LADR Case Notes (August 2022–October 2022) and FLJ Currents (Winter 2023)

*Matthew S. DeAntonio, Matthew Gruenberg & Vanessa Wheeler**

AUGUST 2022 LADR CASE NOTE

Mr. DeAntonio

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***Core Progression Franchise LLC v. O'Hare*, 2021 WL 1222768 (D. Colo. Apr. 1, 2021), *aff'd*, 2022 WL 1741836 (10th Cir. May 31, 2022).**

A gym franchisor recently secured a preliminary injunction against its former franchisee prohibiting the franchisee from operating an independent gym on the same location and using the franchisor's trade secrets.

Chris O'Hare, along with his company, (O'Hare), was a former Core Progression gym franchisee. A few months after the opening of his Core Progression gym in North Carolina, O'Hare stopped paying the royalties and began to convert the Core Progression gym to an independent gym called Altru Fitness. The plaintiff Core Progression Franchise LLC (Core Progression) filed suit alleging that O'Hare breached the non-compete covenant in the franchise agreement and infringed on Core Progression's trademarks in violation of the Lanham Act. O'Hare alleged that the franchise agreement was unenforceable as it was induced by Core Progression's fraudulent representation of future profit. Core Progression filed a motion for preliminary injunction to prohibit O'Hare from operating an independent gym in the same location and continuing to use its trademarks and trade secrets. The U.S. District Court for the District of Colorado granted the preliminary injunction, and the decision was affirmed the Tenth Circuit.

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To obtain a preliminary injunction, the moving party must establish "(1) a substantial likelihood that the movant eventually will prevail on the merits; (2) that the movant will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that the injunction, if issued, would not be adverse to the public interest." *NRC Broad. Inc. v. Cool Radio, LLC*, 2009 WL 2965279, at *1 (D. Colo. Sept. 14, 2009). "As a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal." *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005). The Tenth Circuit applies a heightened standard for "[d]isfavored preliminary injunctions." *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 797 (10th Cir. 2019).

Based on the overwhelming evidence submitted by Core Progression, the district court found that it satisfied all elements for a preliminary injunction. Certain critical evidence stands out:

1. Likelihood of success on the merits: Core Progression alleged that Altru Fitness used its trademarks (e.g., Altru Fitness's profile online showed the Core Progression marks, the Google Maps result for Altru reads "Altru Fitness (formerly Core Progression)," and O'Hare subsequently stipulated to the preliminary injunction prohibiting him from using Core Progression's trademark. O'Hare did not dispute that he took steps to build a competing business out of the same location as the Core Progression gym, downloaded the customer list from the Core Progression database, and contacted customers to say that the gym was transitioning to a competing software while it was still a franchise of Core Progression. The district court and Tenth Circuit also found O'Hare's reliance on Core Progression's misrepresentations in entering the agreement to be unsupported by evidence.
2. Irreparable harm: the district court and Tenth Circuit agreed with Core Progression that O'Hare caused confusion in customers and damaged Core Progression's goodwill. At the time, Core Progression only had locations in Colorado. Core Progression's witnesses testified that O'Hare was its "boots on the ground" in North Carolina, received extensive training and assistances, and that O'Hare made it look like Core Progression "went to North Carolina and failed and was a fraud" by posting on Google Maps that Core Progression was a "fake franchise" in response to a customer's inquiry on the confusion as to whether this location was Altru Fitness or Core Progression.
3. Balance of harm: the non-compete clause prohibits O'Hare from operating a competing business within twenty-five miles of the franchised location within one year. The courts found this "temporary closure of Altru Fitness" (if O'Hare is unwilling to relocate) was "discounted by the fact that the defendant brought that injury upon itself."

4. Public interest: the court found Colorado statutes expressly permit such noncompete agreements; therefore, an injunction was not adverse to the public interest. E.g., Colo. Rev. Stat. Ann. § 8-2-113.

While whether to grant a preliminary injunction is a case-by-case analysis, this case provides valuable insights to both franchisors and franchisees as to how to make strategical plans when the latter considers exiting the system.

SEPTEMBER 2022 LADR CASE NOTE

***Planet Fitness International Franchise v. JEG-United, LLC*, --- F. Supp. 3d ----, No. 20-cv-693-LM, 2022 WL 4484477 (D.N.H. Sept. 27, 2022).** In the wake of a franchisor's changed business strategy for developing foreign markets, a large franchisee with hopes of developing the entire Mexico market for Planet Fitness gyms asserted claims against Planet Fitness International Franchise (Planet Fitness) and its Chief Development Officer after the parties failed to reach an area development agreement for any part of Mexico. On Planet Fitness's motion for summary judgment, the U.S. District Court for the District of New Hampshire examined what kind of development deal the parties would have made and how profitable that deal would have been for franchisee JEG-United, LLC (JEG-United) had the parties concluded such a deal. The court also considered whether any of the franchisee's efforts to develop the market might reasonably have resulted in contracts with third parties giving rise to a claim against Planet Fitness for tortious interference after the area development deal fell through.

In April 2017, Planet Fitness and U.S.-based JEG-United entered into a franchise agreement for a single Planet Fitness unit in Monterrey, Mexico. When they executed the franchise agreement, the parties also executed a side letter agreement granting JEG-United exclusive rights to certain municipalities within Monterrey and a right of first refusal to develop Planet Fitness franchises in Monterrey. The 2017 side letter agreement also discussed terms for an Area Development Agreement (ADA) for Mexico if the parties concluded an ADA deal by the end of 2018. JEG-United strongly hoped at that time to obtain an ADA for all of Mexico.

Soon after JEG-United opened its Monterrey unit in April 2018, Planet Fitness hired a new Chief Development Officer, Ray Miolla (Miolla), and modified its strategy for expanding into foreign markets, including Mexico. Planet Fitness shifted away from having U.S.-based franchisees develop foreign markets—a strategy Planet Fitness believed had not been successful in many markets. Planet Fitness decided to develop Mexico with U.S.-based JEG-United as well as a separate Mexico-based franchisee, offering JEG-United an ADA only for northern Mexico, which Planet Fitness believed could be developed by a U.S.-based company. Miolla targeted the Mexico-based Ibarra Group to develop central and southern Mexico.

Around the same time, JEG-United was looking for real estate opportunities for additional units in Mexico and, specifically, was in discussions with a Mexico-based grocery store chain, Soriana, about leasing Soriana properties for Planet Fitness locations within and outside of Monterrey. By June 2018, JEG-United had executed an agreement to lease property from Soriana for a second franchise unit in Monterrey. Discussions as to other properties remained at a "pretty high level." In late August 2018, Miolla corresponded with Carlos Ibarra of Ibarra Group to raise concerns about how JEG-United was handling the Monterrey lease deal with Soriana, and JEG-United asserted (though the evidence on this point was disputed) that someone at Planet Fitness told Soriana not to deal with JEG-United. By the end of 2018, Soriana was no longer engaging with JEG-United as to any other lease deals.

After receiving franchise presentations from both JEG-United and Ibarra Group in September 2018, Miolla told JEG-United that Planet Fitness was now talking with a second franchise applicant (Ibarra Group) and that Planet Fitness would consider negotiating an ADA with JEG-United for northern Mexico.

The April 2017 side letter agreement between Planet Fitness and JEG-United expired at the end of 2018 with no ADA in place between the parties. Continued negotiations for an ADA for Northern Mexico resulted in a second side letter agreement in March 2019. The March 2019 side letter agreement required the parties to negotiate in good faith consistent with a non-binding term sheet attached to the agreement. The agreement contemplated a development schedule of thirty franchises over eight years, but the term remained open for discussion. The 2019 side letter agreement also contained a put option allowing JEG-United to sell its Mexico franchises to Planet Fitness at book value if no ADA were reached.

In May 2019, JEG-United was in discussions with a Planet Fitness competitor to purchase five gyms in Mexico. JEG-United asked Planet Fitness to approve the negotiations under multiple potential purchase scenarios, including JEG-United purchasing and fully owning the gyms, JEG-United entering a joint venture with Ibarra Group to acquire the gyms, or Planet Fitness purchasing and operating the gyms. However, a strained dynamic between Planet Fitness and the competitor due to then-pending litigation meant that purchase negotiations did not progress.

Planet Fitness continued to negotiate ADA terms with JEG-United and Ibarra Group for their separate Mexico territories through the summer of 2019. In June, JEG-United and Planet Fitness were discussing the development schedule, with JEG-United requesting to change the schedule to twenty units over ten years. The parties ultimately agreed to a twenty-unit schedule, but continued to disagree about the timeframe.

The relationship between Planet Fitness and JEG-United's CEO had long since soured, and by late 2019 JEG-United believed that Planet Fitness preferred Ibarra to take the entire Mexico territory. JEG-United stopped engaging in ADA negotiations with Planet Fitness and began instead to pursue a joint venture with Ibarra Group. While JEG-United and Ibarra were discussing terms in principle, Miolla raised concerns to Ibarra that JEG-United would seek equal partnership in the venture. He made clear that Planet Fitness would require Ibarra to maintain majority control. JEG-United and Ibarra Group never concluded a joint venture deal. Planet Fitness ultimately concluded an ADA with Ibarra Group for all of Mexico.

In March 2020, JEG-United exercised its put option as to its Mexico franchises. Planet Fitness sued JEG-United in June 2020. JEG-United asserted counterclaims against Planet Fitness for breach of contract, breach of the implied covenant of good faith and fair dealing, tortious interference with prospective economic relationships, and violation of the New Hampshire Consumer Protection Act. On summary judgment, Planet Fitness challenged (among other things) JEG-United's lost-profits damages model for its breach of contract and implied covenant claims and argued that none of JEG-United's development activities generated a sufficiently certain expectation of any future contract to give rise to a tortious interference claim.

JEG-United's breach of contract and implied covenant claims—the substance of which was not challenged on summary judgment—asserted that Planet Fitness breached an obligation in the March 2019 side letter agreement to negotiate in good faith towards the execution of an ADA with JEG-United. JEG-United argued that the parties would have agreed to terms if Planet Fitness had negotiated in good faith. Its expert opined that JEG-United suffered lost profits between $46 million, if the ADA were limited to twenty units, and $232 million, if the ADA development schedule reached as many as 100 units.

So, what deal would the parties have made had both parties negotiated in good faith? The court found no evidence to suggest that the parties ever considered a 100-unit development schedule, and thus found JEG-United's $232 million claim too speculative to present to a jury. Conversely, the court found evidence that the parties were reasonably certain to have reached a twenty-unit deal had both parties negotiated in good faith. The court could not say as a matter of law that JEG-United could not recover lost profits of $46 million in connection with the twenty-unit deal the parties might have reached.

JEG-United's tortious interference claims asserted that Planet Fitness improperly interfered with the negotiations between JEG-United and: (a) Soriana; (b) the competitor who sought to sell several gyms in Mexico; and (c) Ibarra Group. The court determined that none of these negotiations had yielded sufficiently certain prospective deals such as to support a claim for tortious interference with future economic advantage. As to the potential purchase of several gyms from Planet Fitness's competitor, it was significant to the court that JEG-United had asked to include Planet Fitness in the negotiations and proposed transaction, with one potential scenario being that Planet Fitness itself purchase and operate the gyms. The court found that the involvement of Planet Fitness in the purchase discussions undercut any claim that Planet Fitness improperly interfered with the discussions by declining to engage in the relationship.

The court also found that JEG-United's conversations with Soriana to lease other properties were too "high level" to create a reasonable expectation that any such leases would actually be executed. The hope of future negotiations for additional Soriana properties without any specific locations, rental rates, or other terms could not, as a matter of law, support a claim for tortious interference with a concrete prospective economic relationship. The court could not say that these parties would have entered any leasing deals but for the alleged interference.

Lastly, the court found no evidence that Planet Fitness or Miolla improperly interfered with JEG-United's failed efforts to obtain a joint venture arrangement with Ibarra Group to develop franchises in Mexico. JEG-United argued that it had reached a deal in principle with Ibarra. But there was no evidence to show any wrongful conduct by Planet Fitness or Miolla to interfere with that deal, as would be necessary to recover for tortious interference with a *prospective* contract under New Hampshire law. Miolla's communication that Planet Fitness would not accept a joint venture arrangement in which the two franchisees were equal partners did not constitute any tort. Planet Fitness was under no obligation to allow franchisees to agree to fifty-fifty partnerships. Nor did any comments by Miolla about the potential purchase price arise to "improper" interference because there was nothing tortious about Miolla opining on the purchase price for the contract. The court thus granted summary judgment to Planet Fitness and Miolla on all JEG-United's tortious interference claims.

OCTOBER 2022 LADR CASE NOTE

***Arrington v. Burger King Worldwide, Inc.*, 47 F.4th 1247 (11th Cir. 2022).** From at least 2010 until September 2018, as part of Burger King franchise agreements, Burger King and its franchisees entered into "No-Hire Agreements" under which each agreed not to hire any employees of another Burger King restaurant for at least six months after the employee left employment at another Burger King restaurant.

In October 2018, three former employees of Burger King franchise restaurants brought suit against Burger King, on behalf of a class of employees of Burger King franchise restaurants, alleging antitrust violations. They asserted that the No-Hire Agreements prevented them from being able to obtain employment at other Burger King restaurants and, as a result, caused them to be paid artificially depressed wages, suffer decreased benefits, and be deprived of job mobility. They claimed the No-Hire Agreements amounted to an unreasonable restraint on trade, in violation of Section 1 of the Sherman Act, and prohibit Burger King franchisees from competing with each other, and with the franchisor, in attracting and retaining labor.

In response to the lawsuit, Burger King filed a motion to dismiss for failure to state a Section 1 Sherman Act claim. Burger King argued that it and its franchisees constituted a single economic enterprise and were not capable of the concerted action that a Sherman Act Section 1 violation requires.

The district court agreed with Burger King, granting Burger King's motion and dismissing the action on the grounds that the complaint failed to state a Section 1 Sherman Act claim because Burger King and each of its franchisees together constituted a single economic enterprise, so they were not capable of conspiring under the Sherman Act.

The plaintiffs appealed to the Eleventh Circuit, and the Eleventh Circuit reversed the district court's decision. The Eleventh Circuit held Burger King and its franchisees compete against each other for employees, so the No-Hire Agreements deprived the marketplace of potentially different hiring decisions by each of the separate restaurant owners. Consequently, the plaintiffs plausibly alleged Burger King and its franchisees engaged in "concerted action" in violation of Section 1 of the Sherman Act.

The Eleventh Circuit reasoned while Burger King and its franchisees have some economic interests in common, each separately pursues their own economic interests when hiring employees. The Eleventh Circuit relied on language in Burger King franchise agreements that emphasized the independent nature of each franchisee's relationship with Burger King and that no fiduciary relationship between the parties exists. The court also relied on Burger King's Franchise Disclosure Document, which expressly warned that other Burger King restaurants may compete with a franchisee's restaurant, and franchisees may face competition from other franchisees, from outlets the franchisor owns, or from other channels of distribution or competitive brands the franchisor's parent company owns or controls.

The Eleventh Circuit further reasoned Burger King's franchisees' independence expressly extends to hiring decisions, relying on language in the Burger King franchise agreements stating each franchisee is solely responsible for all aspects of the employment relationship with its employees, and each franchisee enjoys the sole right to hire and establish wages, hours, benefits, employment policies, and other terms and conditions of employment for its employees without consultation with or approval of the franchisor. The Eleventh Circuit also highlighted statements on Burger King's website stating that job descriptions, compensation, benefits, and other employment terms and conditions applicable to positions at franchised Burger King restaurants will vary and are determined solely by each franchisee.

Finally, according to the Eleventh Circuit's opinion, the plaintiffs' allegations that several franchisees had different approaches to employee recruitment and retention were an additional significant consideration.

Based on the foregoing, the Eleventh Circuit held, in the absence of the No-Hire Agreements, each independent Burger King restaurant would pursue its own economic interests and therefore potentially and fully make its own hiring decisions, including about wages, hours and positions, and they might even attempt to entice employees to leave one restaurant and join their own. The Eleventh Circuit reasoned the No-Hire Agreements removed that ability. Accordingly, the court concluded the plaintiffs had plausibly alleged the No-Hire Agreement qualifies under Section 1 of the Sherman Act as "concerted activity," such activity constituted an allegation of a Sherman Act Section 1 violation, and the district court should not have dismissed the plaintiffs' complaint.

The Eleventh Circuit declined to address the alternative argument by Burger King that the dismissal of the complaint was proper because any restraint on trade was not unreasonable. The court held that argument is best left to the district court in the first instance.

CURRENTS

ANTITRUST

***Deslandes v. McDonald's US, LLC*, Bus. Franchise Guide ¶ 17,129, 2022 WL 2316187 (N.D. Ill. June 28, 2022)**

This case is discussed under the topic heading "Non-compete Agreements."

ARBITRATION

***Callen v. ILKB, LLC*, Bus. Franchise Guide (CCH) ¶ 17,115, 2022 WL 2079651 (E.D.N.Y. June 9, 2022)**

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

CHOICE OF FORUM

***C21FC LLC v. NYC Vision Capital Inc.*, Bus. Franchise Guide (CCH) ¶ 17,132, Case No. cv-22-00736-PHX-SPL, 2022 WL 2646168 (D. Ariz. July 7, 2022)**

A federal district court in Arizona granted the defendants' motion to transfer to the U.S. District Court for the Southern District of New York, where defendants had earlier filed a case involving the same parties and related legal claims.

C21FC LLC (C21FC) entered into a franchise agreement with NYC Vision Capital Inc. (NYCVC) to franchise a New York optometry store, The Eye Man. Shortly thereafter, C21FC entered into a purchase and sale agreement with C21VX LLC (C21VX) for the existing The Eye Man store, but then agreed to amend the agreement to substitute NYCVC as the buyer. NYCVC subsequently opened its own independent The Eye Man store in New York City. The parties disputed whether C21FC had sold NYCVC all assets, including the trademark, or just the physical assets of the business.

On April 13, 2022, NYCVC filed claims in the U.S. District Court for the Southern District of New York against C21FC and several of its chief officers asserting nine counts of fraud, breach of contract, misrepresentation, and franchise law and consumer protection violations. Sixteen days later, C21FC and C21VX brought claims in the U.S. District Court for the District of Arizona against NYCVC and its owners for six counts of declaratory relief, lien foreclosure, trademark infringement, reformation, and breaches of contract and covenants of good faith and fair dealing.

NYCVC filed a motion to transfer or dismiss C21FC and C21VX's claims based on the first-to-file rule. Generally, courts must analyze three factors to determine whether to apply the first-to-file rule: the timing of the lawsuits, the similarity in parties in each case, and the similarity of issues in each case. However, C21CF and C21VX conceded that the three requirements were met. Rather they argued that the first-to-file rule was overridden by the forum selection clause in the parties' franchise agreement, which stated that C21FC may institute any action arising out of the agreement in state or federal court in Arizona. The court found that because the forum-selection clause was clearly permissive, rather than mandatory, the courts of Maricopa County were not the exclusive forum for litigation. The court further concluded that because the forum-selection clause was only permissive, and NYCVC had filed first in another permitted forum, the first-to-file rule would apply. In the interests of justice and efficiency, the court decided to transfer the case to New York rather than stay or dismiss it.

CONTRACT ISSUES

JTH Tax LLC v. Agnant, Bus. Franchise Guide ¶ 17,096, 2022 WL 1556656 (E.D.N.Y. May17, 2022)

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

Callen v. ILKB, LLC, Bus. Franchise Guide (CCH) ¶ 17,115, 2022 WL 2079651 (E.D.N.Y. June 9, 2022)

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

Baymont Franchise Systems v. SB Hospitality Palm Springs, LLC, Bus. Franchise Guide ¶ 17,116, 2022 WL 2063623 (June 8, 2022)

In a dispute involving an alleged defective hotel reservation system, the U.S. District Court for the District of New Jersey partially granted a franchisor's motion for summary judgment, thus narrowing the matters remaining in dispute for trial.

The Plaintiff was Baymont Franchise Systems (Baymont), a hotel franchisor. In 2016, Baymont entered into a franchise agreement with the defendant, SB Hospitality Palm Springs, LLC (SB Hospitality), to operate a Baymont hotel in Palm Springs, California. SB Hospitality's individual members, also defendants, personally guaranteed performance of the franchise agreement. SB Hospitality and its members also gave Baymont a $50,000 promissory note that would immediately come due upon termination of the franchise agreement.

The franchise agreement required Baymont to operate and maintain a computerized reservation system, known as SynXis. Baymont and SB Hospitality entered a second SynXis agreement under which Baymont agreed to use commercially reasonable efforts to always make the reservation system available. Baymont offered a warranty that the reservation system would perform in a workmanlike manner and that it would use reasonable efforts to remedy nonperformance. Also in this agreement, SB Hospitality waived any claims arising out of the SynXis system except those due to Baymont's willful misconduct.

In 2018, due to alleged performance issues with SynXis, SB Hospitality terminated the franchise agreement with approximately eighteen years remaining on its term. Baymont then sued SB Hospitality and its guarantors to recover contractually prescribed liquidated damages, unpaid recurring fees, and payment on the promissory note. The defendants countersued for breach of contract, breach of the SynXis warranty, violation of the New York Franchise Sales Act (NYFSA), and tortious interference with prospective economic advantage. Baymont moved for summary judgment, asking the court to enter judgment in its favor on four of its claims, and against the defendants on their counterclaims and affirmative defenses.

The court granted Baymont summary judgment on two of the defendants' counterclaims and one of its affirmative defenses. It first held that the NYFSA did not apply because no part of the parties' transaction occurred in New York. The fact that one of SB Hospitality's members was a New York resident was not sufficient to bring the transaction within the scope of the NYFSA. Next, the court concluded SB Hospitality could not establish a claim for tortious interference with prospective economic advantage. It presented no evidence of Baymont's malice or of lost bookings. Finally, the court rejected the defendants' argument that the franchise agreement was unconscionable because SB Hospitality's member could not speak or read English and was never presented with a translation of the Franchise Agreement. Under New Jersey law, a party's inability to speak English is not sufficient to void a contract. Furthermore, the member had a copy of the Franchise Disclosure Document and franchise agreement for three weeks before signing it and therefore had ample opportunity to obtain a translation.

The court denied summary judgment as to the parties' remaining claims and defenses. The court found disputed issues of fact as to whether Baymont breached the franchise agreement by failing to provide a working SynXis system, or whether SB Hospitality's problems were due to user error. Because Baymont's breach would have justified SB Hospitality's early termination, the court could not conclude Baymont was entitled to judgment in its favor on its claims premised on SB Hospitality's wrongful termination of the franchise agreement.

The court next concluded the disclaimer in the SynXis agreement, under which SB Hospitality waived all claims arising out of the SynXis system except due to Baymont's "willful misconduct," did not preclude SB

Hospitality's claim for breach of the SynXis warranty. Applying principles of contractual interpretation, the court found this disclaimer did not cover a claim for breach of the warranty that the reservation system would perform in a workmanlike manner and that Baymont would use reasonable efforts to remedy nonperformance. The court reasoned that if willfulness was required to bring a claim for breach of these warranties, the warranties would be rendered meaningless.

Finally, the court found that disputed factual issues precluded summary judgment on SB Hospitality's defense that it was fraudulently induced to enter into the franchise agreement. Here, Baymont relied on a merger clause and another provision in the franchise agreement where SB Hospitality disclaimed reliance on any oral or written representations. Under New Jersey law, this kind of general statement in a contract does not bar the introduction of parol evidence to determine whether a party was fraudulently induced to enter a contract. Thus, the court permitted this affirmative defense to stand.

DAMAGES

The Cleaning Authority, LLC v. Hunsberger Enterprises, Inc., Bus. Franchise Guide (CCH) ¶ 17,146, Case No. CCB-20-3360, 2022 WL 2344169 (D. Md. June 29, 2022)

The U.S. District Court for the District of Maryland granted a motion for default judgment on one count and summary judgment on all remaining counts in a lawsuit arising from the termination of a franchise agreement.

The Cleaning Authority (TCA) and Hunsberger Enterprises, Inc. (Hunsberger) entered into a franchise agreement with a fifteen-year term for residential and commercial cleaning. The sole owner of Hunsberger personally guaranteed performance of the agreement and signed both a confidentiality and noncompetition agreement. TCA had a right to terminate the agreement if any payment was refused by Hunsberger's bank three of more times during a twelve-month period. In 2019 and 2020, Hunsberger failed to make the required payments on at least three occasions during a twelve-month period, and TCA terminated the agreement, triggering a post-term non-competition covenant. Despite the non-compete agreement, Hunsberger continued to advertise and provide cleaning services in its prior territory after its termination in August 2020.

TCA filed claims against Hunsberger and its owner in November 2020, alleging breach of contract. A default was entered against Hunsberger. After conducting discovery, TCA moved for default judgment on its claim for breach of the franchise agreement and summary judgment on its remaining claims related to breach of the personal guaranty and confidentiality and noncompetition agreement.

On the motion for default judgment, the court found that there were no material facts in dispute and that the evidence was sufficient. The court next calculated damages based both upon amounts that had been refused by

Hunsberger's bank and the liquidated damages provision of the agreement. The liquidated damages provision was found to be valid and enforceable under Maryland law because it was mandatory and provided both a clear and unambiguous sum and reasonable compensation. As a result, the court required Hunsberger to pay two years of royalties.

On summary judgment, the court found that there was no genuine dispute as to the two breach of contract claims. The breach of the franchise agreement from the failed payments subjected the owner to personal liability under the guaranty, and Hunsberger's continued operation and solicitation of former clients after termination violated the non-competition provisions. The court further found that the non-compete provisions were, which restricted Hunsberger's ability to operate a cleaning service within twenty miles of his former territory for twenty-four months, were reasonable in scope and thereby enforceable. The court entered an injunction enforcing the noncompete against Hunsberger and its owner for the full term of the covenant.

FRAUD

***Callen v. ILKB, LLC*, Bus. Franchise Guide (CCH) ¶ 17,115, 2022 WL 2079651 (E.D.N.Y. June 9, 2022)**
This case is discussed under the topic heading "Statute of Limitations."

***Baymont Franchise Systems v. SB Hospitality Palm Springs, LLC*, Bus. Franchise Guide ¶ 17,116, 2022 WL 2063623 (June 8, 2022)**
This case is discussed under the topic heading "Contract Issues."

INJUNCTIVE RELIEF

***Gurcharan Brothers Oil Co., Inc. v. Sei Fuel Services, Inc.*, Bus. Franchise Guide (CCH) ¶ 17,140, Case No. 22-cv-3345 (JMW), 2022 WL 2359597 (E.D.N.Y. June 30, 2022)**
The U.S. District Court for the Eastern District of New York granted a motion for a preliminary injunction enjoining the non-renewal of a franchise agreement under the Petroleum Marketing Practices Act (PMPA).

The plaintiff was a franchisee that had operated a Shell-branded gas station and convenience store in New York since 1996. The franchisee's lease for the gas station premises was not clear as to the termination date. The franchisor, who was also the supplier, issued the franchisee a notice of non-renewal of the franchise agreement on the basis that low volume sales and rent concessions made it uneconomical to renew. The notice did not identify expiration of the lease as a basis of non-renewal but did state that the lease would terminate at the same time. The parties signed a mutual termination agreement; the franchisee received the fully executed agreement two months later and then repudiated two days after such receipt.

The franchisor made what it claimed to be a bona fide offer to sell the relevant equipment and leasehold rights, but no agreement was reached. The franchisee filed for an injunction against the nonrenewal and/or termination of the franchise agreement, claiming that the nonrenewal was not valid or in good faith, that the offer to sell was not a bona fide offer, and that the franchisee was willing and capable of continuing the relationship.

The court found that the mutual termination was valid, but that it was timely repudiated under the PMPA. In determining whether the franchisee had repudiated within the seven days allowed after receipt of the mutual termination agreement, the court first considered whether the agreement received had to be fully executed to start the clock. The court found that for the purposes of repudiation under the PMPA, a franchisee has only received a mutual termination agreement when it receives a version that has been signed by the parties. Prior to execution, there could be no agreement to repudiate. The franchisee had repudiated within two days of receipt of the fully executed agreement, so the repudiation was valid even though the document had actually been signed two months earlier.

Having determined that the mutual termination was repudiated, the court turned to the validity of the nonrenewal or termination itself. First, the court examined the offer that was made to franchisee, which was, by its terms, for whatever rights the franchisor might have in the equipment and the lease. Because the franchisor could not identify those rights, and thus what was being offered, with any certainty, the court found that there were serious questions as to whether the offer was bona fide. Second, the court found that there were questions regarding whether the nonrenewal had been made in good faith. Although the court acknowledged that the franchisor put forth evidence that a continued franchise relationship would be uneconomical, the court found it concerning that the alleged economic failings of the franchisee were never raised with the franchisee at all prior to the nonrenewal.

Finally, the court balanced the hardships as required for a preliminary injunction under the PMPA and found that it weighed in favor of the franchisee, given the length of the relationship and the fact that franchisee would only be entitled to continue the relationship while fulfilling the obligations of the franchise agreement. Based upon these factors, the court granted the preliminary injunction against nonrenewal or termination. The court required that a bond be posted in the amount of ten thousand dollars.

***Fursyth Petroleum Foundation Inc. v. PMIG 1025, LLC*, Bus. Franchise Guide (CCH) ¶ 17,108, Case No. PWG 21-cv-2433, 2022 WL 1663564 (D. Md. May 25, 2022)**

A petroleum franchisee's motion for a preliminary injunction enjoining the non-renewal of a franchise agreement under the Petroleum Marketing Practices Act (PMPA) was granted.

In 2004, PMIG 1025, a franchisor, acquired a contract to operate a gas station, car wash, convenience store, and air cargo complex food facility at

Baltimore Washington International Airport (BWI) and took over the subcontract with the Airport Concession Disadvantaged Business Enterprise (ACDBE) that had been operating the facility. In 2009, ACDBE was acquired by Fursyth, a franchisee, who signed a petroleum franchise agreement with the franchisor for renewable three-year terms. Upon renewal in 2014, the franchisor raised the rent to an amount that exceeded what the franchisor had to pay to the Maryland Aviation Administration (MAA) for its lease. The franchisor continued to increase rents in subsequent years, and the renewed 2019 franchise agreement was explicitly subject to the franchisor's underlying lease with MAA.

In November 2020, the franchisor notified Fursyth that the franchise agreement would terminate in January 2021, purportedly based on the expiration of its lease with MAA, a new version of which had gone into effect in January 2020. After the Fursyth requested a bona fide offer to sell the franchisor's interests in the improvements and equipment at the station, the franchisor rescinded the termination. The franchisor issued a new notice of termination for February 2021, but the parties continued to operate as usual after the noticed termination date. The franchisor eventually offered Fursyth a new franchise agreement to operate a 7-Eleven franchise at the station, but the proposed rent was significant and non-negotiable, and Fursyth declined.

On August 19, 2021, the franchisor sent a final notice of nonrenewal effective November 22, 2021. The stated basis for nonrenewal under the PMPA was failure of the parties to agree upon changes or additions to the franchise agreement. The franchisee then initiated this action seeking a preliminary injunction to enjoin the nonrenewal.

In ruling on the motion, the federal district court determined that the franchisee met the reduced standards for a preliminary injunction under the PMPA. There was no dispute that the franchisor was not renewing, and the court found that there were serious questions as to whether the proposed changes to the lease agreement were made in subjective good faith. The court determined that the evidence that the franchisee put forward related to past attempts to terminate the relationship and the communications around those attempts were enough to create a reasonable chance that the franchisor was acting in bad faith.

Further, in weighing the hardships for each party, the court found that the potential loss to the franchisee if the injunction was not granted outweighed the potential loss to the franchisor if it were. As a result, the court granted the motion for the preliminary injunction; the court also held that the franchisor had not made a showing that a bond was necessary and so did not require that the franchisee post any bond.

***JTH Tax LLC v. Agnant*, Bus. Franchise Guide ¶ 17,096, 2022 WL 1556656 (E.D.N.Y. May17, 2022)**

Against the backdrop of a Department of Justice (DOJ) investigation for improper tax preparation practices, a franchisor of tax preparation services terminated a New York franchisee for alleged compliance errors. The U.S. District Court for the Eastern District of New York refused to enter a preliminary injunction enforcing the franchise agreement's post-termination obligations, finding the franchisor had not established likelihood of success on the merits or likely irreparable harm.

The plaintiff in this case is JTH Tax, LLC (Liberty Tax), which franchises income tax preparation services under the Liberty Tax brand. Liberty Tax was the subject of a DOJ investigation into franchisees' preparation of tax returns for self-employed individuals who report Form 1040, Schedule C income on their tax returns.

The DOJ found Liberty Tax's franchisees, with Liberty Tax's actual or constructive notice, falsely reported Schedule C income over several tax seasons. On December 20, 2019, the U.S. District Court for the Eastern District of Virginia entered a consent decree under which Liberty Tax agreed to implement an internal review system to address fraudulent Schedule C filings, disclose the consent decree to prospective franchisees, and notify franchisees of their obligation to safeguard against inaccurate, false, or fraudulent federal tax returns.

The defendant, Alexia Agnant, purchased three new Liberty Tax franchises on November 1, 2019. She acquired four existing Liberty Tax locations on December 31, 2019. The parties disputed whether Liberty Tax disclosed the existence of the DOJ investigation prior to Agnant entering into the franchise agreements. Liberty Tax submitted provisions of the Franchise Disclosure Document (FDD) purportedly containing disclosure of the DOJ investigation. Agnant claimed she never received a copy of these provisions or of the entire FDD. The parties submitted competing versions of the FDD that they each claimed Liberty Tax provided to Agnant.

Beginning in July 2021, Liberty Tax began notifying Agnant of compliance issues at her franchised locations and issuing "notices to cure" and a "notice of default." The court noted that some of these issues were deemed closed, but the status of other issues was unclear. Agnant repeatedly requested clarification from Liberty Tax as to how to come into compliance with the franchisor's requirements. The court documented several communications revealing that Agnant did not understand from Liberty Tax's responses how to come into compliance.

In February 2022, Liberty Tax conducted an audit of two of Agnant's locations, which revealed compliance error rates of fifty percent for 2021 and forty-one percent for 2022. The next month, based on these error rates, Liberty Tax terminated Agnant's franchise agreements effective immediately. Agnant continued to operate at the franchised businesses' same locations, used the same phone numbers, and eventually stopped using Liberty Tax's trademarks and rebranded to Rocket Tax. Meanwhile, Liberty Tax withheld between $500,000 to $1 million that it owed to Agnant for tax preparation services.

After Liberty Tax filed suit against Agnant, the U.S. District Court for the Eastern District of New York entered a temporary restraining order requiring Agnant and her entity, Demetress, to comply with the franchise agreement's post-termination obligations. The court then conducted a hearing to determine whether it should issue a preliminary injunction. The court ultimately concluded that Liberty Tax had not demonstrated a likelihood of irreparable harm or a likelihood of success on the merits. The court therefore denied Liberty Tax's request for a preliminary injunction.

Regarding irreparable harm, the court held that Agnant and Demetress had already ceased using Liberty Tax's trademarks. Thus, there was no evidence of ongoing trademark infringement. Furthermore, beyond conclusory affidavit testimony, Liberty Tax did not offer any evidence that Agnant's use of the former franchise locations and phone numbers would cause irreparable harm, particularly because Liberty Tax had locked Agnant out of its computer systems. Liberty Tax could not claim irreparable harm in the form of lost customers since Liberty Tax demonstrated no intent to imminently re-enter Agnant's markets. Finally, the court determined any harm to Liberty Tax could be remedied by monetary damages and was not irreparable.

The court also concluded Liberty Tax was not likely to succeed on the merits of its claims. The court observed that Agnant had repeatedly "requested guidance on compliance" when Liberty Tax issued notices regarding compliance with federal laws, regulations, and the franchise agreements, but Liberty Tax did not respond with clear guidance. The evidence showed Liberty Tax used inconsistent standards for assessing compliance and withheld tax preparation fees contractually owed to the franchisee.

Because Liberty Tax could not establish either required element, the court denied its motion for a preliminary injunction.

JURISDICTION

Callen v. ILKB, LLC, Bus. Franchise Guide (CCH) ¶ 17,115, 2022 WL 2079651 (E.D.N.Y. June 9, 2022)

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

NON-COMPETE AGREEMENTS

The Cleaning Authority, LLC v. Hunsberger Enterprises, Inc., Bus. Franchise Guide (CCH) ¶ 17,146, Case No. CCB-20-3360, 2022 WL 2344169 (D. Md. June 29, 2022)

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

Deslandes v. McDonald's US, LLC, Bus. Franchise Guide ¶ 17,129, 2022 WL 2316187 (N.D. Ill. June 28, 2022)

This case examined the antitrust implications of no-hire provisions in franchise agreements. The United States District Court for the Northern District of Illinois ultimately held two McDonald's employees had no valid claim that these no-hire provisions violated Section 1 of the Sherman Antitrust Act.

Plaintiff Leinani Deslandes worked for a McDonald's franchisee near Orlando, Florida. She alleged that all McDonald's franchisees sign franchise agreements with no-hire restrictions prohibiting franchisees from employing, or seeking to employ, any person who has been employed by a different McDonald's restaurant within the previous six months. She claimed these provisions prevented her from taking a better-paying job at a different McDonald's location. She filed a putative class action complaint against two franchisor defendants, McDonald's Corporation and McDonald's USA, LLC, alleging violations of the Sherman Antitrust Act.

In her pleading, Deslandes alleged the no-hire provisions were unlawful *per se* or under a quick-look analysis. She did not allege they were unlawful under a rule-of-reason analysis, which would have required pleading facts about the market power in the relevant market.

After McDonald's filed a motion to dismiss, the court held the no-hire provisions were not *per se* invalid because they were ancillary to an output-enhancing agreement, namely, the franchise agreements, which increase output of burgers and fries. The court allowed the quick-look theory to proceed to discovery.

This gave Deslandes an opportunity to amend her complaint to lodge market power allegations that would support a rule-of-reason theory, but Deslandes chose not to do so, likely because proceeding under the rule-of-reason analysis would make it difficult to certify a nationwide class, the court speculated.

Turner, employed by a company-owned location in Covington, Kentucky, filed similar claims and consolidated her case with Deslandes's. She likewise did not assert a rule-of-reason theory.

After discovery, the court denied class certification. In that certification ruling, the court concluded the no-hire provisions could not be analyzed under the quick-look theory. Rather, the rule of reason applied. The court based its decision on recent Supreme Court guidance that restraints of trade "presumptively" call for rule-of-reason analysis; many of these restraints were in vertical agreements between franchisors and franchisees, which require rule-of-reason analysis; and McDonald's had presented evidence that its no-hire provisions had procompetitive effects, which required rule-of-reason analysis. Because individual issues would dominate under a rule-of-reason analysis, the court denied class certification.

Following these two interlocutory orders, McDonald's moved for judgment on the pleadings. It argued the court's previous rulings had eliminated all theory other than the rule of reason. Plaintiff did not plead the rule of reason because it alleged no facts regarding market power in the relevant market. The court agreed and dismissed the plaintiffs' claims for violation of Section 1 of the Sherman Antitrust Act.

Deslandes and Turner attempted to argue dismissal was inappropriate because a plaintiff is not required to formulaically plead legal theories. The court rejected this argument. The court explained that the reason for dismissal was not the failure to include a formal "rule of reason" label. Rather, dismissal was appropriate because the plaintiffs failed to plead specific facts regarding market power in the relevant market that are necessary to establish a plausible claim.

The court also concluded it would be futile for the plaintiffs to amend their complaints to allege the missing market power allegations. It observed that within ten miles of Deslandes's home, there were 517 quick-serve restaurants. Within ten miles of Turner's home, there were 253 quick-serve restaurants. The court reasoned that based on the high volume of restaurants, the plaintiffs could not plausibly allege McDonald's had sufficient market power to suppress their wages through the no-hire provisions.

Turner and Deslandes have since filed an appeal, which is currently pending before the Seventh Circuit.

PETROLEUM MARKETING PRACTICES ACT

***Fursyth Petroleum Foundation Inc. v. PMIG 1025, LLC*, Bus. Franchise Guide (CCH) ¶ 17,108, Case No. PWG 21-cv-2433, 2022 WL 1663564 (D. Md. May 25, 2022)**

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

***Gurcharan Brothers Oil Co., Inc. v. Sei Fuel Services, Inc.*, Bus. Franchise Guide (CCH) ¶ 17,140, Case No. 22-cv-3345 (JMW), 2022 WL 2359597 (E.D.N.Y. June 30, 2022)**

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

STATE DISCLOSURE/REGISTRATION LAWS

***Baymont Franchise Systems v. SB Hospitality Palm Springs, LLC*, Bus. Franchise Guide ¶ 17,116, 2022 WL 2063623 (June 8, 2022)**

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

***Callen v. ILKB, LLC*, Bus. Franchise Guide (CCH) ¶ 17,115, 2022 WL 2079651 (E.D.N.Y. June 9, 2022)**

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

STATUTE OF LIMITATIONS

***Callen v. ILKB, LLC*, Bus. Franchise Guide (CCH) ¶ 17,115, 2022 WL 2079651 (E.D.N.Y. June 9, 2022)**

This case arose out of sixteen alleged misrepresentations and omissions during the franchise sales process. Some of the defendants, all of whom were affiliated with the franchisor, moved to dismiss the complaint on jurisdictional and substantive grounds. Although these moving defendants prevailed on a handful of arguments, the plaintiff franchisee's claims remained largely intact.

In 2015, Thomas and Courtney Callen (Callens) began communicating with a franchisor, ILKB, LLC, (ILKB) about the potential purchase of an iLoveKickboxing franchise in Colorado Springs, Colorado. The Callens alleged ILKB and three of its executives made sixteen misrepresentations and omissions during the courting phase. These entailed oral misrepresentations, omissions from the franchise disclosure document, and false statements at a "Discovery Day" when the Callens and other prospects visited ILKB's New York offices to learn more about the franchise. The Callens signed their franchise agreement on February 29, 2016. Shortly thereafter, they formed Golden Polar Bear, LLC (Golden Polar Bear) to conduct the business of the franchise. They alleged ILKB authorized them to assign their franchise rights to the entity.

The Callens alleged that, when their franchise struggled to remain viable after opening, they learned the falsity of the sixteen misrepresentations and omissions. Pursuant to the franchise agreement's arbitration agreement, the Callens and Golden Polar Bear filed a demand for arbitration with JAMS against ILKB and the executives. But ILKB and the executives refused to pay their portion of the arbitration fees, so JAMS held the arbitration in abeyance.

Subsequently, ILKB Too, LLC (ILKB Too) acquired ILKB's assets. The Callens alleged ILKB Too and its three individual members took "full control" of the franchisor, thereby becoming its successor.

On July 24, 2020, the Callens and Golden Polar Bear filed a lawsuit in the U.S. District Court for the Eastern District of New York against ILKB, the executives, ILKB Too, and the members. When the court asked the parties whether the litigation should be stayed pending the outcome of the arbitration, they all responded that the court should hear and decide the litigation. The court deemed these responses to constitute a waiver of the right to arbitrate. ILKB, ILKB Too, and the members then moved to dismiss the complaint pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6).

ILKB Too and the members first argued they were not subject to personal jurisdiction in New York. The court disagreed, finding it could exercise "successor liability" jurisdiction. This is a theory under New York law by which a successor entity inherits its predecessor's jurisdictional status. Because the plaintiffs plausibly alleged a successor liability claim against ILKB Too and the members based on a the "de facto merger" and "mere continuation" theories, the court could exercise successor liability jurisdiction. The court therefore denied these defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(2).

Next, the court turned to the moving defendants' argument that Golden Polar Bear, which was not an original signatory to the franchise agreement, had no standing. The court construed this argument as a motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), which allowed the court to consider extrinsic evidence. While the plaintiffs generally alleged the franchisor authorized the Callens' assignment to Golden Polar Bear, they neither submitted a copy of any written authorization nor alleged the specific terms of the assignment. Without this detail, Golden Polar Bear could not establish standing. The court dismissed Golden Polar Bear's claims pursuant to Federal Rule of Civil Procedure 12(b)(1).

The moving defendants also sought dismissal of the Callens' claims for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). First, they argued the Callens' claims for violations of the New York Franchise Sales Act (NYFSA) and the Colorado Consumer Protection Act (CCPA) were time barred. The moving defendants argued the Callens signed their franchise agreement on February 29, 2016, but did not file the litigation until July 24, 2020, thus running afoul of the relevant three-year statutes of limitation.

The court disagreed and refused to dismiss these claims. Under a New York tolling statute, the statute of limitations on the NYFSA claim was tolled for the time that elapsed between the Callens' demand for arbitration, on February 26, 2019, and the final determination that there was no right to arbitrate. And in Colorado, a statutory discovery rule prevented the Callens' CCPA claim from accruing until the Callens discovered, or reasonably should have discovered, the illegal conduct. Thus, both tolling rules brought the Callens' NYFSA and CCPA claims within the three-year statutes of limitation.

The court also rejected the moving defendants' arguments that the NYFSA and CCPA did not apply to this dispute. Although NYFSA only applies to sales or offers to sell franchises in New York, the Callens sufficiently alleged an offer in New York by virtue of their visit to ILKB's New York offices for a Discovery Day. As for CCPA, while that statute is designed to remedy injuries to the public rather than private wrongs, the court found ILKB plausibly alleged a public injury by claiming ILKB sold dozens of franchises to the public and held a public Discovery Day attended by Colorado residents.

The moving defendants also moved to dismiss the Callens' claim for breach of the franchise agreement. This claim was partially premised on ILKB's failure to participate in the arbitration. The moving defendants argued the court should dismiss this claim because the Callens failed to allege the necessary element that they performed their obligations under the contract. But the Callens' complaint demonstrated they performed their obligations by bringing a JAMS arbitration action. This step established the essential element of performance.

The court then analyzed the moving defendants' arguments that the alleged misrepresentations and omissions could not support a fraud claim. For one of the misrepresentations, the Callens did not identify the speaker or the time of the misrepresentation and thus failed to satisfy the particularity requirements of Federal Rule of Civil Procedure 9(b). Two of the alleged omissions were not actionable because they concerned matters of public record. And two more alleged misrepresentations referred to what ILKB *would* do, which was a prediction of future events and therefore not actionable. But the court rejected the moving defendants' arguments that the remaining alleged misrepresentations were not actionable. Thus, the Callens' fraud claim survived as to the twelve remaining misrepresentations.

STATUTORY CLAIMS

***Callen v. ILKB, LLC*, Bus. Franchise Guide (CCH) ¶ 17,115, 2022 WL 2079651 (E.D.N.Y. June 9, 2022)**

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

***The Watch Co., Inc. v. Citizen Watch Co. of America, Inc.*, Bus. Franchise Guide ¶ 17,095, 2022 WL 1535262 (7th Cir. May 16, 2022)**

After a watch manufacturer terminated a retailer as an authorized seller of its products, the retailer sued for violations of the Wisconsin Fair Dealership Law. The Seventh Circuit affirmed the district court's dismissal of the retailer's claims, agreeing that it was not a dealer under the statute.

The defendant, Citizen Watch Company of America, Inc. (Citizen), manufactures and sells watches. For nearly thirty years, the plaintiffs (WatchCo) sold Citizen watches as an authorized retailer pursuant to Citizen's retail-distribution policy. As of February 2021, Citizen's watches accounted for 10.7% of WatchCo's sales. Five WatchCo employees and an outside firm helped WatchCo sell Citizen watches and service warranty issues. WatchCo estimated that since 1993, it had invested "many thousands of hours" into the Citizen product line.

On March 1, 2021, Citizen updated its policy to prohibit retailers from selling watches through third-party websites, rather than the retailer's own websites, unless the retailer could meet certain exceptions. Despite not meeting any of the exceptions, WatchCo continued to sell Citizen watches on Amazon.com in violation of the policy. As a result, Citizen terminated WatchCo as an authorized retailer. WatchCo retained 808 Citizen watches in its inventory, which it was free to sell despite the termination.

WatchCo sued Citizen alleging violation of the Wisconsin Fair Dealership Law, claiming that Citizen terminated its dealership without good cause or sufficient notice. Citizen removed the case to the U.S. District Court for the Eastern District of Wisconsin and moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The district court granted the motion and dismissed WatchCo's claim after finding that WatchCo did not satisfy the statutory definition of a dealer, which precluded application of the statute. WatchCo appealed, and the appellate court affirmed dismissal of the claims.

The dispute turned on whether WatchCo sufficiently pleaded it had a "community of interest" with Citizen. The test for what constitutes a community of interest boils down to two questions: (1) Does the alleged dealer derive a large proportion of its revenues from the dealership? and (2) Has the alleged dealer sunk substantial, unrecoverable investments into the dealership? As for the first question, the appellate court observed that although WatchCo derived 10.7% of its revenue from selling Citizen watches, that amount was insufficient to establish a community of interest. The court cited another case where 23% of revenue was "not dispositive." It concluded that, while the termination of the relationship would cause WatchCo to suffer some lost profits, the termination would not threaten its economic viability.

Turning to the second question, the appellate court concluded WatchCo had not alleged that it sank unrecoverable investments into the Citizen relationship. Despite alleging expenditures of "tens of thousands of dollars annually on advertisements" to benefit the Citizen brand, WatchCo failed to specify whether those expenditures were for multiple brands or exclusively for the Citizen brand. The court also observed that WatchCo could recoup its costs by selling the remaining inventory, potentially at a premium.

Because WatchCo failed to allege a community of interest, it was not a dealer and could not assert claims under the Wisconsin Fair Dealership Law. The appellate court affirmed dismissal of WatchCo's claims.

TORTIOUS INTERFERENCE

***Baymont Franchise Systems v. SB Hospitality Palm Springs, LLC*, Bus. Franchise Guide ¶ 17,116, 2022 WL 2063623 (June 8, 2022)**

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