross's loan to Elkafrawi. Further, IHOP reasonably determined that Tangas engaged in willful misconduct when she refused to attend the internal IHOP interview in California. As such, no reasonable jury could find that IHOP and DineEquity failed to undertake an adequate investigation and make "a reasoned business judgment not to indemnify Tangas."

NEGLIGENCE

***Lomeli v. Jackson Hewitt, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,147, No. 2:17-CV-02899-ODW (KSx), 2018 WL 1010268 (C.D. Cal. Feb. 20, 2018)**

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

RICO

***Lomeli v. Jackson Hewitt, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,147, No. 2:17-CV-02899-ODW (KSx), 2018 WL 1010268 (C.D. Cal. Feb. 20, 2018)**

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

RIGHT OF FIRST REFUSAL

***Bobcat of Duluth v. Clark Equip. Co.*, Bus. Franchise Guide (CCH) ¶ 16,128, No. 16-1007 (PAM/LIB), 2018 WL 559531 (D. Minn. Jan. 25, 2018)**

The U.S. District Court for the District of Minnesota vindicated a manufacturer in its application of its right of first refusal and transfer provisions in a dealer agreement. Plaintiff Bobcat of Duluth (Bobcat of Duluth), an independent dealer of defendant Clark Equipment Co. d/b/a Bobcat Co. (Bobcat), sued Bobcat for violating the Minnesota Heavy and Utility Equipment Manufacturers and Dealer Act (MHUEMDA) and the Minnesota Agricultural Equipment Dealers Act (MAEDA), and for breach of contract, alleging that Bobcat placed unreasonable restrictions when Bobcat of Duluth tried to sell its dealership and cut the purchase price by more than half.

Bobcat of Duluth signed annual dealer agreements with Bobcat for many years. In 2002, a Bobcat representative suggested that Bobcat of Duluth supplement its sales by selling equipment manufactured by Kubota Tractor Corporation (which had competitive product lines), and Bobcat of Duluth did so. In 2012, Bobcat changed its policies to require new dealers to sell Bobcat products exclusively, but this policy was not added to Bobcat of Duluth's annual dealer agreements.

In 2014, Bobcat of Duluth informed Bobcat that it wanted to sell its business, and Bobcat informed Bobcat of Duluth that it would require the buyer to sell Bobcat products exclusively and suggested that Bobcat of Duluth sell the Kubota portion of its dealership separately. When Bobcat of Duluth found a buyer—Quality Forklift Sales and Service, Inc. (Quality Forklift)—it wanted to buy both the Bobcat and the Kubota portions of the dealership. Bobcat of Duluth sent the letter of intent (LOI) to Bobcat. Bobcat conditionally approved this transfer, but then also sent a letter requiring exclusivity to Bobcat products. When Quality Forklift would not agree to these terms, Bobcat refused to consent to the transfer.

Bobcat sought summary judgment on Bobcat of Duluth's claims. The MHUEMDA and MAEDA provide that "no equipment manufacturer 'may terminate, cancel, fail to renew, or substantially change the competitive circumstances of a dealership agreement without good cause.'" Bobcat argued that Bobcat of Duluth's claims under these acts failed because it was still a dealer under the dealer agreement. Bobcat of Duluth argued that the "substantial change" element of the acts had been breached. But the court cited law defining "substantial change" under the acts, which provide that it "is a change that has substantially adverse although not necessarily lethal effect on the dealership. It is a change that is material to the continued existence of the dealership, one that significantly diminishes its viability, its ability to maintain a reasonable profit over the long term or to stay in business." The court found that Bobcat of Duluth did not identify how this change harmed its ability to make a reasonable profit in the long term or

to stay in business, and thus there was no substantial change in the competitive circumstances of the dealership agreement. The court also found that the acts do not provide a claim for unreasonably failing to consent to a transfer. Accordingly, the claims under both acts were dismissed.

Bobcat of Duluth also claimed that Bobcat breached the right-of-first refusal provisions of the dealer agreement by refusing to approve the sale. Bobcat first argued that the separate assignment provision in the dealer agreement gave it the right to approve or deny a proposed transfer; in response, Bobcat of Duluth argued that the right-of-first refusal provision of the agreement controlled this situation instead. The court agreed with Bobcat, as these provisions covered different rights. Bobcat had a right to choose its dealers, and withholding its consent under this provision did not breach the agreement or the covenant of good faith and fair dealing.

Bobcat also argued that the right-of-first refusal provision of the agreement, even if it applied, was not triggered because the letter of intent was not an offer in that it was not final and allowed further negotiation. The court agreed that the letter of intent was an agreement to develop an offer and thus was not an actual offer. It also noted that even if it was an offer, that would mean that Bobcat would have had to purchase the whole dealership, including the Kubota portion, which would lead to the absurd result of Bobcat purchasing its competitor's product lines. Here, too, the court found that Bobcat did not breach the agreement or the covenant of good faith and fair dealing due to its absolute right to choose its dealers.

The motion for summary judgment was granted in its entirety in favor of Bobcat.

***Audi of Am., Inc. v. Bronsberg & Hughes Pontiac, Inc.*, No. 3:16-cv-2470, 2018 WL 1035767 (M.D. Penn. Feb. 23, 2018)**

The U.S. District Court for the Middle District of Pennsylvania held Audi of America, Inc. (Audi) to its right of first refusal and no more. Plaintiff Audi sued defendant Bronsberg & Hughes Pontiac, Inc. (referred to as Wyoming Valley in the opinion)—which operated seven dealerships, including an Audi dealership under a dealership agreement—to prevent a transfer of the dealership. Wyoming Valley had entered into an asset purchase agreement with North American Automotive Services, Inc. and related entities (referred to as Napleton in the opinion) for its seven dealerships in one single transaction, without separately pricing the dealerships. Napleton ultimately also intervened in this action.

When Wyoming Valley informed Audi of the transaction, Audi responded that it could not analyze its right of first refusal under the dealership agreement without the Audi dealership being separately apportioned in the deal, and it requested a breakdown of the price or a withdrawal of the deal. Wyoming Valley responded that the deal did not have an allocation of the purchase price and that would require more negotiations and an amendment to the deal. Later, Wyoming Valley provided Audi with an

\$8 million value for the Audi dealership (almost half of the deal total), but also stated that such a breakdown in the context of an auto multiplex was very complicated.

Audi held that this was not a good-faith breakdown and sued Wyoming Valley to enjoin the sale to Napleton and to seek a declaration that Wyoming Valley breached the dealership agreement and the Pennsylvania Board of Motor Vehicles Act. After an initial temporary restraining order and preliminary injunction preventing Wyoming Valley from selling any of the assets under the Napleton deal, the court lifted the restrictions on the sale of unrelated dealerships (for brands unrelated to Audi) but kept in place the restrictions on the sale of Audi and Volkswagen dealerships.

After the lawsuit commenced, however, Wyoming Valley and Napleton amended their deal to remove the Audi dealership from the sale altogether, although the purchase price did not change. Audi alleged that this was not a valid amendment because it was just trying to get around Audi's right of first refusal. Wyoming Valley and Napleton later amended the deal a second time to specifically state what dealerships Napleton was purchasing and excluding any assets of the Audi and Volkswagen dealerships.

Audi and Wyoming Valley sought summary judgment on Audi's claims of breach of the dealership agreement, breach of the Act, and declaratory judgment. The dispute focused on whether Audi still had an active right of first refusal so that it could purchase Wyoming Valley's Audi dealership. Audi first argued that the Audi assets were still included in the asset purchase agreement, despite the second amendment, because these assets were still a critical and essential part of the deal. The court found, however, the standard under both the Act and the dealership agreement was not if the assets were critical to the deal, but rather if Wyoming Valley was attempting "to transfer substantially all of its Audi assets or substantially change the ownership interest of its Audi dealership." Because the amended deal did not do this, it did not create Audi's right of first refusal under the Act or the dealership agreement.

Audi next argued that the right of first refusal turned into an irrevocable option to purchase the Audi dealership. The court relied on a New York Court of Appeals case, *Lin Broadcasting Corp. v. Metromedia, Inc.*, 542 N.E.2d 629 (N.Y. 1989), which analyzed the difference between a right of first refusal and an option to purchase—the difference being that an option creates the power of the optionee to compel the seller to sell at an agreed price, while a right of first refusal has a willing seller who wants to part with the property. The court found Audi only had a right of first refusal. It pointed to Audi's allegation that it had been unable to use its right of first refusal because Wyoming Valley did not provide a good faith breakdown. It also noted that Audi's only right was to prevent the sale of the assets to another party, which Audi accomplished when Wyoming Valley and Napleton dropped the assets from the deal and the court previously ordered those assets severed from the deal. Audi tried to argue, in addition, that

Wyoming Valley removed the assets from the deal in bad faith and thus was subject to a case-law exception referenced in *Lin Broadcasting*, but the court rejected this argument because the supporting case was distinguishable—where the party used a long-term lease to maneuver permanently around a five-year right of first refusal, which did not happen here. Accordingly, the court granted summary judgment on Audi’s claims in favor of Wyoming Valley.

STATUTORY ISSUES

***Bobcat of Duluth v. Clark Equip. Co.*, Bus. Franchise Guide (CCH) ¶ 16,128, No. 16-1007 (PAM/LIB), 2018 WL 559531 (D. Minn. Jan. 25, 2018)**

This case discussed under the topic heading “Right of First Refusal.”

TORTIOUS INTERFERENCE

***Oneida Grp., Inc. v. Steelite Int’l U.S.A., Inc.*, Bus. Franchise Guide (CCH) ¶ 16,107, No. 17-cv-0957 (ADS)(AKT), 2017 WL 6459464 (E.D.N.Y. Dec. 15, 2017)**

The plaintiff Oneida Group, Inc. (Oneida) sued a number of defendants, including Steelite International U.S.A. Inc. (Steelite), Tablewerks Inc. (Tablewerks), and certain former Oneida employees who went to work for Steelite for misappropriation of trade secrets and tortious interference with business relations. Several defendants moved to dismiss Oneida’s claims. The U.S. District Court for the Eastern District of New York denied the motion to dismiss with respect to the trade secret misappropriation claims but granted the motion to dismiss with respect to Oneida’s claim for tortious interference with business relations.

Oneida designs and sells dinnerware and sourced many of its products from Royal Porcelain Public Co. Ltd. (Royal Porcelain). Oneida purchased the Royal Porcelain products through Tablewerks and alleged that it had the exclusive right to sell Royal Porcelain products in North America. In December 2016, however, Steelite purchased Tablewerks’ assets and notified Oneida that Steelite would begin self-distributing Royal Porcelain products in North America and that it did not believe there was an agreement between Oneida and Tablewerks. Oneida alleged that Steelite and Tablewerks were now selling dinnerware designs that Oneida had previously sold and that it had trade dress protections in those designs. Moreover, Oneida argued that Steelite had misappropriated trade secrets, including its go-to-market strategy based on proprietary customer segmentation, end-user analysis, product margins, costs, rebate programs, proposed changes in those rebate programs, sales forecasting, and customer-specific account strategy.

In order to prevail on its claim for misappropriation of trade secrets under the Ohio Uniform Trade Secrets Act, Oneida had to show: (1) the existence of a trade secret; (2) the acquisition of a trade secret as a result of a confidential relationship; and (3) the unauthorized use of a trade secret. The court first held that the purported trade secrets were sufficiently alleged as trade secrets because other courts have granted trade secret protection to similar information, such as grand strategies, pricing, distribution and marketing strategies, and confidential business relationships. Moreover, the court held that Oneida had sufficiently alleged it took steps to keep that information secret by having third parties execute nondisclosure agreements and including confidentiality provisions in its employee handbook.

With respect to the acquisition of trade secrets as a result of a confidential relationship, Oneida alleged that two former employees were privy to the purported trade secrets and that they brought these trade secrets with them when they went to work for Steelite. Although Oneida could not specifically allege which trade secrets each of the former employees was privy to, the court held that at the motion to dismiss stage, Oneida's pleadings were sufficient because it identified trade secrets with specificity and sufficiently alleged that the two former employees had acquired trade secrets as a result of their confidential relationship with Oneida.

With respect to whether or not Steelite used the trade secrets, the court held it was a very close call because the allegations were at most circumstantial. The court held that Oneida barely met its pleading standard to allege unlawful use of trade secrets but that it did so by alleging that, within two months of acquiring Tablewerks, Steelite offered dishes previously sold by Oneida at a trade show; that Steelite was attempting to sell dishes to Oneida's customers; and that it had two examples showing Steelite employees in possession of confidential Oneida information. Therefore, the court held that Oneida sufficiently alleged facts at the motion to dismiss stage for a claim for misappropriation of trade secrets.

The court then turned to Oneida's claim for tortious interference with business relations. The elements of a tortious interference claim are: (1) the plaintiff had business relations with third parties; (2) the defendant interfered with those business relationships; (3) the defendant acted for a wrongful purpose or used dishonest, unfair, or improper means; and (4) the defendant's act injured a business relationship. The court held that Oneida failed to adequately allege the existence of business relations with a third party. Although Oneida made general reference to customers, the court held that this was insufficient to allege the element of business relations with a third party because it was vague and had no specifics as to which business relationship had been injured. The court, therefore, dismissed Oneida's claim for tortious interference but did so without prejudice, offering Oneida thirty days to amend its complaint to address the shortcomings in its claim for tortious interference.

***Roxul USA, Inc. v. Armstrong World Indus., Inc.*, Bus. Franchise Guide (CCH) ¶ 16,137, No. CV 17-1258, 2018 WL 810143 (D. Del. Feb. 9, 2018).**

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

TRADEMARK INFRINGEMENT

***Heartland Consumer Prods. LLC v. DineEquity, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,135, No. 1:17-cv-01035-SEB-TAB, 2018 WL 465784 (S.D. Ind. Jan. 18, 2018)**

This case involves a trademark dispute between the owners of the Splenda® sweetener brand and the Applebee’s and IHOP franchises. After the U.S. District Court for the Southern District of Indiana denied the defendant franchisors’ motion to dismiss, the case continued as to whether each defendant engaged in infringing activity through their manufacture of off-brand artificial sweetener in yellow packets and their distribution of same to their Applebee’s and IHOP franchisee restaurants.

In 2015, Plaintiffs Heartland Consumer Products LLC and TC Heartland LLC (collectively, Heartland) purchased the Splenda® brand; with that purchase came several design trademarks that were either registered or pending registration in the U.S. Patent and Trademark Office. Several of the design trademarks protected the artificial sweetener’s yellow packaging color. DineEquity, Inc., which owns and operates Applebee’s and IHOP, began packaging and selling off-brand, lower-quality sucralose sweetener in yellow packets similar to those used for packaging Splenda®. DineEquity then distributed the Non-Splenda Sweetener packets to Applebee’s and IHOP restaurants in their franchise network and allegedly represented that the Non-Splenda Sweetener packets contained genuine Splenda®. Heartland received multiple reports from Applebee’s and IHOP customers expressing their confusion over what sweetener they received, and some even stated they believed that Splenda® is of a lesser quality than the Non-Splenda Sweetener they may have consumed.

As a result, Heartland conducted an investigation and discovered that at forty-six Applebee’s and IHOP franchises around the country, the restaurant staff affirmatively represented that the Non-Splenda sweetener offered to customers was in fact Splenda®. Due to these misrepresentations and the existence of customer confusion, Heartland brought suit against DineEquity and other franchisors alleging trademark infringement, false design of origin, unfair competition, and trademark dilution. Specifically, Heartland asserted that franchisors DineEquity, Applebee’s, Applebee’s Franchisor, IHOP, IHOP Franchising, and IHOP Franchisor maintained “significant control” over their respective Applebee’s and IHOP franchisee restaurants. Further, Heartland alleged that the defendant franchisors infringed upon Heartland’s

trademark rights and misrepresented Non-Splenda Sweetener as Splenda® by providing customers with Non-Splenda Sweetener without Heartland's authorization and without distinguishing it from Splenda®, thereby causing customer confusion.

In response, the defendant franchisors filed a motion to dismiss, arguing that the yellow packaging color served a functional purpose in that the yellow color distinguished the sweeteners as sucralose rather than low-calorie sweetener or sugar and that such packaging was therefore not a protectable trademark feature. Further, the defendant franchisors asserted that Heartland's complaint collectively referred to the franchisors and therefore did not provide sufficient notice to each individual defendant as to its alleged wrongdoing.

The court denied the franchisor defendants' motion to dismiss regarding both the trademark infringement claims and notice pleading requirements under Federal Rule of Civil Procedure Rule 8. First, under precedent established in *Qualitex Co. v. Jacobson Products Co., Inc.*, 514 U.S. 159, 162 (1995), color alone may be protected as a trademark where the color signifies a product's brand and identifies and distinguishes it from other products. Color cannot be protected as a trademark, however, "if it serves a functional purpose that would place competitors at a disadvantage by significantly hindering their ability to 'replicate important non-reputation-related product features.'" Here, the court held that the complaint's allegations supported the inference that the yellow packaging has a secondary meaning and serves only to signify that the contents in the packets are Splenda®, not sucralose generally. Further, Heartland's claims against the defendant franchisors, collectively, were not insufficient to satisfy the notice pleading requirements under Rule 8. Specifically, Heartland's complaint alleged that DineEquity packaged the Non-Splenda Sweetener in yellow packets, that each defendant distributed the Non-Splenda Sweetener packets to Applebee's and IHOP customers, and that the defendants maintained "significant control" over their respective Applebee's and IHOP restaurants that made misrepresentations regarding the Non-Splenda Sweetener to customers. As such, Heartland's complaint plausibly alleged that each defendant directly participated in infringing activity due to the control they exerted over their franchised restaurants. The discovery process will make it clear whether the allegations of infringing activity against each defendant franchisor prove to be true. Accordingly, despite Heartland's collective reference to all defendant franchisors, Rule 8's notice pleading requirements were satisfied.

Complete Nutrition Franchising, LLC v. J. Howell, LLC, Bus. Franchise Guide (CCH) ¶ 16,138, No. 8:17-CV-3170, 2018 WL 1174206 (D. Neb. Mar. 6, 2018)

This case discussed under the topic heading "Discovery."

TRADE SECRETS

***Oneida Grp. Inc. v. Steelite Int'l U.S.A., Inc.*, Bus. Franchise Guide (CCH) ¶ 16,107, No. 17-cv-0957 (ADS)(AKT), 2017 WL 6459464 (E.D.N.Y. Dec. 15, 2017)**

This case discussed under the topic heading “Tortious Interference.”