Franchising & Distribution Currents

Earsa R. Jackson, Maral Kilejian & Matthew Gruenberg

ANTITRUST

Fuentes v. Royal Dutch Shell PLC, No. 2:18-CV-05174 (E.D. Pa. Nov. 29, 2018)
This case is discussed under topic heading "Labor and Employment."

Ms. Jackson

In re Automotive Parts Antitrust Litig., Bus. Franchise Guide (CCH) ¶ 16,302, No. 12-MD-02311, 2018 WL 7108016 (E.D. Mich. Nov. 6, 2018)
After six years of litigation, the court approved a class action settlement in which it had been alleged that certain auto dealers and certain auto parts makers had conspired to fix the price of auto parts. The contentious price-fixing class action was brought on behalf of direct purchasers who were overcharged for various automotive parts, including wire harness products, heater control panels, instrument panel clusters, fuel senders, occupant safety restraint system products, bearings, air conditioning systems, starters, windshield wiper systems, and windshield washer systems.

Ms. Kilejian

The court granted preliminary approval of the class action settlement, finding it fair, adequate, and reasonable. The settlement provides $115 million in settlement funds that will benefit eligible automobile dealers who purchased the relevant component parts or new vehicles containing those parts during the specified class periods. Following Sixth Circuit precedent, the U.S. District Court for the Eastern District of Michigan noted that it considered a number of factors when determining whether a settlement should be granted final approval, including (1) the likelihood of success on the merits

Mr. Gruenberg

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weighed against the amount and form of the relief offered in the settlement; (2) the complexity, expense, and likely duration of further litigation; (3) the opinions of class counsel and class representatives; (4) the amount of discovery engaged in by the parties; (5) the reaction of absent class members; (6) the risk of fraud or collusion; and (7) the public interest. The court found an overwhelming number of these factors had been met. Specifically discussing the expense of continued litigation and the lack of opposition to the settlement, the court granted preliminary approval. Further, the court found that the settlements met the requirements of Rule 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure, and the settlement class was granted certification for settlement purposes only.

***Matthew Enter., Inc. v. Chrysler Grp., LLC*, Bus. Franchise Guide (CCH) ¶ 16,264, No. 17-16010 (9th Cir. Sept. 26, 2018)**

Matthew Enterprise Inc. (Enterprise), a Chrysler, Jeep, Dodge, and Ram dealership in Northern California, unsuccessfully challenged dealership incentive programs offered to other nearby dealerships by Chrysler as a form of price discrimination under the Robinson-Patman Act. Reviewing the district court's dismissal of Enterprise's challenge to the rental assistance incentive de novo, the Ninth Circuit held that because there was a four-year difference in the commencement of business between Enterprise and the allegedly favored party, the claim was properly dismissed.

Further, the court also found that Enterprise's request for a new trial was properly denied. Enterprise had requested jury instructions including a proposed addition of the concept of "evenhandedness." However, the court noted that the notion of evenhanded treatment is subsumed within the given instruction's requirement of a showing that the incentives would not have been practically available had Enterprise engaged in commercially reasonable efforts to achieve them. Because Enterprise had failed to take commercially reasonable steps to avail itself of the proposed incentive, the jury instruction was proper.

Finally, the court noted that the district court's allocation of the burden of proof of price discrimination to plaintiff was not erroneous. Under the Robinson-Patman Act, a purchaser plaintiff must establish that the seller has engaged in price discrimination; the existence of functional availability, as it existed here, defeated the claim.

ARBITRATION

***Doctor's Assocs., Inc. v. Kirksey*, Bus. Franchise Guide (CCH) ¶ 16,312, No. 3:18-cv-963 (JCH), 2018 WL 6061573 (D. Conn. Nov. 19, 2018)**

The United States District Court for the District of Connecticut rejected an argument by a Subway sandwich shop franchisee, Karlton Kirksey, that the entire arbitration provision in the agreement with the franchisor, Doctor's Associates Inc. (DAI), was invalid.

DAI initiated arbitration proceedings against its franchisee, Kirksey, alleging that he was in default of the franchise agreement. In response, Kirksey filed suit in Louisiana state court seeking to enjoin the arbitration from being held.

The case was removed to the United States District Court for the Eastern District of Louisiana, which found that the arbitration provision was enforceable against Kirksey. Noting that the agreement between the two parties contained a "delegation provision," which allows questions of arbitrability to be sent to arbitration so long as the parties clearly and unmistakably express their intent to do so, the court found that DAI and Kirksey had agreed to send all questions of arbitrability to the arbitrator rather than the courts. Even though Kirksey argued that this decision contravenes the Supreme Court's holding in *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010), the court noted, instead, that *Rent-A-Center* stands for the proposition that when the agreement contains a delegation provision, all challenges to the validity of that agreement's arbitration provisions must be decided by the arbitrator.

***Safe Step Walk in Tub Co. v. CKH Indus. Inc.*, Bus. Franchise Guide (CCH) ¶ 16,270, 242 F. Supp. 3d 245 (S.D.N.Y. 2017)**
This case is discussed under the topic heading "Definition of Franchise."

BANKRUPTCY

***In re Meena, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,304, Case Nos. 8-18-74693-reg, 8-18-74694-reg, 8-18-74695-reg, 8-18-74804-reg, 2018 WL 5880916 (Bankr. E.D.N.Y. Nov. 6, 2018)**
The court determined that certain individual and corporate debtors did not file for bankruptcy in bad faith when a franchisor moved to dismiss and requested relief from the automatic stay. The franchisor failed to show that it was a secured creditor of the corporate debtors as separate legal entities, each of which owned collateral related to the franchise business.

Two individuals, Choudhry and Gulmeena Javaid (Individual Debtors), entered into three franchise agreements with General Nutrition Corporation (GNC). The Individual Debtors together owned three corporations, Meena, Inc., Desa of NY, Inc., and SDA, Inc. (collectively, Corporate Debtors), which conducted business from each of the franchises. In addition to the franchise agreements, the Individual Debtors and GNC entered into two purchase money security interests and filed four UCC-1 financing statements listing the Individual Debtors as the debtors and the collateral as the inventory in the franchises. Despite having no memorialized agreement with the Corporate Debtors, GNC regularly sold them merchandise and accepted payments from them.

On August 14, 2017, GNC attempted to terminate the three franchises due to a pattern of wholesaling in violation of the franchise agreements. The

following day, GNC sued the Individual Debtors in the Western District of Pennsylvania for breach of the franchise agreements and fraud. GNC and the Individual Debtors executed an agreement (Settlement Agreement), which administratively closed the district court action. After the Individual Debtors failed to comply with the Settlement Agreement, on June 13, 2018, GNC sought emergency relief from the district court. The court issued an order on consent of the parties (Consent Order) that required the Individual Debtors to make certain payments or GNC could immediately take control of the franchises.

Notably, the Corporate Debtors were not named in the franchise agreements, were not signatories to the security agreements, were not named as debtors on the financing statements, were not named as parties in the district court action, and were not signatories to the Settlement Agreement.

On July 12, 2018 (the date on which GNC was to receive payment from the Individual Debtors under the Settlement Agreement), the Corporate Debtors each filed Chapter 11 bankruptcy petitions, listing GNC as an unsecured creditor. On July 17, 2018, the Individual Debtors filed a bankruptcy petition, thereby staying the Pennsylvania district court case. The Individual Debtors' bankruptcy petition did not list the inventory of the franchises as assets; rather, the Corporate Debtors' petitions included the inventory in their schedules. GNC filed motions to dismiss, asserting that the Individual Debtors and Corporate Debtors filed for bankruptcy in bad faith. However, GNC did not differentiate between the Individual Debtors and the Corporate Debtors when describing its claim. As a result, GNC described itself as a secured creditor with a claim of almost $2 million, and it requested dismissal or relief from the automatic stay.

The court denied GNC's motions to dismiss. First, the court discussed the need to determine the legal relationships between the parties. Despite that GNC treated the Corporate Debtors as though they were parties to the franchise agreements, no relationship between GNC and the Corporate Debtors was memorialized in writing. Rather, the Corporate Debtors were each separate legal entities that were never mentioned in the parties' various agreements. Unless the court pierced the corporate veil, the Corporate Debtors had no rights under the franchise agreements. As a result, the Corporate Debtors were not franchisees, and GNC was not a secured creditor of the Corporate Debtors. Therefore, GNC had no cash collateral rights with respect to the Corporate Debtors, and the bankruptcy petitions of the Corporate Debtors had no effect on the franchise agreements.

With respect to GNC's secured status, GNC not only was an unsecured creditor of the Corporate Debtors, but it also did not perfect a security interest in the inventory owned by the Corporate Debtors. Aside from the fact that the Corporate Debtors were not signatories of the security agreements, GNC failed to name the Corporate Debtors on the financing statements and therefore did not have a perfected lien on any inventory owed by the Corporate Debtors. The fact that the Individual Debtors incorporated their

business did not extend the financing statements to cover inventory owned by the Corporate Debtors.

The court next held that the franchise agreements were not terminated and thus a franchisor-franchisee relationship still existed. The Settlement Agreement and Consent Order allowed the Individual Debtors to continue operating the franchises. Further, the court found that there was in fact a relationship between GNC and the Corporate Debtors, but the nature of that relationship was still unclear.

Finally, the court found that the bankruptcy petitions—filed by both the Individual Debtors and the Corporate Debtors—were not filed in bad faith, and therefore there was no cause to warrant dismissal. Though the timing of the filings could be construed as intent to delay or frustrate the efforts of creditors to enforce their rights, GNC failed to establish that it was a *secured* creditor, as GNC did not sell any inventory to the Individual Debtors and failed to perfect its interest in the inventory sold to the Corporate Debtors. All of the other factors regarding bad faith either did not exist or could not be determined based on the record before the court. Accordingly, the court left the automatic stay in place.

***In re RMH Franchise Holdings, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,263, 590 B.R. 655 (Bankr. D. Del. 2018)**

The court affirmed the right of a franchisee to continue operating its restaurants during bankruptcy. Because the franchisor failed to provide unambiguous notice of termination under Kansas law prior to the time at which the franchisee filed for bankruptcy, the franchises became property of the estate and could not be terminated due to the automatic stay.

Franchisor Dine Brands Global, Inc. (Dine Brands) sought control of various Applebee's restaurants, all of which were operated by RMH Franchise Holdings, Inc. (RMH), the second-largest Applebee's franchisee. Dine Brands claimed that RMH failed to pay royalty fees since June 2017 and owed Dine Brands more than $12 million. Dine Brands asserted that it terminated franchise agreements with RMH as a result of RMH's default.

In September 2017, Dine Brands sent RMH a termination letter, with ninety days to cure the default in royalty payments. Over the next few months, Dine Brands sent various cure extension letters to RMH. On May 8, 2018, RMH and its affiliates filed Chapter 11 bankruptcy petitions. Also on May 8, 2018, Dine Brands (1) sent a forbearance letter with respect to RMH's default; (2) sent a letter purporting to terminate the franchise agreements for franchises in Arizona and Texas, retroactively effective to April 27, 2018; and (3) filed suit against RMH in a district court in Kansas, seeking a declaratory judgment that the franchise agreements terminated before RMH's bankruptcy petition was filed.

Both Dine Brands and RMH filed motions for summary judgment. Dine Brands contended that the franchise agreements automatically terminated when the final cure period expired, pursuant to the September 2017

termination letter. RMH, however, asserted that Dine Brands did not provide it with unambiguous notice of intent to terminate the agreements. Specifically, RMH argued that the cure extensions did not discuss termination and that a forbearance letter delayed the exercise of Dine Brands' termination rights. Since termination could not have been exercised before the bankruptcy petition was filed, RMH claimed that the franchise agreements were property of the estate and could not be terminated as a result of the automatic stay.

The court granted RMH's motion for summary judgment. Specifically, the cure extension letters did not reference termination and therefore could not have provided unambiguous notice of termination. Further, a forbearance letter, signed in April 2018, stated that Dine Brands would not enforce its rights or remedies until May 8, 2018. Dine Brands failed to exercise its rights on May 8, 2018, before RMH filed for bankruptcy. As a result, because termination could not have been exercised before the bankruptcy petition was filed, the franchise agreements became property of the bankruptcy estate and could not be terminated due to the automatic stay.

BREACH OF CONTRACT

Brightstar Franchising, LLC v. N. Nev. Care, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,272, No. 17 C 9213, 2018 WL 4224454 (N.D. Ill. Sept. 4, 2018)

This case is discussed under the topic heading "Breakaway Franchisees."

***Khorchid v. 7-Eleven, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,287, No. 18-8525 (JBS/JS), 2018 WL 5149643 (D.N.J. Oct. 22, 2018)**

This case is discussed under the topic heading "Good Faith and Fair Dealing."

BREAKAWAY FRANCHISEES

***Brightstar Franchising, LLC v. N. Nev. Care, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,272, No. 17 C 9213, 2018 WL 4224454 (N.D. Ill. Sept. 4, 2018)**

The court granted BrightStar Franchising LLC's (BrightStar) Motion for a Preliminary Injunction and two Motions to Compel Arbitration. BrightStar is an Illinois-based company that franchises its name and business model related to home-based healthcare services throughout thirty-seven states. Northern Nevada Care (NNC), which is owned and operated by Stephen and Teresa Neff, entered into a ten-year franchise agreement with BrightStar to provide home healthcare in and around the area of Carson City, Nevada.

Two years into the franchise agreement, NNC began servicing a patient in the neighboring town of Reno, in violation of the express terms of the

*Mr. Gruenberg's firm represented the plaintiff franchisor in this matter.

franchise agreement. When BrightStar ordered NNC to turn the patient over to BrightStar Reno, the franchisee operating in the Reno territory, and pay restitution, NNC responded by terminating its operations as a BrightStar franchise. Following the termination of the franchise agreement, the couple behind NNC began operating a similar home healthcare entity known as Allevia Living in the same area where the BrightStar franchise was operated. BrightStar subsequently sought an order permanently enjoining NNC from operating Allevia Living. NNC counterclaimed, alleging both consumer fraud and common law fraud.

The court found that BrightStar was likely to succeed on the merits of its breach of contract claim against NNC, despite NNC's counterclaims that BrightStar fraudulently induced NNC into franchising the Carson City territory with repeated assurances that NNC would eventually be able to acquire the Reno territory. Because this argument was based on oral statements made by the franchisor that contradicted the language of the franchise agreement, the court did not find this argument compelling. Further, the court found that BrightStar would suffer irreparable harm to its customer base and business relationship if Allevia Living were allowed to continue operating. Finally, the court determined that any harm suffered by NNC was self-inflicted and that the public interest was served by granting the injunction.

BUSINESS OPPORTUNITY LAWS

KMCC Enters., LLC v. Savvy Chic Mgmt., Inc., Bus. Franchise Guide (CCH) ¶ 16,285, No. 4:18-CV-532, 2018 WL 5295812 (E.D. Tex. Oct. 25, 2018)

On October 25, 2018, a federal judge in Texas granted franchisee's motion to remand a case back to state court after finding that its complaint failed to raise a substantial issue of federal law.

Plaintiffs Kenneth and Marie Walls and KMCC Enterprises (collectively Plaintiffs) sued Jessica Chandler, Savvy Chic Management, Inc. and Sculpt Pod (collectively Defendants) in the Texas 393rd District Court for violations of the Texas Business Opportunities Act (TBOA), Tex. Bus. & Com. Code §51.302, and other state laws. Plaintiffs claim that Defendants induced them into entering a franchise agreement to operate one of Defendants' nonsurgical weight loss franchises by making false and material misrepresentations about the liposuction process available to franchisees.

Defendants removed the action to the U.S. District Court for the Eastern District of Texas, arguing that the court may exercise federal jurisdiction because the claim for TBOA violations requires the interpretation of various federal statutes and regulations and arises under federal law. Plaintiffs subsequently filed a motion to remand the case and requested attorney's fees and costs. In granting Plaintiffs' motion, the judge reasoned that the court was unable to exercise its limited jurisdiction over the case unless the complaint raised a disputed and substantial federal issue. The court found that the

complaint, on its face, did not need any reference to or interpretation of federal law.

After granting the motion to remand, the court added that "[it] would be reluctant to exercise federal question jurisdiction over this case even if the TBOA exemption in question were an element of Plaintiff's TBOA claim. . . . In this case, if the Court were to exercise federal question jurisdiction, it would resolve federal issues that appear insubstantial—while also disturbing the congressionally approved balance of federal and state judicial responsibilities."

CHOICE OF FORUM

***Williams v. Aire Serv, LLC*, Bus. Franchise Guide (CCH) ¶ 16,297, No. 1:18-cv-099-NT, 2018 WL 4955198 (D. Me. Oct. 12, 2018)**

The U.S. District Court for the District of Maine enforced a forum selection clause, finding that a heating and air conditioning repair business franchisee, Troy Williams Heating in Bangor, Maine, was required to litigate his suit against his franchisor, Aire Serv, LLC, in Waco, Texas. The court rejected all of the franchisee's arguments, including his claims that the forum selection clause (1) was the product of unequal bargaining power; (2) would deprive him of his day in court; and (3) was against public policy. The franchisor's motion to dismiss was thus granted in part, denied in part, and the case was transferred from the U.S. District Court for the District of Maine to the U.S. District Court for the Western District of Texas. The claim arose from a franchise agreement between the two parties in which the franchisee alleges that the franchisor was not fully transparent regarding the franchisee's applicable zone.

Franchisee made three arguments that venue was appropriate in the District of Maine: (1) the franchise agreement is void, as a whole; (2) the forum selection clause is unenforceable under the factors set forth in *M/S Breman v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); and (3) transfer is not warranted under the 28 U.S.C. § 1404(a) factors. The court rejected each of these arguments, in turn, finding that there was no fraud in the inducement of the contract, the bargaining power between the two parties was not fundamentally unfair, the expense on Franchisee to litigate in Texas was not too great, and the agreement itself did not contravene public policy. Finally, under Section 1404(a), Texas was still the appropriate venue for the suit, despite Franchisee's arguments that Texas courts were more congested than Maine's.

CHOICE OF LAW

***Country Inn & Suites by Radisson, Inc. v. Hugh Desert Inv'rs 3 LLC*, Bus. Franchise Guide (CCH) ¶ 16,317, No. 27-CV-17-18933 (Minn. Dist. Nov. 6, 2018)**

This case is discussed under the heading "Jurisdiction."

***E&I Holdings, Inc. v. Coral Springs Eggs and I, LLC*, Bus. Franchise Guide (CCH) ¶ 16,262, No. 17-cv-2377, 2018 WL 4680339 (D. Colo. Sept. 28, 2018)**

This case is discussed under the heading "Unfair Competition/Unfair and Deceptive Practices."

***Gigi's Cupcakes, LLC v. 4 Box, LLC*, Bus. Franchise Guide (CCH) ¶ 16,313, No. 3:17-CV-3009-B, 2018 WL 6068817 (N.D. Tex. Nov. 19, 2018)**

The court denied a motion for reconsideration of its Order under Federal Rule of Civil Procedure 54(b), holding that a Tennessee choice-of-law provision in franchise agreements applied in a consolidated action by a franchisor against multiple cupcake franchisees from different states. The court, however, withheld ruling on the franchisees' counterclaims under the franchise acts of their states until the record could be developed further, given that the case was in its early stages. The court did not initially have the facts to make a choice-of-law decision, and the court wanted to avoid causing an improper waiver of the protections of the various franchise statutes.

Franchisor Gigi's Cupcakes, LLC (Gigi's) sued ten of its franchisees from many different states seeking to have their respective franchise agreements enforced and declared valid. The Unit Franchise Agreements (UFAs) with each of the franchisees provided in substantially similar language that "any dispute between Franchisor and Franchisee shall be governed by and construed in accordance with the laws of the State of Tennessee." The court initially held that Tennessee law applied because the franchisees did not argue their position based on Texas choice-of-law rules, by establishing either that (1) the chosen law of Tennessee had no relationship to the parties; or (2) applying Tennessee law would contradict the public policy of a state with a materially greater interest than Tennessee. The franchisees' motion for reconsideration reframed the argument under Texas choice-of-law rules by asserting that the application of Tennessee law to the UFAs for the franchisees from Minnesota, North Dakota, Indiana, and Ohio would violate public policies of those states because those states have franchise acts that afford greater protections to franchisees than Tennessee law.

The court emphasized that choice-of-law provisions are enforceable by default in Texas, and overcoming the presumption of enforceability requires satisfying the standards set out in the *Restatement (Second) of Conflicts of Laws* § 187(2). The analysis under this Section is performed in three steps. The court will not enforce the choice-of-law provision if all of these questions are answered affirmatively: (1) Does another state have a more significant relationship with the parties and transaction than the chosen state? (2) Does another state have a materially greater interest than the chosen state in determining a particular issue? and (3) Does another state have a fundamental policy that would be contravened by the application of the chosen state's law? Considering

the first question requires a factual inquiry into the contacts identified in Section 188 of the *Restatement* and the principles listed in Section 6. The court examines the quality, not quantity, of the following contacts: (1) the place of contracting; (2) the place of contract negotiation; (3) the place of performance; (4) the place of the contract's subject matter; and (5) the parties' domicile, residence, nationality, place of incorporation, and place of business.

Here, the court could not even make the initial inquiry under the Texas choice-of-law rules because it was not provided with enough factual information. The court cautioned that prohibiting a franchisee from asserting claims under its state franchise act that includes an anti-waiver provision is contrary to the fundamental policies in those states. Accordingly, the court held that the parties' choice of Tennessee law applied to all claims, except the franchisees' franchise act counterclaims, at this point, because the franchisees did not meet their burden to satisfy Section 187(2).

***Great Am. Opportunities, Inc. v. Kent*, Bus. Franchise Guide (CCH) ¶ 16,286, No. 17-cv-01662-RBJ, 2018 WL 5249998 (D. Colo. Oct. 22, 2018)**
This case is discussed under the heading "Labor and Employment."

***Safe Step Walk in Tub Co. v. CKH Indus., Inc.*, Bus. Franchise Guide (CCH) ¶ 16,270, 242 F. Supp. 3d 245 (S.D.N.Y. 2017)**
This case is discussed under the topic heading "Definition of Franchise."

CLASS ACTION

***In re Automotive Parts Antitrust Litig.*, Bus. Franchise Guide (CCH) ¶ 16,302, No. 12-MD-02311, 2018 WL 7108016 (E.D. Mich. Nov. 6, 2018)**
This case is discussed under the topic heading "Antitrust."

CONTRACT ISSUES

***E&I Holdings, Inc. v. Coral Springs Eggs and I, LLC*, Bus. Franchise Guide (CCH) ¶ 16,262, No. 17-cv-2377, 2018 WL 4680339 (D. Colo. Sept. 28, 2018)**
This case is discussed under the heading "Unfair Competition/Unfair and Deceptive Practices."

***Sleepy's LLC v. Select Comfort Wholesale Corp.*, Bus. Franchise Guide (CCH) ¶ 16,314, 779 F.3d 191 (2d Cir. 2015)**
This case is discussed under the topic heading "Unfair Competition/Unfair and Deceptive Practices."

DAMAGES

***Red Lion Hotels Franchising, Inc. v. First Capital Real Estate Invs., LLC*, Bus. Franchise Guide (CCH) ¶ 16,279, No. 2:17-CV-145-RMP, 2018 WL 4259241 (E.D. Wash. Sept. 6, 2018)**

Court granted motion to strike affirmative defenses asserting that liquidated damages clauses in franchise agreements were an unconscionable and unenforceable penalty, noting that the defenses were untimely, having been raised for the first time almost a year after the case was filed, and further, were not in fact a penalty but rather a reasonable forecast of compensation for harm caused by the breach.

Red Lion sued First Capital Real Estate Investment, LLC and other defendants (together, Defendants) for breach of contract after Defendants failed to make payments due under an early termination provision under three Franchise Licensing Agreements (FLAs). Defendants admittedly signed the agreements that required payment of (1) past due licensing fees and (2) lost profits from the early termination of the twenty-year licensing agreement, based on a calculation of the hotels' prior revenue. Defendants, however, challenged these liquidated damages clauses as unenforceable and unconscionable penalties. Red Lion asked the court to strike Defendants' affirmative defense as untimely, given that Defendants waited to assert the defense until after the deadline for amending their answer and completion of discovery. The court addressed both the timeliness and merits of Defendants' penalty defense.

The court held that Red Lion would be prejudiced by allowing Defendants to raise their affirmative defense more than one year after the case was filed. Defendants attempted to plead new facts that would require the court to reopen discovery and delay the trial to permit Red Lion to adequately prepare for Defendants' penalty defense.

For the purposes of a complete record, the court also addressed the merits of Defendants' penalty defense. The court enforced the liquidated damages clauses, noting that, under Washington state law, the amount fixed was a reasonable forecast of compensation for harm caused by the breach and the harm was difficult to ascertain prior to contracting. Both parties were sophisticated, knew of the risks associated with the hotels in question, and negotiated other terms in the FLAs. Plus, the state of Washington favors such liquidated damages clauses and rarely construes them as a penalty. Defendants argued that the liquidated damages clauses were unreasonable based on actual revenues at the time of early termination, but this is an incorrect touchpoint. Courts analyze the inherent risks and foreseeability of damages at the time of contracting. Here, the court found the clauses enforceable as written.

DEFINITION OF FRANCHISE

***Safe Step Walk in Tub Co. v. CKH Indus., Inc.*, Bus. Franchise Guide (CCH) ¶ 16,270, 242 F. Supp. 3d 245 (S.D.N.Y. 2017)**

The U.S. District Court for the Southern District of New York granted in part and denied in part a motion to dismiss a franchisee's counterclaims, asserting that the parties' relationship did not constitute a franchise under state and federal law.

Through multiple agreements, Safe Step Walk in Tub Co. (Safe Step) granted CKH Industries, Inc. (CKH) a license to use Safe Step's trademarks to market, sell, and install Safe Step's tubs in particular geographic areas. Safe Step filed suit when CKH failed to pay marketing fees as required by the agreements. CKH filed counterclaims for violations of various state franchise laws, breach of contract, and unfair business practices including fraud, and Safe Step moved to dismiss these counterclaims for failure to state a claim.

In its complaint, Safe Step described the business relationship as a licensor-licensee or supplier-dealer based on CKH's license to deal in its bathtub products. CKH, however, argued that the parties had a franchise relationship and that Safe Step intentionally tried to structure the relationship to avoid federal and state franchise laws. Using this deception, CKH alleged that Safe Step purposefully escalated costs to constructively terminate the franchise and unlawfully compete directly against CKH.

The court first examined whether the agreements constituted franchise agreements under federal and state laws. The Federal Trade Commission Act defines a franchise as "any continuing commercial relationship or arrangement, whatever it may be called," where the contract specifies (1) the franchisee will gain the right to operate a business associated with the franchisor's trademarks; (2) the franchisor will or has authority to exert a significant degree of control over the franchisee's method of operation; and (3) the franchisee is required to make payments to the franchisor as a condition to obtain or commence operations.

After examining the parties' agreements, the court had little difficulty finding the relationship plausibly constituted a franchisor-franchisee relationship under the FTC Rule. The court nevertheless held CKH did not have an actionable claim for alleged disclosure violations since there was no private right of action to enforce the disclosure requirements.

As a result, CKH turned to franchise laws under Connecticut, New Jersey, New York, and Rhode Island where it sold Safe Step's products. Tennessee precedent does not allow a choice-of-law clause to trump statutory protections, and the court determined that Tennessee law would recognize the protections available under the franchise acts of those other states—each of which would have characterized CKH's business as a franchise. While CKH's claims for the failure to provide disclosures were barred in New York due to the state's specific statute of limitations, the court held that claims for failure to renew and constructive termination survived.

New York and Rhode Island had also enacted so-called "Little FTC" Acts, which prohibited conduct that impacted consumers at large. The court dismissed CKH's claims under these statutes because the claims arose out of the parties' contractual relationship and not from an effect on consumers as a whole.

Even though CKH conceded that it had not requested renewal in writing ninety days prior to the end of the term, it argued that the agreements persisted after expiration based on the parties' course of dealing and practice. Safe Step countered that Tennessee's Statute of Frauds would bar any such "oral" agreement, but the court emphasized that the statute of frauds did not apply once partial performance occurred, as it did here. Because the agreements were enforceable, the court concluded the alleged breaches during the "original terms" of the agreements prior to modification were actionable but those occurring after modification largely failed as a matter of law.

The court construed CKH's fraud-related claims to allege unfair competition and common law fraud. CKH's unfair competition claim failed under Tennessee law because that claim was only proper for trademark infringement or intentional interference with business relationships. Neither situation applied because CKH was using the trademarks, which was governed by the parties' agreements, and Safe Step could not interfere with its own contract with CKH. The court did find CKH had properly alleged fraud with regard to the negotiations and pre-agreement activities, but it rejected those rooted in the performance of the agreements' terms because those claims sounded more like tortious breach of contract.

FINANCIAL PERFORMANCE REPRESENTATIONS

***E&I Holdings, Inc. v. Coral Springs Eggs and I, LLC*, Bus. Franchise Guide (CCH) ¶ 16,262, No. 17-cv-2377, 2018 WL 4680339 (D. Colo. Sept. 28, 2018)**

This case is discussed under the heading "Unfair Competition/Unfair and Deceptive Practices."

FRAUD

***E&I Holdings, Inc. v. Coral Springs Eggs and I, LLC*, Bus. Franchise Guide (CCH) ¶ 16,262, No. 17-cv-2377, 2018 WL 4680339 (D. Colo. Sept. 28, 2018)**

This case is discussed under the heading "Unfair Competition/Unfair and Deceptive Practices."

FTC FRANCHISING RULE

***KMCC Enters., LLC v. Savvy Chic Mgmt., Inc.*, Bus. Franchise Guide (CCH) ¶ 16,285, No. 4:18-CV-532, 2018 WL 5295812 (E.D. Tex. Oct. 25, 2018)**

This case is discussed under the topic heading "Business Opportunity Laws."

***Safe Step Walk in Tub Co. v. CKH Indus., Inc.*, Bus. Franchise Guide (CCH) ¶ 16,270, 242 F. Supp. 3d 245 (S.D.N.Y. 2017)**
This case is discussed under the topic heading "Definition of Franchise."

GOOD FAITH AND FAIR DEALING

***Khorchid v. 7-Eleven, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,287, No. 18-8525 (JBS/JS), 2018 WL 5149643 (D.N.J. Oct. 22, 2018)**
In this case, the U.S. District Court for the District of New Jersey examined whether a franchisor violated its franchise agreement following Hurricane Sandy. The court dismissed the claims because the franchisee failed to plead facts sufficient to establish violation of the duty of good faith and fair dealing, breach of contract, or statutory violations.

Franchisee/plaintiff alleged various breach of contract claims, breach of the duty of good faith and fair dealing, and violation of the New Jersey Franchisee Practices Act (NJFPA) when the franchisor attempted to constructively terminate the franchise agreement by failing to repair franchisee's store after Hurricane Sandy and imposing alleged unreasonable terms related to vendors, advertising, and marketing issues. Franchisee accused franchisor of engaging in a tactic that would drive franchisee to eventually terminate the agreement.

The court held that to succeed on a claim for breach of duty of good faith and fair dealing, the franchisee must show a bad motive or intent, which the franchisee failed to plead. The court also held that this claim could not arise out of the same conduct and facts used to support the breach of contract claim because the claims were mutually exclusive. As a result, the claim was dismissed.

The court also held that the franchisee's breach of contract claim must be dismissed because it did not sufficiently allege a breach or damages.

Finally, the court dismissed the NJFPA claim because the claim was not sufficiently pleaded, including the franchisee's failure to specify which section of the NJFPA was being violated and in what way. The court held that unreasonable demands upon the franchisee did not lead to a violation of this statute. As a result, the court dismissed all claims against the franchisor.

INJUNCTIVE RELIEF

***Prop. Mgmt. Bus. Sols. v. Averitte*, Bus. Franchise Guide (CCH) ¶ 16,280, No. 2:18-cv-552, 2018 WL 4327922 (D. Utah Sept. 10, 2018)**
The U.S. District Court for the District of Utah granted a franchisor's motion for preliminary injunction where the franchisor showed that the franchisee was operating a competing business after termination of its franchise agreements in violation of a restrictive covenant that prohibited competition within a fifty mile radius of the former franchised location for a period of two years after expiration of the agreements.

The plaintiff/franchisor entered into two franchise agreements with defendant/franchisee to run a property management service. When the agreements

expired, the parties continued to operate. Eventually the franchisor sent the franchisee a letter indicating that any "implied agreement" was terminated. The franchisee formed a new company providing property management services. The franchisor alleged that the franchisee violated the franchise agreement including the non-compete provision. The franchisor sought a preliminary injunction. Specifically, the franchisor asked the court to order franchisee to transfer property management accounts to the franchisor.

The court reiterated the high burden applicable to obtaining a preliminary injunction and found that the franchisor met the high burden. Applying Utah law, the court held that the franchisor met its burden to show likelihood of success on the merits. The court explained that the non-compete was necessary to protect the franchisor's goodwill and to protect current franchisees from unfair competition by former franchisees. The court also found that the provision was reasonable in its geographical extent (a fifty-mile radius from franchisee's location and a fifty-mile radius from any other system business), duration (two years), the nature of the franchisee's duties, and the nature of the interest the franchisor sought to protect.

Furthermore, the franchisor met its high burden to show that, absent the preliminary injunction, it would be subject to irreparable harm. The court held that allowing the franchisee to operate without granting the injunction could lead to a domino effect of franchisees abandoning their franchise agreements and violating their non-compete obligations. The court also held that if the preliminary injunction was not granted, the franchisor would suffer irreparable harm to goodwill, customer loyalty, and brand recognition.

Finally, the court weighed the balance of harm and public interest and held that the preliminary injunction should be granted.

JURISDICTION

***Country Inn & Suites by Radisson, Inc. v. Hugh Desert Inv'rs 3 LLC*, Bus. Franchise Guide (CCH) ¶ 16,317, No. 27-CV-17-18933 (Minn. Dist. Nov. 6, 2018)**

The court denied franchisor's motion to dismiss, noting that the Minnesota Franchise Act (MFA) applied to claims brought by Texas-based hotel franchisee where a sale or purchase, or offer of sale or purchase, occurred in Minnesota. The court rejected the argument that the MFA cannot apply to out-of-state franchisees if the statute's jurisdictional requirements are otherwise met.

In 2014, defendant HD Sunland Park Property LLC (HD) acquired a hotel in El Paso, Texas (Hotel). Shortly after acquiring the Hotel, HD learned that it could no longer operate the Hotel as a Holiday Inn and, therefore, it authorized its agent, defendant Vandenburg, to find another hotel brand of the same general quality. An employee of plaintiff County Inn & Suites by Radisson, Inc. (Country Inn & Suites) represented to Vandenburg that Country Inn & Suites had developed a plan that would make its brand comparable to the way in which the Hotel was previously operated.

Country Inn & Suites further proposed a licensing agreement whereby it would provide a franchise consultant and significant operational support to HD. Soon after, Country Inn & Suites prepared a franchise disclosure document and license agreement whereby defendant High Desert Investors 3 LLC (HDI)—which was the sole member of HD—was listed as "franchisee." Country Inn & Suites also sent Vandenburg a Corporate Guaranty of License Agreement, which listed defendant MT Sunland Park Hotel LLC (MT Sunland)—a member of HDI—as the guarantor of HDI's obligations under the license agreement. Without authority from HDI or MT Sunland, Vandenburg signed both the license agreement and the guarantee.

In 2016, after County Inn & Suites failed to provide the promised services to HD under the license agreement and a subsequent agreement, HD stopped paying franchise fees. As a result, County Inn & Suites sued HD, HDI, MT Sunland, and other defendants for breach of the license agreement. In response, the defendants asserted various counterclaims, including, breach of the MFA. In response, Country Inn & Suites filed a motion to dismiss, asserting that the MFA was inapplicable because (1) the license agreement provided that, despite the Minnesota choice-of-law provision, the MFA would not apply, and (2) the MFA does not protect foreign corporations doing business entirely outside of Minnesota.

The court disagreed and held that the defendants sufficiently alleged that (1) the MFA applied to the license agreement; (2) Country Inn & Suites violated the MFA; and (3) County Inn & Suites fraudulently induced the defendants to enter into the license agreement.

First, the license agreement provided that the MFA would nonetheless apply—despite the parties' waiver in the license agreement of its application—if the jurisdictional scope of the MFA was independently met. Here, evidence suggested that a sale or purchase, or an offer to sell or an offer to purchase, occurred in Minnesota. As such, the jurisdictional scope of the MFA was independently met. Further, despite County Inn & Suites' attempt to argue that a foreign franchisee may not assert the protections of the MFA, the Court found that case law indicates otherwise. The MFA was designed to protect potential franchisees within Minnesota from unfair contracts and previously unregulated abuses. As a result, Minnesota courts have found that an out-of-state franchisor may be held to the same standards of the MFA if the franchisor meets the jurisdictional scope of the MFA. The same principle applies to franchisees—courts look to the facts of each case to determine whether the franchisee meets the jurisdictional scope of the MFA.

Accordingly, depending on the facts of the case, the MFA does apply to foreign franchisees. Because Country Inn & Suites and the defendants transacted business within Minnesota at the time of the license agreement, the MFA applied to the license agreement.

***Keurig Green Mountain, Inc. v. Global Barstas, U.S., LLC*, Bus. Franchise Guide (CCH) ¶ 16,296, No. 18-CV-0095 (LAK), 2018 WL 4926446 (S.D.N.Y. Oct. 10, 2018)**

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

***KMCC Enters., LLC v. Savvy Chic Mgmt., Inc.*, Bus. Franchise Guide (CCH) ¶ 16,285, No. 4:18-CV-532, 2018 WL 5295812 (E.D. Tex. Oct. 25, 2018)**
This case is discussed under the topic heading "Business Opportunity Laws."

LABOR AND EMPLOYMENT

***Acosta v. Jani-King of Okla., Inc.*, Bus. Franchise Guide (CCH) ¶ 16,312, 905 F.3d 1156 (10th Cir. 2018)**
The Tenth Circuit reversed the lower court's grant of a motion to dismiss a complaint filed by the Secretary of Labor, which had asserted that Jani-King, a janitorial company providing cleaning services in Oklahoma, violated the Fair Labor Standards Act (FLSA).

Jani-King engages individuals, pairs of related individuals, or small corporate entities to perform janitorial work on its behalf through franchise agreements. Recently, Jani-King began requiring individuals and pairs of related individuals to form corporate entities, which then become the named parties to the franchise agreements.

The Secretary of Labor brought a complaint against Jani-King and sought an injunction requiring the company to keep the requisite FLSA employee records. The Secretary argued that the individuals who form corporate entities and enter franchise agreements as required by Jani-King essentially performed the work of the company and, under the economic realities test, were employees of Jani-King. Jani-King brought a motion to dismiss, which the district court granted, on the basis that the Secretary "ignores corporate forms" and that the FLSA does not plausibly apply to all janitorial cleaners.

The Secretary alleged that Jani-King violated the FLSA because it did not make, keep, and preserve the required records for janitorial cleaners, due to improperly classifying the cleaners as independent contractors, when they were employees. The Tenth Circuit found that, per the six-factor economic realities test, wherein it is well-settled that an individual's relationship with their employer determines its characterization, a plausible argument existed that certain Jani-King franchisees may fall into the purview of the FLSA. Given the procedural posture, the court found that the Secretary's complaint contained sufficient factual matters to give Jani-King notice of which franchisees may be implicated by the action.

***Frey v. Hotel Coleman*, Bus. Franchise Guide (CCH) ¶ 16,278, 903 F.3d 671 (7th Cir. 2018)**
The Seventh Circuit addressed a joint employer case involving a franchise management company and the employee of a franchisee. The court held that an employee, Bogustawa Frey, on the payroll of a Holiday Inn franchisee (Hotel Coleman), who was fired after she filed an EEOC charge for sexual harassment and discrimination by the CEO of the company hired to operate the hotel, can sue that company as her employer.

Hotel Coleman owned a Holiday Inn Express franchise and hired a separate entity, Vaughn Hospitality, Inc. (Vaughn Hospitality), to run the daily

operations of the hotel. Per the terms of the hotel management agreement between the two companies, Vaughn Hospitality was responsible for the hiring, supervising, directing, training, compensating, and discharging of employees. Despite the fact that all employees who worked at the hotel, including Frey, were on the Hotel Coleman payroll, Hotel Coleman agreed not to interfere in any way with Vaughn Hospitality's supervision of the employees.

Following significant sexual harassment at the hands of Vaughn Hospitality's CEO, Frey brought suit under Title VII and the Illinois Human Rights Act. The district court concluded on a motion for summary judgment that Vaughn Hospitality was not an employer as defined under the relevant statutes. Relying on the economic realities test stated by *Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377, 378–79 (7th Cir. 1991), the court noted that Vaughn Hospitality, and not Hotel Coleman, had control over every aspect of Frey's work environment, provided all necessary training, and expected Frey to work long-term. Given that the economic realities test is a balancing one, the court suggested that, under the test, Vaughn Hospitality could be regarded as Frey's employer. Thus, the Seventh Circuit remanded the case for further proceedings concurrent with their opinion.

Fuentes v. Royal Dutch Shell PLC, No. 2:18-CV-05174 (E.D. Pa. Nov. 29, 2018)

A former Jiffy Lube International, Inc. worker filed a proposed class action antitrust suit against the chain and its parent company Royal Dutch Shell PLC (collectively Jiffy Lube) in federal court on November 29, 2018, alleging that "no-poaching" provisions in Jiffy Lube's franchise agreements illegally suppress employee wages. In the lawsuit, plaintiff Victor Fuentes (Fuentes) contends the clause prohibits a Jiffy Lube shop from hiring any individual who has worked at another Jiffy Lube within the prior six months. The complaint alleges that this practice essentially suppresses competition among workers resulting in lower pay for all employees. The lawsuit contends Jiffy Lube violated the Sherman Antitrust Act with the "no-poaching" clause, and seeks to bring action against Jiffy Lube on behalf of all current and former Jiffy Lube employees affected.

This case highlights other national franchise chains, such as Jimmy John's and McDonald's, who federal courts have reprimanded for using no-poaching clauses in franchise agreements. In this case, the complaint reads that "[w]hile eliminating these anticompetitive clauses will help workers going forward, current and former employees of Jiffy Lube—including [the plaintiff]—are owed antitrust damages for years of wage suppression." It is not clear how the court will rule, but this will be a case to follow. Fuentes and similarly situated Jiffy Lube workers "seek[] to recover these damages and obtain additional injunctive relief," as stated in the complaint.

***Great Am. Opportunities, Inc. v. Kent*, Bus. Franchise Guide (CCH) ¶ 16,286, No. 17-cv-01662-RBJ, 2018 WL 5249998 (D. Colo. Oct. 22, 2018)**

The U.S. District Court for the District of Colorado granted summary judgment on a defendant's former sales representative's claim for tortious interference with business relationships by his former employer (a fundraiser products wholesaler) in the context of non-compete, non-solicit, and trade secret claims arising from the sales representative's post-resignation conduct, but denied cross-motions for summary judgment on the remaining contract and trade secret claims.

The court first determined that Colorado law applied to the claims despite the employment agreement's choice-of-law provision designating Tennessee law because (1) the defendant was a Colorado resident; (2) the breach allegedly occurred in Colorado; (3) the effects of non-competition would be felt in Colorado; and (4) Tennessee's reasonableness standard for non-compete clauses was contrary to Colorado's fundamental public policy of voiding non-compete provisions that do not fall into one of four exceptions. The exception at issue here was whether the contract related to the protection of trade secrets. The court held that a fact issue existed as to whether there was a trade secret at issue; thus enforceability and liability for breach of contract claims could not be determined on summary judgment.

The court also held that a prior Tennessee case by the employer, which found that the employer could not prove lost profits, did not serve to bar the current claims under the doctrine of issue preclusion because the specific customers and circumstances were relevant to proving damages. Thus the prior case did not raise an identical issue. Finally, the court held that the economic loss rule barred the tortious interference claim because the employment agreement imposed the same duty not to solicit the employer's current or prospective customers as the duty underlying the tort. However, the economic loss rule did not bar the employer's statutory trade secret claims, despite the fact that the employment agreement provisions were identical to the duties imposed by the Defend Trade Secrets Act and the Colorado Uniform Trade Secrets Act, because the court found that neither of the respective legislatures intended to provide extra-contractual remedies.

NON-COMPETE AGREEMENTS

***Atlantic Pinstriping LLC v. Atlantic Pinstriping Triad, LLC*, Bus. Franchise Guide (CCH) ¶ 16,266, No. 3:16-CV-547-GCM, 2018 WL 4265564 (W.D.N.C. Sept. 6, 2018)**

The U.S. District Court for the Western District of North Carolina held former franchisees in civil contempt of a preliminary injunction prohibiting them from contacting their former customers and for conducting work in violation of a non-compete clause.

In June 2016, franchisor Atlantic Pinstriping terminated the three franchise agreements it had with the franchisees. Shortly after, the franchisor filed suit seeking to enjoin the former franchisees from violating the non-compete and non-solicitation covenants in their franchise agreements. After a hearing, the court entered an order enjoining the former franchisees from owning or operating a competing business and contacting any former customers for a two-year period. The parties then proceeded to arbitrate the remaining claims pursuant to the arbitration agreement in the franchise agreements.

While the arbitration was pending, the franchisor sought relief from the court to obtain discovery from the former franchisees showing their communications with customers and invoices to customers to aid in enforcement of the preliminary injunction. After the franchisees failed to produce all the documents requested, franchisor moved to hold them in contempt.

While the discovery and contempt proceedings were pending, the arbitrator issued an award finding that the termination of the former franchisees was proper, the non-compete and non-solicitation provisions were enforceable, and that the franchisees had violated these provisions, thus entitling franchisor to recover damages.

After the arbitration award was confirmed by the court, the court continued to adjudicate the motion for contempt against the former franchisees. Ultimately, the court found the former franchisees in contempt for violating provisions of the preliminary injunction by continuing to solicit and contact former customers after the entry of the preliminary injunction.

The court awarded the franchisor damages from the former franchisees for work performed for customers solicited in violation of the preliminary injunction. The court also awarded the franchisor almost $100,000 in attorney's fees incurred for pursuing the motion for contempt. Finally, the court also granted a one-year extension to the initial preliminary injunction, ordering that any further violations would result in a $1,000-a-day fine until cured.

***E&G Franchise Sys. Inc. v. Janik*, Bus. Franchise Guide (CCH) ¶ 16,301, No. 18-cv-416-wmc, 2018 WL 5630589 (W.D. Wis. Oct. 31, 2018)**

E&G Franchise Systems, Inc., a restaurant franchisor, sought preliminary injunctive relief against its former franchisee, The Janik Group, claiming trade dress infringement stemming from the former franchisee's operation of an allegedly competing business as defined under the franchise agreement. The U.S. District Court for the Western District of Wisconsin denied E&G's motion for preliminary injunction.

The franchisor operates and sells franchises under the names "Erbert & Gerberts" and "Erbert and Gerberts Sandwich Shop." In April 2015, Janik signed a franchise agreement to operate an E&G branded sandwich shop in Plano, Texas. In early 2018, E&G notified Janik on several occasions that it was in default of the franchise agreement for failing to purchase all the

necessary items from approved supplies, along with other similar defaults. In May 2018, E&G terminated Janik's franchise agreement without notice or further opportunity to cure. Janik closed the restaurant soon after the termination. Following the termination and closure, Janik opened another sandwich restaurant at the same location with a different build-your-own ordering process and an expanded menu, including salads, wraps, subs, and panini options.

E&G then filed suit to enjoin Janik from operating the new restaurant claiming it violated the non-compete provision in the franchise agreement and constituted trade dress infringement. Upon review of the parties' briefing, the court denied E&G's motion for preliminary injunction.

First, the court held that Janik was not infringing on E&G's trade dress because E&G failed to prove its trade dress was worthy of protection. Specifically, the court found that E&G's trade dress consisting of the use corrugated metal, the counter space and table layout, and the combination of lighting fixtures, were too generic because the trade dress descriptions lacked specificity as to what the particular elements of the trade dress were or how the combinations made them worthy of protection.

Second, the court also denied E&G injunctive relief enforcing the non-compete agreement. The non-competition provision prohibited Janik from operating a restaurant that derives more than 50% of its sales from "sandwiches." Janik argued that the term "sandwiches" was defined as cold sub-sandwiches of the type that E&G served, whereas Janik's new restaurant included hot sandwiches, wraps, and paninis. The court, however, found that the definition of "sandwich" was a fact issue that it could not determine.

However, the court found that E&G failed to demonstrate it would be irreparably harmed by Janik's operation of the new sandwich shop. In particular, the court rejected E&G's argument that the language in the franchise agreement stating that irreparable harm occurred upon a violation of the agreement was conclusive. Rather, the court concluded that while this language was persuasive, E&G failed to prove irreparable harm because the next closest E&G franchise was 600 miles away. Moreover, E&G could not show that it was actively seeking new franchisees in the area, especially since three other franchises in the area had also closed and there was no indication of pursuing new franchisees. Accordingly, the court denied E&G's injunctive relief but retained the case to allow E&G to prove monetary damages.

***Great Am. Opportunities, Inc. v. Kent*, Bus. Franchise Guide (CCH) ¶ 16,286, No. 17-cv-01662-RBJ, 2018 WL 5249998 (D. Colo. Oct. 22, 2018)**

This case is discussed under the topic heading "Labor and Employment."

***Prop. Mgmt. Bus. Sols. v. Averitte*, Bus. Franchise Guide (CCH) ¶ 16,280, No. 2:18-cv-552, 2018 WL 4327922 (D. Utah Sept. 10, 2018)**

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

***Tri-State Bobcat, Inc. v. FINN Corp.*, Bus. Franchise Guide (CCH) ¶ 16,281, 338 F. Supp. 3d 971 (D. Minn. 2018)**

The U.S. District Court for the District of Minnesota dismissed a dealer's claims for breach of equipment dealer statutes, and granted the franchisor's motion for summary judgment on its breach of contract claims after the dealer entered into an agreement with one of the franchisor's competitors in violation of the parties' non-compete.

Tri-State Bobcat, Inc. (Tri-State) was an authorized equipment dealer for FINN Corporation (FINN) for five years. The parties typically renewed their contract each year. In early 2016, due to mounting competitive pressure, FINN inserted a non-compete provision in its contract. Tri-State refused to sign FINN's new contract because, unbeknownst to FINN, Tri-State was in serious negotiations to sell equipment for one of FINN's competitors. In August 2016, FINN learned via a press release that Tri-State had become a premier dealer for one of FINN's competitors. FINN later terminated its relationship with Tri-State due to Tri-State's refusal to sign or conduct business under the terms of the non-compete provision.

Tri-State sued FINN for breach of contract and wrongful termination under equipment dealership statutes when the two parties could not reach an agreement on new contract terms. The court dismissed all of Tri-State's claims under the Equipment Statutes and granted FINN's summary judgment motion on Tri-State's breach of contract claim.

First, Tri-State alleged wrongful termination under the Equipment Statutes. Although a 2016 contract was never executed, Tri-State argued that a contract was implied from the conduct of the parties. But the parties' correspondence in 2016 centered on contract negotiations, rather than routine business issues. Further, FINN was clear that it would not continue a relationship with Tri-State without its assent to the non-compete provision. Tri-State's wrongful-termination claims failed.

Second, Tri-State argued that the non-compete would significantly diminish Tri-State's viability and that the Equipment Statutes prohibit manufacturers from substantially changing the competitive circumstances of a dealer agreement without good cause. This argument failed. Sale of FINN equipment was less than five percent of Tri-State's 2015 revenue. Further, Tri-State achieved year-over-year growth in sales and revenue despite FINN's decision to terminate the relationship.

Third, the court rebuffed Tri-State's argument that FINN failed to renew Tri-State's dealership agreement without good cause. The non-compete provision was an essential and reasonable requirement that applied equally to all FINN dealers. FINN's competitive concerns were genuine and documented.

Fourth, FINN moved for summary judgment on Tri-State's breach of contract claim because no implicit or explicit contract existed in 2016. The court agreed, granted FINN's motion for summary judgment, and dismissed Tri-State's complaint with prejudice.

ORAL AGREEMENTS

***PMT Mach. Sales, Inc. v. Yama Seiki USA, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,282, No. 17-CV-1731-JPS, 2018 WL 5775919 (E.D. Wis. Nov. 2, 2018)**

PMT Machinery Sales, Inc. (PMT) sold products for Yama Seiki USA, Inc. (Yama Seiki), a manufacturer. In late 2015, PMT asked Yama Seiki to grant it an exclusive dealership. Yama Seiki promptly presented conditions of an agreement, which PMT rebuffed. After months of correspondence, PMT became aware that Yama Seiki was treating PMT like an exclusive dealer, with open-ended terms. One year later, Yama Seiki told PMT that it was not an exclusive dealer. PMT then sued Yama Seiki, alleging a violation of Wisconsin's Fair Dealership Law (WFDL) when Yama Seiki made a substantial change to the competitive circumstances of PMT's dealership.

Yama Seiki argued that PMT never had a "dealership" under Wisconsin law, and the court agreed. *Inter alia*, PMT never had the right to commit Yama Seiki to a sale or use a trade name, trademark, or other commercial symbol of Yama Seiki. "All customer orders were placed with Yama Seiki directly, and Yama Seiki billed the customer directly." Because PMT never had authority to transfer products itself or commit Yama Seiki to a sale, PMT never had a "right to sell or distribute" as highlighted in the WFDL.

STATUTORY CLAIMS

***E&I Holdings, Inc. v. Coral Springs Eggs and I, LLC*, Bus. Franchise Guide (CCH) ¶ 16,262, No. 17-cv-2377, 2018 WL 4680339 (D. Colo. Sept. 28, 2018)**

This case is discussed under the heading "Unfair Competition/Unfair and Deceptive Practices."

***Gigi's Cupcakes, LLC v. 4 Box, LLC*, Bus. Franchise Guide (CCH) ¶ 16,313, No. 3:17-CV-3009-B, 2018 WL 6068817 (N.D. Tex. Nov. 19, 2018)**

This case is discussed under the topic heading "Choice of Law."

***Keurig Green Mountain, Inc. v. Global Barstas, U.S., LLC*, Bus. Franchise Guide (CCH) ¶ 16,296, No. 18-CV-0095 (LAK), 2018 WL 4926446 (S.D.N.Y. Oct. 10, 2018)**

In this case, the United States District Court for the Southern District of New York held that a party bringing claims under various state statutes must have some type of connection to the state under which it brings the claims. Here, franchisees brought claims under various state franchise registration and disclosure laws and state trade protection statutes. The court held that the franchisees could not bring statutory claims from states in which they did not have a "concrete connection."

Specifically, the court held that the franchisees could not bring claims under the California Franchise Investment Law because they were not domiciled in the state of California. The court held the same for a claim brought under the Michigan Franchise Investment Law. The court held that a claim brought under the North Dakota statute on franchise registration did not apply because the franchisees did not allege that the offer to sell or buy occurred in North Dakota or that they were domiciled in North Dakota. The court held that the Rhode Island Franchise Investment Act did not apply because the franchisees were not Rhode Island residents. The court held that the Hawaii Investment Law did not apply because the franchisees were not domiciled in Hawaii. The court held that the Virginia Retail Franchising Act did not apply because there was no nexus or connection with the transaction at issue and Virginia. The court held that the Florida and New Jersey trade protection statutes did not apply because no actions took place in either state, and there was no connection of the parties or transaction to either state.

The court held that the Washington Franchise Investment Act applied because the franchisees were domiciled in Washington. In addition, the court held that because the alleged failure to register occurred in Washington, the Washington statute of limitations must apply. The court held that a two-year statute of limitations was applicable and that, because registration information is publicly available, the failure to register accrues on the date of execution of a franchise agreement. The court explained that the discovery rule does not apply to this type of claim. Given that the claim was brought outside of the statute of limitations, the court held that the claim was time barred.

***PMT Mach. Sales, Inc. v. Yama Seiki USA, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,282, No. 17-CV-1731-JPS, 2018 WL 5775919 (E.D. Wis. Nov. 2, 2018)**
This case is discussed under the topic heading "Contract Issues."

***Tri-State Bobcat, Inc. v. FINN Corp.*, Bus. Franchise Guide (CCH) ¶ 16,281, 338 F. Supp. 3d 971 (D. Minn. 2018)**
This case is discussed under the topic heading "Non-Compete Agreements."

TERMINATION AND NONRENEWAL

***PMT Mach. Sales, Inc. v. Yama Seiki USA, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,282, No. 17-CV-1731-JPS, 2018 WL 5775919 (E.D. Wis. Nov. 2, 2018)**
This case is discussed under the topic heading "Oral Agreements."

***Red Lion Hotels Franchising, Inc. v. First Capital Real Estate Invs., LLC*, Bus. Franchise Guide (CCH) ¶ 16,279, No. 2:17-CV-145-RMP, 2018 WL 4259241 (E.D. Wash. Sept. 6, 2018)**
This case is discussed under the topic heading "Damages."

***Tri-State Bobcat, Inc. v. FINN Corp.*, Bus. Franchise Guide (CCH) ¶ 16,281, 338 F. Supp. 3d 971 (D. Minn. 2018)**
This case is discussed under the topic heading "Non-Compete Agreements."

TRADEMARK INFRINGEMENT

***Safe Step Walk in Tub Co. v. CKH Indus., Inc.*, Bus. Franchise Guide (CCH) ¶ 16,270, 242 F. Supp. 3d 245 (S.D.N.Y. 2017)**
This case is discussed under the topic heading "Definition of Franchise."

TRADE SECRETS

***Great Am. Opportunities, Inc. v. Kent*, Bus. Franchise Guide (CCH) ¶ 16,286, No. 17-cv-01662-RBJ, 2018 WL 5249998 (D. Colo. Oct. 22, 2018)**
This case is discussed under the topic heading "Labor and Employment."

TRANSFERS

***Picktown Foods, LLC v. Tim Hortons USA, Inc.*, Bus. Franchise Guide (CCH) ¶ 16,294, No. 17-21072-CIV, 2018 WL 3412872 (S.D. Fla. June 12, 2018)**
Franchisor Tim Hortons did not breach the franchise agreements with several of its franchisees when it refused to consent to franchise sales. The franchisees had each entered into ten-year agreements with Tim Hortons and later sought franchisor's approval on the sale of five Tim Horton's restaurants to Ravi Patel, a separate individual, for $4.4 million. The franchisees sought approval to sell the restaurants in accordance with the proposed Asset Purchase Agreements.

Franchisee's agreements with Tim Hortons provide the franchisor with the "sole and absolute discretion" to approve any sale. Tim Hortons denied the franchisee's proposed sale on the basis that the proposed sales price exceeded the depreciated value of the "personalty and inventory." The court found that this stated reason was squarely within Tim Horton's right to deny the sale, given that the franchise agreement contains language allowing franchisor to "arbitrarily withhold its consent to any transfer of this Agreement in whole or in part if it determines in its sole and absolute discretion that the sale or transfer price to be paid by any proposed transferee is inappropriate."

Franchisees additionally claimed that Tim Hortons breached the franchise agreements by failing to consent to the sale of the restaurants. Finding that the language of the contract was unambiguous as to franchisor's right to deny the sale of the restaurants if price was deemed inappropriate, the court regarded franchisees' claim as without merit.

UNFAIR COMPETITION/UNFAIR AND DECEPTIVE PRACTICES

***E&I Holdings, Inc. v. Coral Springs Eggs and I, LLC*, Bus. Franchise Guide (CCH) ¶ 16,262, No. 17-cv-2377, 2018 WL 4680339 (D. Colo. Sept. 28, 2018)**

The U.S. District Court for the District of Colorado granted in part and denied in part a franchisor's motion to dismiss counterclaims filed by a franchisee.

E&I Holdings, Inc. (E&I) filed a motion to dismiss counterclaims alleging breach of contract, fraud in the inducement, violations of Florida tort law, and violation of the Colorado Consumer Protection Act. E&I was the franchisor of Egg & I restaurants and entered into written franchise agreements with franchisees Pomegranate, Inc. and Coral Springs Egg and I, LLC, in April 2013 and July 2014, respectively. The terms were identical, and both agreements required the franchisees to pay monthly royalties and advertising contributions. E&I sent default notices to the franchisees for failure to pay and terminated the agreements after franchisees refused to cure their payment defaults. Because the franchisees continued to operate at least one restaurant as if it were in good standing, E&I initiated a lawsuit. The franchisees asserted that E&I upsold them using "deceptive false sense of urgency sales tactics," falsely represented that open territories were scarce, and provided a Franchise Disclosure Document (FDD) with severely understated costs.

E&I merged with a competing breakfast chain in 2015. Soon after, the franchisees believed E&I adopted a policy not to approve any new restaurants for at least a year and intentionally watered down the quality of the Egg & I brand. E&I allegedly knew but failed to disclose that it would be impossible for franchisees to meet the requirement to open twelve stores in only a few years in an expensive area like Palm Beach County, Florida.

The court first considered franchisees' breach of contract claim, which was premised on E&I's pretextual termination, watering down the Egg & I brand, and violating the implied covenant of good faith and fair dealing. E&I argued that the franchise agreements had been modified orally or through conduct, but failed to address the implied covenant of good faith and fair dealing claim. Because the court determined that the breach of contract counterclaim was based *entirely* on the implied covenant, it denied the motion to dismiss due to E&I's lack of response.

E&I also argued that the fraud in the inducement claim failed the heightened pleading requirements of Federal Rule of Civil Procedure 9(b) and was barred by a non-reliance provision in the contracts under which the franchisees acknowledged they were not relying on any of the alleged misrepresentations. The court rejected the argument under Rule 9(b) and specifically noted that the Rule 9(b) standard is modified when pleading fraudulent omission claims. The franchisees did not respond to the second argument based on the provision in the agreement. While the court did not make any

ruling on the enforceability of the non-reliance provision, it granted the motion because franchisees failed to respond to that allegation.

Third, E&I argued that claims based on the Florida Franchise Act and Florida Unfair and Deceptive Trade Practices Act were barred by the agreements' choice-of-law provision mandating Colorado law. Colorado had adopted the "most significant relationship" test for multi-state claims, and the court dismissed the claim because the franchisees had not applied the appropriate standard in response to the motion to dismiss.

Finally, the court dismissed the claim under the Colorado Consumer Protection Act because the Colorado Supreme Court had held that the Act could not be used "to remedy a purely private wrong." The franchisees tried to argue that watering down food and beverages sold to the public did impact actual or potential consumers, but the court once again dismissed the claim since the franchisees relied on yet another incorrect legal standard.

***Safe Step Walk in Tub Co. v. CKH Indus., Inc.*, Bus. Franchise Guide (CCH) ¶ 16,270, 242 F. Supp. 3d 245 (S.D.N.Y. 2017)**

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

***Sleepy's LLC v. Select Comfort Wholesale Corp.*, Bus. Franchise Guide (CCH) ¶ 16,314, 779 F.3d 191 (2d Cir. 2015)**

In the middle of a bench trial, the United States District Court for the Eastern District of New York granted defendant Select Comfort's motion for judgment under Rule 52(c) of the Federal Rules of Civil Procedure. Sleepy's, LLC (Sleepy's) appealed and argued that the district court's dismissal of its contract, good faith and fair dealing, unfair competition, and slander claims was based on errors of law. The Second Circuit agreed and reversed the trial court's decision.

Sleepy's became an authorized retailer of Sleep Number beds manufactured by Select Comfort under a written Dealer Agreement. Sleepy's sold the "Personal Preference" line of beds, while Select Comfort retained the right to sell its "core" line of beds in company-owned retail stores. These two bed types had different foundations and control features, and the Dealer Agreement required each party not to "adversely affect the character, reputation and good will (collectively the 'Brand Image') of the other party."

Sleepy's had disappointing sales numbers but soon learned Select Comfort salespeople were disparaging Sleepy's and the Personal Preference line that it was authorized to sell. To investigate, Sleepy's hired secret shoppers to visit Select Comfort stores and presented twelve statements by Select Comfort's salespeople at trial. The secret shoppers testified that the salespeople stated Sleepy's beds were on inferior wooden foundations, were stored in warehouses where they attracted allergens and dust mites, and came with inferior sales terms that Sleepy's would deceitfully refuse to honor.

The district court found no evidence of disparagement prior to the expiration of the Dealer Agreement, but the Second Circuit held the trial court

had conflated the terms "expiration" and "termination." These were distinct terms under the language of the contract. Thus, the Second Circuit vacated the slander claim and ordered the lower court to determine whether the Dealer Agreement had been extended by the parties' conduct—and whether any disparagement occurred while the agreement was still in force. The Second Circuit vacated the judgment on Sleepy's unfair competition and good faith and fair dealing claims for the same reasons.

The district court also had concluded that eleven statements were not actionable because the secret shoppers were the first to mention that Sleepy's stores also sold Select Comfort merchandise and asked questions about Sleepy's to induce a response. The lower court ruled that this meant Sleepy's had consented to those statements as a matter of law. As for the final statement, the district court held that a reasonable listener would not have believed the statement asserted facts as opposed to non-actionable sales talk. The Second Circuit disagreed with both findings, in large part because the district court had used an incorrect understanding of New York defamation law, which relies in part on the *Restatement (Second) of Torts*. The *Restatement* provides that an honest inquiry or investigation by a person defamed to ascertain the existence, source, content, or meaning of a defamatory publication is not a defense for the defamer. The Second Circuit also found the final statement had a precise meaning capable of being proven true or false and conveyed defamatory facts about Sleepy's business.

Accordingly, the Second Circuit remanded and ordered the district court to reconsider whether Sleepy's inquiries via the secret shoppers were motivated by a good faith attempt to learn if Select Comfort had a consistent pattern of slander, or whether it was merely a ruse to bait Select Comfort into a lawsuit. Notably, even if the individual statements were not actionable, the Second Circuit noted that Sleepy's might still have an actionable claim by showing Select Comfort had a routine practice of slandering Sleepy's, which would be admissible evidence under Federal Rules of Evidence 406.

VICARIOUS LIABILITY

Patel v. Sunvest Realty Corp., Bus. Franchise Guide (CCH) ¶ 16,289, C.A. No.: N18C-01-185 AML, 2018 WL 4961392 (Del. Super. Ct. Oct. 15, 2018)

The Delaware Superior Court held that a real estate broker who worked for RE/MAX Sunvest Realty (Sunvest), a franchisee of the franchisor RE/MAX LLC, was not an indispensable party for claims brought against the franchisee and the franchisor. Defendants had moved to dismiss the complaint filed by plaintiffs alleging that a real estate broker, who was formerly employed by Sunvest in a franchise branch, had embezzled funds that the plaintiffs had given to him for investment in real estate. Defendants argued that the Sunvest broker who allegedly embezzled the funds was an indispensable party.

The court granted the motion in part and denied it in part, ruling that the broker may be an essential fact witness, he was not an indispensable party to the action. The court reasoned that the broker did not have a personal stake in the action nor would his lack of participation impair his ability to protect his interests. Further, the court ruled that plaintiffs had sufficiently pleaded their vicarious liability claims for the RE/MAX franchisor by alleging its apparent authority over the franchisee defendant. Plaintiffs noted that they relied on the franchisor's name and brand recognition to invest with the broker. The court found that these allegations were sufficient to suggest a plausible vicarious liability claim.

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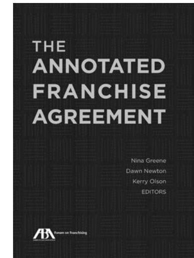

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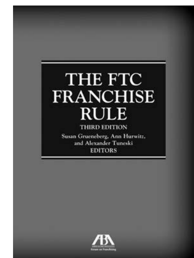

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