LADR Case Notes (January 2023–March 2023) and FLJ Currents (2023)

*Filemon Carrillo, Maisa Frank & Briar Siljander**

Mr. Carrillo

Ms. Frank

Mr. Siljander

JANUARY 2023 LADR CASE NOTE

Burnett v. National Association of Realtors, 2022 WL 17741708 (W.D. Mo. Dec. 16, 2022)

This case involves putative class action, franchise, and antitrust claims. The plaintiff home sellers asserted antitrust and Missouri Merchandising Practices Act (MMPA) claims against several realty franchisors and the National Association of Realtors. In this decision, the court ruled on the defendants' motions for summary judgment.

The franchisor defendants are real estate broker franchisors that operate through franchises, as well as subsidiaries and affiliates. The Defendant National Association of Realtors (NAR) is a trade association, which adopts rules and a code of ethics for its realtor members.

The plaintiffs sold their homes through the Multiple Listing Service (MLS)—a database of properties for sale in a certain geographic area—and asserted antitrust claims related to the buyer broker commission that they paid in their home sales.

To list a property on an MLS, a broker must participate in the MLS and abide by MLS's rules. NAR requires that any MLS comply with its rules and ethics. At the heart of the dispute is a NAR rule that requires any seller broker listing on MLS make a unilateral offer

**Filemon "Phil" Carrillo (fcarrillo@mulcahycarrillo.com) is a partner at Mulcahy Carrillo LLP in Irvine, California. Maisa Frank (maisa.frank@lathropgpm.com) is a partner at Lathrop GPM LLP in its Washington, DC office. Briar Siljander (briar@triolawplc.com) is the founding member of Trio Law PLC, practicing in Michigan, California, Arizona, and Pennsylvania. He represents franchisors and franchisees in transactional and litigation matters.*

of commission to the buyer broker—specifying the compensation offered to the buyer broker. A listing cannot be posted on MLS unless it complies with that rule. The compensation offered to the buyer broker is paid for simply bringing in a buyer, and not for any amount of hours worked or specific services provided. NAR refers to these cooperative compensation arrangements in its rules and code of ethics.

Specifically, the plaintiffs take issue with the commission split with the buyer's broker in a standard residential real estate transaction. Generally, the franchisor defendants train their brokers to use a six percent commission rate, to be split equally between the seller broker and buyer broker. The franchisor defendants train their brokers not to lower their commission rates. The franchisor defendants receive a percentage of their brokers' commissions.

The franchisor defendants require their franchisees to be members of NAR and/or abide by its code of ethics. One piece of evidence cited by the court was an FDD produced by a franchisor reflecting these requirements. The franchisor defendants' witnesses testified that these cooperative compensation arrangements are beneficial and core to organized real estate.

NAR also has a Clear Cooperation Rule that requires all listings to be posted on MLS within a certain amount of time, and a special certification posted, if a seller does not want a listing disseminated by the MLS. This is done to encourage cooperation with competitors for the client's best interests. In contrast, listings that are private and outside of the MLS threaten cooperation in the industry.

Plaintiffs alleged that the NAR rule requiring every MLS listing broker to make a unilateral offer of paying a commission to the buyer broker is an anticompetitive restraint that results in inflated real estate commissions. The court denied the defendants' motion for summary judgment.

Sherman Act and Missouri Antitrust Claims

The Sherman Act prohibits contracts, combinations, or conspiracy in restraint of trade. 15 U.S.C. § 1.

Do the plaintiffs have standing? NAR claimed that the plaintiffs lacked standing to even bring the claims because they are not direct purchasers because sellers do not purchase the buyer broker's services. The standing argument relied on *Illinois Brick v. Illinois*, 401 U.S. 720 (1977), which bars antitrust claims by indirect purchasers. The court concluded that the plaintiffs established a genuine dispute of fact of whether they are direct purchasers because the seller must consent to the buyer broker's commission rates and the amounts are included in the listing agreement.

Is there evidence of conspiracy? The defendants argued that there was no contract, combination, or conspiracy. The court cited the Supreme Court's holding in *Associated Press v. United States*, 326 U.S. 1, 11 (1945), that trade association rules in and of themselves are contracts restraining commerce where they contain provisions designed to stifle competition. Here, the court found a genuine dispute about whether NAR's rule and the franchisor defendants' adoption of it is direct evidence of a conspiracy, and whether the defendants adhered to a common scheme. The court noted that there is evidence that the NAR rule stifled competition among brokers by artificially inflating commission rates. "Because these commission offers [of six percent] are blanket offers and agreed to prior to listing the house, the Buyer-Broker will receive the same amount in commission regardless of the effort made, stifling competition." The court found such evidence creates a genuine question of fact of whether adoption and enforcement of the NAR rule is a conspiracy to restrain trade.

In reaching its conclusion, the court rejected the franchisor defendants' argument that they cannot be liable for their brokers' conduct—who set their own rates—because the question is not what rates were actually used, but whether a conspiracy existed.

Is there evidence of restraint of trade? The court next addressed whether NAR's rule is an unreasonable restraint of trade. The parties disputed whether the *per se* rule or the rule of reason test applied to the facts of the case. The defendants argued against application of the *per se* rule, which applies to agreements that are so plainly anticompetitive that no elaborate study of the industry is needed to establish illegality. The defendants further argued that the rule of reason should apply instead because the NAR rule did not explicitly set the actual commission rates.

The court found the *per se* rule applicable because there was an issue of material fact as to whether the defendants engaged in horizontal price fixing, and horizontal price fixing agreements are *per se* unlawful. Under the *per se* rule, the plaintiffs can prove the unreasonableness of the restraint merely by proving the existence of the restraint.

Is there evidence of antitrust injury? The defendants also argued that the plaintiffs could not show antitrust injury by showing they were harmed or suffered any damage. The court found that there was evidence that the NAR rule caused harm because, without it, sellers would not pay the buyer brokers' commissions. Additionally, the court found a genuine dispute as to whether the plaintiffs were overcharged as a result of the rule, establishing the fact of damage.

Missouri Merchandising Practices Act

To establish a claim under the MMPA, a plaintiff must show (1) the lease or purchase of a product or service from the defendant; (2) primarily for personal, family, or household purposes; (3) that they suffered an ascertainable loss of money or property; (4) as a result of an act declared unlawful by Missouri Revised Statutes § 407.020. Mo. Rev. Stat. § 407.010 *et seq.*

Was the harm in connection with the defendants' conduct? The defendants argued that the plaintiffs did not establish this element because the defendants had not entered into a transaction with the plaintiffs. The court rejected this argument, finding that the MMPA does not require a direct contractual relationship. Instead, the plaintiffs only need show a relationship between the sale and alleged unlawful action. The court found this element met by the showing of a connection between the home purchases and the NAR rule. Although the franchisor defendants raised a question of whether they could be vicariously liable for their franchisees' conduct, the court found that point irrelevant because it was the defendants' own conduct at issue.

Is there ascertainable loss? In response to the defendants' assertion that there was no ascertainable loss in these circumstances, the plaintiffs argued that they received nothing of value from the buyer broker, so are not required to show ascertainable loss. The court agreed: but for the NAR rule, they would not have paid the buyer broker's commission.

Is the NAR rule an unfair practice? The court considered that the MMPA does not define unfair practices, and whether a practice is unfair can be a factual issue. The court found a genuine dispute of material fact as to whether the NAR rule and the defendants' actions to stabilize commissions rates violated the Sherman Act and Missouri antitrust laws, and, therefore, it held that the same conduct also raises a genuine dispute of fact as to whether the defendants engaged in unfair practices that offend public policy.

This case is certainly one to watch, as it continues past the summary judgment stage, to learn how the intertwining franchise and antitrust issues will unfold.

JANUARY 2023 LADR CASE NOTE

Golden Fortune Import & Export Corp. v. Mei-Xin Ltd., No. 22-1710, 2022 WL 353649 (3d Cir. Aug. 5, 2022)

Golden Fortune is a distributor of Asian groceries. It distributes more than 1,500 products from over 150 brands along the East Coast. Mei-Xin is Hong Kong company that produces premium brand moon cakes under the "Maxim" brand. Mooncakes are Chinese round pastries that are typically filled with red bean or lotus seed paste and are given as gifts during the Mid-Autumn Festival in China, other parts of Asia, and the United States. Mei-Xin entered into a distribution agreement with Golden Fortune to distribute its Maxim mooncakes in the Eastern United States. After a few years of declining sales, Mei-Xin warned Golden Fortune that it would terminate the agreement if sales did not improve. They did not, and, in 2022, Mei-Xin terminated its agreement with Golden Fortune.

Golden Fortune filed suit in U.S. District Court for the District of New Jersey alleging violations of the New Jersey Franchise Practices Act (NJFPA) and requesting a preliminary injunction preventing Mei-Xin from terminating the agreement. Mei-Xin opposed the preliminary injunction and argued that the NJFPA did not apply. The court determined that Golden Fortune had established that the NJFPA applied and that Golden Fortune was likely to succeed on its wrongful termination claim, and granted the preliminary injunction

The NJFPA applies to franchises that establish or maintain a place of business in New Jersey, have gross sales of products or services between the franchisor and franchisee of more than $35,000 in the preceding twelve months, and where more than twenty percent of the franchisee's gross sales are or are intended to be derived from the franchise. The NJFPA defines a franchise as "a written agreement for a definite or indefinite period of time in which a person grants another person a license to use a trade name, trade mark, service mark, or related characteristics and in which there is a community of interest in the in the goods or services." The court concluded that Golden Fortune had demonstrated a community of interest and that the sale of mooncakes constituted twenty percent of its gross sales. The Third Circuit disagreed and reversed.

In their verified complaint, Golden Fortune contended that the sale of Mei-Xin's Maxim mooncakes constituted twenty-four percent of its gross sales during the fiscal quarter preceding the Mid-Autumn Festival. It reached this percentage through a complicated formula that removed the gross sales of mooncakes from its annual gross sales, divided the adjusted gross sales into quarterly sales, and added the annual gross sales of mooncakes to the adjusted gross sales of the quarter leading up to the Mid-Autumn Festival. The district court noted that the NJFPA contains no controlling time period for establishing the twenty percent of gross sales requirement and that the New Jersey legislature made it clear that (1) the NJFPA was intended to protect "not only retail businesses, but also wholesale distribution franchisees"; (2) courts have "more narrowly construed the [NJFPA] than was intended by the legislature"; and (3) courts should interpret the NJFPA to give effect to its legislative purpose. The court concluded that, although "the mathematical gymnastics employed by [Golden Fortune] appear to test the flexibility of the [NJFPA] to its uppermost limits," Golden Fortune had "arguably sufficiently plead" the twenty percent sales requirement.

On appeal, the Third Circuit rejected the lower court's conclusion that "no temporal limitation applie[d]" to the twenty percent gross-sales requirement. The court concluded that the phrase "12 months preceding the institution of the suit" in the prior section of the statute also set a temporal limitation for the twenty percent of gross sales requirement. The court noted that a term appearing multiple times in a statute should "generally read the same way each time it appears" and that the term "gross sales" in both subsections should be read as "gross sales over a 12 month period." The court further reasoned that this interpretation was consistent with the purpose of the NJFPA because it would "offer security to franchisees that depend on franchisor for the success of their business" but not "distributors who rely on several different supply streams." The court concluded that because Golden Fortune only derived 8.6% of its annual income from the sale of Maxim mooncakes it had not established that the NJFPA applied.

The Third Circuit also reversed the district court's finding that Golden Fortune had sufficiently pled a "community of interest" between itself and Mei-Xin. The district court explained that "the concept of community of interest is broad, elastic and elusive" and that a community of interest exists when the terms of the agreement or the nature of the business require the franchisee to "make a substantial investment in goods or skill that will be of minimal use outside the franchise." The district court stressed that the substantial investment could be intangible, such as the franchisee "creating a base of clients" and conducting market research for the franchisor's products. The district court concluded that Golden Fortune had established a community on interest by demonstrating that it had developed a customer base for Maxim mooncakes, wrapped its delivery vehicles with the Maxim logo, and invested in Maxim-branded uniforms, billboards, and point of sale materials.

The Third Circuit disagreed and reversed. It focused its common-interest analysis on the degree of "franchisee's vulnerability," including factors such as the alleged franchisor's control over the franchisee, the franchisee's economic dependence, the disparity in bargaining power between the parties, and the presence of a franchise specific investment by the franchisee. Here, the Third Circuit found that, although Golden Fortune had used company resources including its sales staff and a distribution facility to promote Maxim mooncakes, those resources were not exclusively devoted to Maxim mooncakes and had continuing value after the distribution agreement ended. The court also stressed that, although Mei-Xin had suggested marketing materials, Golden Fortune was not required to comply and because Maxim mooncakes were only one of the "approximately 1,598 products" Golden Fortune distributed, there was no disparity in bargaining power. The Third Circuit reversed the district court's finding that the NJFPA applied and that a preliminary injunction was warranted.

MARCH 2023 LADR CASE NOTE

JTH Tax, LLC v. Agnant, 62 F.4th 658 (2d Cir. 2023)

A former tax-preparation franchisee defeated the franchisor's motion for a preliminary injunction to enforce a post-term non-compete when the franchisee de-branded and continued to operate after franchise termination.

In March 2022, the franchisor JTH Tax, LLC, d/b/a Liberty Tax Service (Liberty), terminated franchisee Alexia Agnant's (Agnant) franchise agreements, claiming that Agnant and her staff had committed material violations of federal tax laws and regulations in providing tax preparation services. Liberty also demanded that Agnant comply with various post-termination obligations, including her non-compete and non-solicitation covenants. Agnant refused, and she stopped using Liberty's marks but continued to operate.

In April 2022, Agnant sued Liberty, asserting claims for violation of the New York Franchise Sales Act, fraud in the inducement, and unjust enrichment, and disputed Liberty's termination of the franchise agreement. The following day, Liberty sued Agnant for breach of the franchise agreements, violation of the Defend Trade Secrets Act of 2016, trademark infringement, false designation and misrepresentation of origin, federal trademark dilution, unjust enrichment, and common-law conversion, alleging that the former franchisee refused to comply with various post-termination obligations, including non-compete and non-solicitation covenants. Liberty moved for preliminary injunctive relief, and the district court denied the motion. The Second Circuit affirmed the district court's ruling.

The Second Circuit first held that a heightened standard applies and that Liberty must show a "clear or substantial" likelihood of success on the merits, and a "strong" irreparable harm. "[A] plaintiff must meet that standard if he seeks an injunction that provides him substantially all the relief he seeks in the litigation, and that cannot be meaningfully undone in the event that the enjoined party prevails at trial on the merits." Liberty failed to explain "how a court could undo the effect of a wrongfully imposed injunction that would effectively put Agnant out of business." The court cited multiple franchise termination cases and analyzed the effect on defendants: "[T]he right to continue a business . . . is not measurable entirely in monetary terms, especially when that business is essential to the defendant's manner of living." "Like the family-owned businesses in those cases, Agnant would suffer irreparable harm if she were wrongfully put out of business." Agnant provided testimony that she used her home as collateral for the business loan, that she had been in business only for two years, and that she did not have a track record, and that she would be unable to provide for her family and pay for the legal fees if her business were closed.

The court next reviewed the district court's rulings that Agnant's evidence and competing testimony "neutralized" Liberty's declarations and held that Liberty did not meet the standard of a clear or substantial likelihood of success on the merits. On the one hand, Agnant testified she did not violate federal tax laws and that "Liberty would pick on little things." On the other hand, Liberty's pre-termination communications with Agnant consistently offered her only boilerplate and non-specific guidance, and lacked specificity as to what exactly she was doing wrong. Liberty's declaration was also conclusory and did not provide any example of a tax return prepared by Agnant that violated federal law.

Finally, the court examined the "strong irreparable harm" element and upheld the district court's ruling that Liberty failed to meet its burden. In this case, the district court found, although Agnant did not stop operating, she was no longer using Liberty's name, confidential information, or proprietary information and resources. The court reasoned, there is no "automatic assumption" that "irreparable harm must inevitably be assumed in breach of covenant cases," and "a plaintiff must present the district court with actual evidence."

The facts and rulings in this case provide insights on franchisees' potential arguments either against a similar preliminary injunction or to support a preliminary injunction against termination.

CURRENTS

ANTITRUST

***Arrington v. Burger King Worldwide, Inc.*, Bus. Franchise Guide (CCH) ¶ 17,173, 47 F.4th 1247 (11th Cir. 2022)**

The Eleventh Circuit reversed a decision dismissing an anti-poaching class action against Burger King, holding that the franchisor and its franchisees are independent actors capable of concerted action in violation of Section 1 of the Sherman Act. The case arose as a challenge to Burger King's no-hire and no-poach clause, which had appeared in its standard franchise agreement from at least 2010 until at least 2018. Under the provision, Burger King and its franchisees must not attempt to hire away any current employees of each other or of another Burger King franchisee, and must not hire any former employees of each other or of another Burger King franchisee for six months after the employee leaves their employment. A breach of the no-hire and no-poach clause is grounds for termination of the franchise agreement.

Burger King has more than 7,000 units throughout the United States, and more than ninety-nine percent of its system is franchised. Only about 50 restaurants—all in the Miami area—are corporately owned and operated by Burger King.

The plaintiffs were all employees of Burger King franchisees between 2010 and 2018. They claimed that the no-poach and no-hire provision prevented them from finding employment at other Burger King franchised restaurants and, as a result of the limited job mobility, caused them to be paid depressed wages and decreased benefits. The plaintiffs filed a complaint alleging antitrust violations, including a violation of Section 1 of the Sherman Act, asserting that Burger King and its independent franchisees colluded to depress their wages and employment opportunities by agreeing not to solicit or hire each other's employees.

The district court concluded that Burger King and its franchisees were not separate actors, but rather constituted a single economic enterprise. As a result, the court found Burger King and its franchisees were incapable of taking concerted action in violation of Section 1 of the Sherman Act.

The Eleventh Circuit disagreed. Relying primarily on the Supreme Court's decision in *American Needle, Inc. v. National Football League*, 560

U.S. 193 (2010), which held that the NFL's member clubs could engage in unlawful concerted action with respect to licensing of merchandise, the court concluded that the complaint plausibly alleged that Burger King and its franchisees were independent competitors for employees. As such, they could potentially be liable for a violation of Section 1 of the Sherman Act.

In reaching this conclusion, the Eleventh Circuit principally cited provisions of Burger King's franchise agreements that stated that the franchises were independently owned and operated, and the court ruled that franchisees are independent contractors and not agents or employees of Burger King. The court also observed that no fiduciary relationship exists between franchisees and Burger King and that the franchisees were entirely responsible for all aspects of the employment relationship with their employees. And the franchisees had no protected or exclusive territory; rather, their franchise agreements permitted them to operate only a single restaurant in a specific location.

Finding that Burger King and its separate and independent franchisees compete against each other for employees, the Eleventh Circuit determined that the complaint plausibly alleged that Burger King and its franchisees engaged in concerted action in violation of Section 1 of the Sherman Act, and reversed and remanded the case.

ARBITRATION

***Bissonnette v. LePage Bakeries Park St., LLC,* Bus. Franchise Guide (CCH) ¶ 17,188, 49 F.4th 655 (2d Cir. 2022)**

The *Bissonnette* decision arose from an interesting procedural posture. The underlying case involved claims for misclassification of employees and related claims under the Fair Labor Standards Act asserted by distributors of baked goods for several subsidiaries of Flowers Foods, Inc. Flowers Foods, Inc. is a holding company of subsidiaries that produce breads and other baked goods, which are collectively referred to as "Flowers." Flowers sells exclusive distribution rights within specific geographic territories. The distributors—who are designated as independent contractors—purchased distribution rights in discrete territories and drove trucks to market, sell, and distribute the baked goods produced by Flowers. The plaintiffs, Neal Bissonnette and Tyler Wojnarowski, are distributors for Flowers who own distribution rights in Connecticut. They filed suit as a putative class. The manufacturer and its subsidiaries filed a motion to compel arbitration, which was granted by the U.S. District Court for the District of Connecticut. After compelling arbitration, the court dismissed the action.

At the district court and on appeal, the issue was whether the distributor-truckers were exempt from mandatory arbitration under the Federal Arbitration Act (FAA), which excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. If a plaintiff is a transportation worker, then arbitration cannot be compelled under the FAA. The district court found that the distributors were not transportation workers under the FAA and, therefore, compelled arbitration.

The Second Circuit issued its original opinion affirming the district court's order compelling arbitration. *Bissonnette v. LePage Bakeries Park St., LLC*, 33 F.4th 650 (2d Cir. 2022). One month later, the Supreme Court issued its opinion in *Southwest Airlines Co. v. Saxon*, __ U.S. __, 142 S. Ct. 1783 (2022), in which it held that a ramp supervisor at Southwest Airlines whose work regularly required her to load and unload cargo from planes was a transportation worker under the FAA. The plaintiffs in the *Bissonnette* matter filed a motion for rehearing or rehearing *en banc* in light of this intervening authority. The Second Circuit granted the motion for rehearing.

Under the distributor agreements, the plaintiffs pick up baked goods from Connecticut warehouses and deliver the products to stores within their territory. They earn the difference between the price they pay Flowers for the products and the price they sell the products to retailers. As distributors, the "plaintiffs undertake to maximize sales; solicit new locations; stock shelves and rotate products; remove stale products; acquire delivery vehicles; maintain equipment and insurance; distribute Flowers' advertising materials and develop their own . . . ; retail legal and accounting services; and hire help." Additionally, the distributors can sell their distribution rights for a profit.

The distributor agreement contains an arbitration provision governed by the FAA. It also provides that it is "governed by the FAA and Connecticut law to the extent Connecticut law is not inconsistent with the FAA." Notably, the Second Circuit had jurisdiction over the appeal because the district court dismissed the case after compelling arbitration, making it a final decision with respect to an arbitration under Section 16(a)(3) of the FAA.

The court first addressed Flowers' request that it compel arbitration pursuant to Connecticut law, regardless of whether the FAA applies. After noting that the Second Circuit had not previously ruled on the application of state law to arbitration provisions under the FAA, the court found that the meaning of the words "not inconsistent" in the arbitration provision is unclear.

Flowers argued that Connecticut law is not inconsistent with the FAA because the FAA does not preclude enforcement of arbitration provisions with transportation workers, and the plaintiffs argued that it is inconsistent because Connecticut law does not exclude transportation workers where the FAA does. The Second Circuit stated that it was imprudent to remand to the district court for arbitration to proceed under Connecticut law because of the dispute over the term "not inconsistent." Accordingly, the court moved on to analyze whether the plaintiffs fall under the FAA's exclusion.

The court began its analysis by explaining that neither Congress nor the Supreme Court has defined "transportation worker." Given that the FAA gives two examples, "seamen" and "railroad employees," the court explained that "transportation worker" is placed in the context of a transportation industry. It then cited prior decisions by the Second Circuit where the court interpreted the statute to be limited to workers in a transportation industry. Based on these holdings, the court concluded that "an individual works in a transportation industry if the industry in which the individual works pegs its charges chiefly to the movement of goods or passengers, and the industry's predominant source of commercial revenue is generated by that movement." The court interpreted the *Saxon* decision by the Supreme Court as not inconsistent with this holding because, there, the industry at issue (airlines) is an analog to transport by rail and sea.

The court did discuss the Supreme Court's instruction in *Saxon* that courts must consider "the actual work that the members of the class, as a whole, typically carry out" and what the worker "frequently" does for the employer. The Second Circuit concluded that the distinctions drawn in *Saxon* were not implicated by the *Bissonnette* facts because "those who work in the bakery industry are not transportation workers, even those who drive a truck from which they sell and deliver the breads and cakes."

Next, the court addressed the dissent's assertion that, because the plaintiffs are in the trucking industry, they are exempt from the FAA. Even though they spend "appreciable parts of their working days moving goods from place to place by truck, the decisive fact is that the stores and restaurants are not buying the movement of the baked goods, so long as they arrive." Finding that the plaintiffs worked in the baking industry, the court held that they do not work in the transportation industry. As a result, the court found that the FAA's exclusion did not apply and the order compelling arbitration was appropriate.

Circuit Judge Jacobs issued a concurring opinion. In it, Judge Jacobs explained that the district court had the power to stay the proceedings pending arbitration and should not have dismissed the case citing Section 3 of the FAA. He noted a split among the circuits about this issue, with some courts holding a stay is mandatory and others holding that district courts may dismiss a case. Judge Jacobs then explained that in the Second Circuit, under *Katz v. Cellco Partnership*, 794 F.3d 341 (2d Cir. 2015), a stay is mandatory when a party requests a stay.

Judge Jacobs explained that a stay is appropriate and in line with the FAA's pro-arbitration purpose: when a case is stayed pending arbitration, the order compelling arbitration is interlocutory and therefore unappealable. Where a case is dismissed, however, a party has an automatic right to appeal, like the plaintiffs did in *Bissonnette*. He observed that the appellate aspect of litigation impedes the expeditious disposition of an arbitration. *Bissonnette*, 49 F.4th at 666 (quoting *Augustea Impb Et Salvataggi v. Mitsubishi Corp.*, 126 F.3d 95, 99 (2d Cir. 1997)).

Judge Jacobs also observed that issuing a stay may preserve the district court's subject matter jurisdiction over the dispute for purposes of adjudicating post-arbitration petitions. He explained that the Supreme Court's recent opinion in *Badgerow v. Walters*, __ U.S. __, 142 S. Ct. 1310 (2022), where the

Court held that the "look through" approach for finding federal jurisdiction in petitions under Section 4 of the FAA (governing petitions to compel arbitration) does not apply to petitions under Sections 9 (governing petitions to confirm awards) and 10 (governing vacaturs and rehearing of arbitrations) of the FAA. He explained that a court must find subject matter jurisdiction before deciding whether to enforce an arbitration provision under Section 4 and that, to do so, a court may see if the underlying controversy arises under federal law.

This "look through" vehicle is not available for Sections 9 and 10 of the FAA after *Badgerow*. However, the *Badgerow* opinion left open the possibility that, where a case is stayed, district courts may be able to retain jurisdiction.

Circuit Judge Pooler issued a dissenting opinion. He analyzed the Supreme Court's *Saxon* opinion and stated that the majority opinion erred by continuing the Second Circuit's pre-*Saxon* caselaw holding that a transportation worker must work for a transportation industry. He explained that the "one area of common ground" is that truck drivers qualify for the FAA's exemption. Judge Pooler also disagreed with Judge Jacob's concurring opinion to the extent that Judge Jacob would hold that a stay is mandatory, whether or not a party requests one.

CHOICE OF FORUM

AFC Franchising, LLC v. Purugganan, Bus. Franchise Guide (CCH) ¶ 17,162, 43 F.4th 1285 (11th Cir. 2022)

The Eleventh Circuit recently reversed a lower court's dismissal for lack of jurisdiction, upholding a floating forum selection clause in a franchise agreement. In 2009, Danilo Purugganan, a New York resident, entered into a master development agreement with Doctors Express Franchising, whose principal place of business was in Maryland. The agreement contained a Maryland choice-of-law provision, and a floating forum-selection clause that required that all disputes be brought in the location of the franchisor's principal place of business at the time the action is commenced. In 2013, Doctors Express assigned the master development agreement to AFC Franchising, an Alabama limited liability company with its principal place of business in Alabama. Purugganan was notified of the assignment.

After his relationship with AFC soured, Purugganan threatened to sue AFC Franchising in Connecticut or New York. AFC responded by filing a declaratory judgment action in Alabama seeking a declaration that the forum selection clause required disputes to be resolved in Alabama. Purugganan moved to dismiss the suit for lack of personal jurisdiction and improper venue. In the alternative, Purugganan sought to have the court transfer the case to Connecticut, where he had subsequently sued AFC.

The district court granted Purugganan's motion, concluding that he lacked the requisite minimum contacts with Alabama to exercise personal jurisdiction. Importantly, the district court also found that Purugganan had not contractually waived his personal jurisdiction defense by agreeing to the forum selection clause in the master development agreement. In making this determination, the court noted that, while AFC became a party to the master development agreement through an assignment from Doctor's Express, there was no reference to assignees in the forum selection clause.

AFC appealed, and the Eleventh Circuit reversed. First, the appellate court considered whether the forum selection clause applied to the dispute. The court noted that the clause contained clear language waiving objections to personal jurisdiction in the state "in which we have our principal place of business at the time the action is commenced." Thus, the question became whether the word "we" applied to AFC, the assignee, or only to Doctors Express, the original party to the contract. Applying Maryland law, the court determined that, as the assignee, AFC holds the same right as Doctors Express to litigate in the state containing its principal place of business, especially since the master development agreement contained an unrestricted right to assign the agreement and there was no dispute over the validity of the assignment. Therefore, the Eleventh Circuit determined that the forum selection clause did apply to the dispute.

Second, the Eleventh Circuit considered whether the forum selection clause was enforceable. The appellate court held that Purugganan failed to meet his heavy burden of demonstrating that enforcement of the forum selection clause would be unfair or unreasonable under the circumstances, and failed to identify any public policy that would be frustrated by enforcement. In response to Purugganan's argument that Alabama was not contemplated as a possible forum for a dispute when the agreement was executed, the court pointed out that Purugganan knew the litigation forum could change over the life of the contract if the franchisor's principal place of business changed, and knew that Doctor's Express could assign its rights under the agreement without restriction. Thus, the Eleventh Circuit found the district court erred in dismissing for lack of personal jurisdiction and reversed the dismissal.

A concurring opinion clarified that this decision was limited to a finding of personal jurisdiction and would not directly impact the parallel litigation between the parties involving the same forum selection clause, which has been pending in a Connecticut federal court for years.

***JTH Tax, LLC v. Leggat*, Bus. Franchise Guide (CCH) ¶ 17,174, No. 2:22CV41 (RCY), 2022 WL 3970197 (E.D. Va. Aug. 31, 2022)**

The U.S. District Court for the Eastern District of Virginia denied a franchisor's motion to strike the motion to dismiss or transfer brought by its franchisees and granted the franchisees' motion to transfer the case to the U.S. District Court for the Southern District of California, where the franchisees operated the franchised business.

The franchisor of Liberty Tax Services sued its franchisee and the franchisee's guarantors after the franchise agreement between the parties expired and the franchisee continued to operate in the same physical location. The franchisor alleged eight claims ranging from unpaid royalties and advertising fees to divulging of trade secrets and confidential information. The franchisees filed a motion to dismiss and a separate motion to dismiss or transfer on the same day. Together with its response, the franchisor also filed a motion to strike the franchisee's motion to dismiss or transfer, arguing that, because the franchisee filed two motions, any defenses not raised in the first motion should be waived pursuant to Federal Rule of Civil Procedure 12(b)(3). The court swiftly disposed of the franchisor's motion to strike, noting that the franchisees' two motions to dismiss were filed four minutes apart and rejected the franchisor's "hyper-technical argument."

Moving to the franchisees' motion to dismiss or transfer, the court first addressed the choice of law question: whether Virginia law or California law would apply when the franchise agreement provided for Virginia law, but a California Addendum to the franchise agreement stated that the choice of law provision "may not be enforceable under California law" and "[i]f the franchise agreement contains a provision that is inconsistent with the law, the law will control." The court reviewed three cases from different circuits considering similar California state addenda, each of which ultimately determined the addendum did not override a clear choice of law provision in the franchise agreement. Interpreting the franchise agreement and addendum before it, the court concluded that the California Addendum modified the choice of law clause such that Virginia law applied unless it was inconsistent with the California Franchise Relations Act (Cal. Bus. & Prof. Code § 20000 *et seq*.).

The district court next conducted a venue analysis under 28 U.S.C. § 1404. Determining that the action could have been brought in the Southern District of California where the franchised business was operated and where the franchisees continued to operate after the franchise agreement expired, the court then considered the four venue factors: "(1) the weight accorded to plaintiff's choice of venue; (2) witness convenience and access; (3) convenience of the parties; and (4) the interest of justice." Considering the first factor, the court noted that, while the plaintiff's choice of venue is generally "entitled to substantial weight," it is not necessarily the case when the actions underlying the claim do not occur in the home district of the plaintiffs. The court determined the first factor favored the franchisor, but its weight was reduced because the actions giving rise to the claim did not occur in Virginia. Because the court determined neither party provided specific information regarding witness convenience, the factor did not favor either side.

For the third factor—convenience of the parties—the court observed that the Supreme Court's *Atlantic Marine* decision would ordinarily require a court to abide by the parties' contractually chosen forum save for extraordinary circumstances. However, referencing its choice of law discussion, the court explained that the forum selection clause was not valid because the parties intended portions of the agreement to be governed by California law.

The court concluded by analyzing whether the interests of justice were better served by transferring the case. Noting that the franchisor did not address the factor, the court again addressed its conclusion that the California Addendum reflected the parties' intent to have California law apply to at least certain parts of the franchise agreement. The court determined from this provision that the parties "could legitimately expect to litigate in California." Additionally, the court acknowledged California's strong public policy interest in having disputes involving franchisees located within its state resolved in the state. Finally, the court explained that the California court would be better suited to handle questions rising under California law. Given its finding that California had a strong public policy interest in as evidenced by the California Addendum, the district court concluded that the last prong outweighed all of the others and granted the franchisees' motion to transfer the case to California.

CHOICE OF LAW

***JTH Tax, LLC v. Leggat*, Bus. Franchise Guide (CCH) ¶ 17,174, No. 2:22CV41 (RCY), 2022 WL 3970197 (E.D. Va. Aug. 31, 2022)**

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

***JTH Tax LLC v. Pierce*, Bus. Franchise Guide (CCH) ¶ 17,177, No. 1:22-CV-1237-SEG, 2022 WL 4122215 (N.D. Ga. Sept. 8, 2022)**

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

CONTRACT ISSUES

***JTH Tax LLC v. Pierce*, Bus. Franchise Guide (CCH) ¶ 17,177, No. 1:22-CV-1237-SEG, 2022 WL 4122215 (N.D. Ga. Sept. 8, 2022)**

The U.S. District Court for the Northern District of Georgia granted in part and denied in part a motion to dismiss filed by two former franchisees in response to a lawsuit filed by the franchisor of Liberty Tax Service. After a five-year term, the franchise agreement expired in October 2017. Notwithstanding the expiration, the franchisees continued to operate consistent with the terms of the now-expired franchise agreement. Three years after the franchise agreement expired, the franchisor sent notices to the franchisee demanding they make payments owed and file required reports with the franchisor. In May 2020, the franchisor sent a letter to the franchisees asserting the franchise agreement was terminated, even though it had already terminated three years prior.

In an amended complaint, the franchisor asserted claims for equitable relief, monetary relief, a violation of the defend trade secrets act, conversion, and tortious interference with contract. The franchisees filed a motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6).

The court first raised a choice of law issue, one not addressed by the parties. The choice of law provision in the expired franchise agreement stated that Virginia law applied. Because no party argued that application of Virginia law would contravene the public policy of Georgia, the court applied Virginia law. However, the court strongly forecasted that Georgia's public policy interests regarding non-competite covenants would likely trump the parties' contractual choice of law. The court then turned to the substance of the franchisees' motion to dismiss.

The franchisees argued that the non-compete covenant in the franchise agreement could not be enforced for longer than two years after the expiration of the franchise agreement. The franchisor argued that the parties had an implied-in-fact agreement to continue operating under the same terms as the expired franchise agreement. The court concluded that the franchisor's pleadings plausibly pled that the parties had an implied-in-fact contract and that one of the terms of the implied-in-fact contract was an agreement to incorporate the post-termination non-compete covenant found in the franchise agreement. The court similarly rejected the franchisees' motion to dismiss the franchisor's conversion claim based on the running of the statute of limitations because the court determined that, if the franchisor ultimately proved an implied-in-fact contract existed, the statute of limitations would not have passed.

The franchisees also sought to dismiss a breach of contract claim made by the franchisor against the individuals who were originally franchisees under the franchise agreement, but who later assigned their interests in the franchise agreement to a limited liability company they owned and operated. The court rejected the franchisees' argument because the individuals were still guarantors under the franchise agreement so there existed a potential basis to hold the individuals liable under the agreement.

Finally, the court dismissed the franchisor's tortious interference claim against two entities owned by the individual former franchisees because it determined that entities controlled by individuals who also controlled the franchisee entity could not induce themselves to breach a contract. The court also noted that the claim for tortious interference had to fail because the new entities (which the franchisor accused of tortiously interfering with the agreement) were created by the franchisee individuals for the purpose of breaching the franchise agreement. The court also deemed that it was likely in this case that the new entities were not "strangers" to the franchise agreement sufficient to permit a claim for tortious interference.

Expressing doubt about the enforceability of the non-compete covenant in Georgia, the district court nonetheless permitted the franchisor's breach of contract claims to proceed.

***Peterbrooke Franchising of America, LLC v. Miami Chocolates*, LLC, Bus. Franchise Guide (CCH) ¶ 17,199, No. 21-10242, 2022 WL 6635136 (11th Cir. Oct. 11, 2022)**

Peterbrooke is the franchisor of chocolate shops under the PETERBROOKE® brand. Miami Chocolates acquired an existing franchised location and assumed operation of the chocolate shop in September 2010 under the existing franchise agreement.

As has become customary in the industry, the franchise agreement provides that the franchisee would purchase and install the point-of-sale (POS) system specified by the franchisor. The franchisee acknowledged in the agreement that it may be required to replace or upgrade the entire POS system to one capable of performing functions specified by the franchisor. Furthermore, the franchisee agreed to install new hardware or software at its own expense, as directed by Peterbrooke and within the franchisor's "sole and exclusive discretion."

Peterbrooke sent letters to its franchisees between November 2013 and October 2015 changing the required POS system three times. The letters specifically gave notice that failure to comply would result in enforcement of the contractual rights that Peterbrooke reserved in the event of a breach. Miami Chocolates objected to changing its POS system pursuant to Peterbrooke's instruction, stating that the systems would not be beneficial and did not comply with industry standards.

In January 2016, Miami Chocolates implemented the Square POS system, which was not one of the systems Peterbrooke required. Miami Chocolates argued that Peterbrooke failed to test the new systems it was requiring. Peterbrooke terminated Miami Chocolates' franchise agreement because the franchisee refused to implement the approved POS systems as required.

Upon termination, Peterbrooke required Miami Chocolates to remove its trademarks and trade dress and sought to enforce a post-termination non-compete provision, which prohibited Miami Chocolates from operating a competing business within a twenty-five-mile radius for a two-year period.

After Miami Chocolates failed to comply with the post-termination provisions, Peterbrooke filed suit, asserting federal and state trademark infringement and unfair competition claims and breach of the franchise agreement. Miami Chocolates counterclaimed, asserting breach of contract, breach of the implied covenant of good faith and fair dealing, and violation of the Florida Deceptive and Unfair Trade Practices Act, along with two requests for declaratory relief.

The franchisor and franchisee filed cross-motions for summary judgment. The court found that Peterbrooke complied with the franchise agreement in asking the franchisees to implement a new POS system. As a result, the court found Miami Chocolates had no justification for refusing to implement the new POS system and had committed a material breach of the franchise agreement.

The court also enforced the non-compete provision, finding it was reasonable as to time, geographic limitation, and line of business, and because the provision protected Peterbrooke's legitimate business interest. On the claim for breach of the non-compete provision, the court found Peterbrooke was damaged in the amount of $10,275.36 and that it was entitled to summary judgment. After the court entered a final judgment, the franchisee appealed.

On appeal, Miami Chocolates argued that (1) Peterbrooke failed to establish that it tested the new POS system and determined it was beneficial to the franchisees; (2) Peterbrooke failed to establish that the franchisee's failure to implement the new POS system was material; (3) summary judgment on Peterbrooke's unfair competition claim was not warranted because the alleged breach was not material; and (4) the district court erred in granting summary judgment on the franchisee's counterclaims because Peterbrooke wrongfully terminated the franchise agreement.

The Eleventh Circuit first addressed whether Miami Chocolates breached the franchise agreement by failing to install the new POS system. Based on the cannon of contract interpretation that a court must first look at the natural and plain meaning of the language, the court found that the franchise agreement grants Peterbrooke broad and full discretion to determine whether a new POS system is appropriate. The appellate court found the franchisee's argument that Peterbrooke must first test and find the new POS system beneficial to franchisees lacked merit. Even if testing was required, based on the language of the contract, the franchise agreement neither identified any particular level of testing nor obligated the franchisor to share the details of the testing. As a result, Peterbrooke's requirement that its franchisees install the new POS system was appropriate under the franchise agreement, and Miami Chocolates' failure to comply was a breach.

Next, the appellate court analyzed whether Miami Chocolates' breach was material. The court noted that some provisions of the franchise agreement specifically stated that compliance was material, while the provision setting obligations about implementing a POS system did not state this. Based on the legal axiom that different language in different contractual provisions implies that a different meaning was intended, the court found that the failure to comply with POS system obligations was not necessarily material. The court also found that evidence in the record demonstrated genuine issues of material fact remained as to the materiality of the breaches. Peterbrooke's corporate representatives testified that other franchisees were allowed to operate with old POS systems. In fact, at least half of the franchisees were allowed to continue using a POS system other than the required version when Miami Chocolates' agreement was terminated. Finally, the court noted that the Square POS system Miami Chocolates installed had the same functionality as the system required by Peterbrooke—a fact the franchisor did not dispute—and that Peterbrooke was provided with access to the franchisee's account.

Based on these findings, the appellate court held that genuine issues of material fact remained. As a result, it reversed the district court's rulings on summary judgment as inappropriate. Moreover, based on this holding, the Eleventh Circuit reversed summary judgment on Peterbrooke's unfair competition claim, and held summary judgment on Miami Chocolates' claim for wrongful termination of the franchise agreement was also inappropriate.

GOOD FAITH AND FAIR DEALING

***American Dairy Queen v. Wineinger*, Bus. Franchise Guide (CCH) ¶ 17,151, No. 21-cv-378-WMC, 2022 WL 3027004 (W.D. Wis. Aug. 1, 2022)**

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

***Peterbrooke Franchising of America, LLC v. Miami Chocolates, LLC*, Bus. Franchise Guide (CCH) ¶ 17,199, No. 21-10242, 2022 WL 6635136 (11th Cir. Oct. 11, 2022)**

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

LABOR AND EMPLOYMENT

***Bissonnette v. LePage Bakeries Park St., LLC*, Bus. Franchise Guide (CCH) ¶ 17,188, 49 F.4th 655 (2d Cir. 2022)**

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

***Mouanda v. Jani-King International*, Bus. Franchise Guide (CCH) ¶ 17,163, 653 S.W.3d 65 (Ky. 2022)**

The Supreme Court of Kentucky ruled that a sole member of a limited liability company franchisee could pursue a claim under the Kentucky Wage and Hour Act (KWHA) against a franchisor and master franchisee, despite a 2017 amendment to the KWHA stating that "'neither a franchisee nor a franchisee's employee' can be an employee of the franchisor," because the court ruled the member was neither a franchisee (the LLC was the franchisee) nor an employee of the LLC.

The appellant, Mouanda, desiring to become a Jani-King franchisee, was required by the master franchisee to form an LLC that would be the franchisee and execute the franchise agreement with the master franchisee. The master franchisee provided the Articles of Organization and other legal documents relating to the LLC and franchise relationship. When Mouanda did not achieve the results she alleged she was promised, she sued the master franchisee and franchisor, alleging claims of fraud, breach of contract, and unconscionability, as well as her claim under the KWHA.

The franchisor and master franchisee both moved to dismiss the complaint based on the language of the KWHA, which states "neither a franchisee nor a franchisee's employee shall be deemed to be an employee of the franchisor" for purposes of the KWHA. The Kentucky Supreme Court, reversing the trial court and appellate court, stated that Mouanda was neither the franchisee nor an employee of the franchisee. The court further concluded that language in the franchise agreement stating that the franchisee was an independent contractor and the franchisee's employees were not employees of the master franchisee was similarly inapplicable to Mouanda, the owner of the LLC. Instead, the court opined, determining whether Mouanda was an employee of the master franchisee or franchisor required a fact-intensive inquiry.

The court examined several opinions from other jurisdictions, focusing on two other cases involving a similar janitorial franchise system: *Vazquez v. Jan-Pro Franchising International, Inc.*, 986 F.3d 1106, 1110 (9th Cir. 2021), and *Depianti v. Jan-Pro Franchising International, Inc.*, 990 N.E.2d 1054, 1058 (Mass. 2013). From these cases, the court derived that no employment contract existed between Mouanda and either the franchisor or master franchisee, and did not "automatically preclude" a claim under the KWHA. The court emphasized that "a business entity cannot use the labels of 'franchisor' and 'franchisee' to avoid employment law and regulation. Instead, how the parties functioned and conducted their business must be analyzed and mere reliance on their contract labels is inappropriate."

The court asserted that at least a dozen provisions in the franchise agreement evidenced that the master franchisee held a "significant degree of control" over the LLC franchisee and, by extension, Mouanda. Further, the court stated that it must consider "the practical, and not just contractual, realities of the relationship." The court directed the trial court, on remand, to apply the economic realities test to determine whether Mouanda was an employee and could therefore state a claim under the KWHA. The court again emphasized that nothing in the franchise agreement precluded the franchisee's owner from bringing a claim under the KWHA.

The Kentucky Supreme Court also determined that Mouanda had standing to bring a claim, herself, for fraud against the franchisor or or master franchisee, because the claim related to conduct occurring prior to the formation of the LLC.

***Patel v. 7-Eleven, Inc.*, Bus. Franchise Guide (CCH) ¶ 17,198, 2022 WL 4540981 (D. Mass. Sept. 28, 2022)**

A federal court in Massachusetts granted a franchisor's motion for summary judgment, determining that the franchisor was not the employer of its franchisees because they did not perform services for the franchisor.

A group of five 7-Eleven franchisees brought a putative class action against 7-Eleven alleging that the franchisor had misclassified them as independent contractors instead of employees. The franchisees claimed this constituted a violation of the Massachusetts Independent Contractor Law and violated the

Massachusetts Wage Act. After several years and many procedural twists and turns, the parties filed cross-motions for summary judgment.

In its motion for summary judgment on the plaintiffs' claims, 7-Eleven argued that the Independent Contractor Law did not apply because the franchisees could not meet their threshold requirement of showing that they performed services for 7-Eleven. Massachusetts's Independent Contractor Law requires a showing by the employer that an individual is free from control and direction in the performance of the service, both under their contract and in fact; that the service is performed outside of the usual course of business of the employer; and that the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as the service performed.

The plaintiffs argued that they had performed services like working full-time in the store and operating twenty-four hours a day, in addition to preparing and submitting cash reports—actions beneficial to 7-Eleven and promised under the franchise agreements. 7-Eleven responded that these were not "services" because they were not performed in exchange for payment. Rather, it was 7-Eleven who provided services to its franchisees in exchange for franchise fees. The plaintiffs also argued that, because the revenue paid to 7-Eleven in the from of royalty fees is dependent on the franchisees' stores' revenue, they provided services to 7-Eleven.

The court agreed with 7-Eleven, even in light of the Independent Contractor Law's liberal construction of the term "service." The court remarked that a legitimate franchise relationship involves a certain mutuality of economic interests between the franchisor and its franchisees, but this mutuality is not sufficient to show that the franchisees provide services to the franchisor. As a result, the court granted 7-Eleven's motion for summary judgment and denied the plaintiffs' motion for summary judgment, along with their motion for class certification.

NON-COMPETE AGREEMENTS

JTH Tax LLC v. Pierce, Bus. Franchise Guide (CCH) ¶ 17,177, No. 1:22-CV-1237-SEG, 2022 WL 4122215 (N.D. Ga. Sept. 8, 2022)

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

TERMINATION AND NONRENEWAL

Peterbrooke Franchising of America, LLC v. Miami Chocolates, LLC, Bus. Franchise Guide (CCH) ¶ 17,199, No. 21-10242, 2022 WL 6635136 (11th Cir. Oct. 11, 2022)

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

TORTIOUS INTERFERENCE

***JTH Tax LLC v. Pierce*, Bus. Franchise Guide (CCH) ¶ 17,177, No. 1:22-CV-1237-SEG, 2022 WL 4122215 (N.D. Ga. Sept. 8, 2022)**
This case is discussed under the topic heading "Contract Issues."

TRANSFERS

***American Dairy Queen v. Wineinger*, Bus. Franchise Guide (CCH) ¶ 17,151, No. 21-cv-378-WMC, 2022 WL 3027004 (W.D. Wis. Aug. 1, 2022)**
This action arose from a Dairy Queen franchisee's attempt to sell his location. The franchisee, David Wineinger, operated his Dairy Queen location in Sparta, Wisconsin, pursuant to a franchise agreement executed in 1952. He purchased the location in 1998 and was assigned the 1952 franchise agreement.

The 1952 franchise agreement was only two pages long. In many respects, the sixty-year-old agreement did not account for the many significant changes in the Dairy Queen system, and it provided the franchisee with protections that are not available under the new agreement. For example, the 1952 agreement provided an exclusive territory that covered a five-mile radius around the city of Sparta, Wisconsin, and set the price of dairy mix used to make frozen treats at thirty-four cents per gallon. Moreover, because in 1952 Dairy Queen locations only sold frozen treats and did not sell standard food menu, the 1952 agreement allowed franchisees to sell non-system food at their locations.

In 2021, Wineinger notified Dairy Queen that he wanted to sell his location. Dairy Queen responded that any prospective buyer would need to sign the current franchise agreement. After hearing that the franchisor would require the buyer to sign a new agreement, one buyer backed out of the sale, and another cut their offer by forty percent.

The parties' dispute centered on whether American Dairy Queen could require a buyer of the Sparta location to sign a new franchise agreement. American Dairy Queen filed suit seeking a judicial declaration that it was allowed to require a new agreement. Wineinger countersued seeking the opposite judicial declaration and asserting claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and violation of the Wisconsin Fair Dealership Law (WFDL).

The parties filed cross motions for summary judgment on their respective claims. As explained below, the court analyzed Wineinger's claims in turn and ultimately concluded that Dairy Queen was within its rights to require a buyer to sign a new franchise agreement.

The court began its analysis with the plain language of the franchise agreement. The relevant provision states that the

> Agreement shall be binding upon the heirs, executors, administrators, successors, and assigns of the parties hereto, provided that the "Dealer" may not transfer or assign any of his rights under this Agreement without the approval of the "Licensee" in writing to such transfer or assignment.

Wineinger argued that although Dairy Queen must provide its consent before a transfer can be effectuated, Dairy Queen did not have the discretion to withhold consent unless the buyer signs a new franchise agreement. In Wineinger's view, the franchisor could not impose conditions on a proposed transfer that would deprive him of his ability to assign the rights and privileges of the 1952 franchise agreement to a new owner. Dairy Queen argued its discretion was unfettered, but the court dispelled this position as a "silly" one considering the implied covenant of good faith and fair dealing.

The court was also not persuaded by Wineinger's argument that, because Dairy Queen approved five assignments of the 1952 franchise agreement in the past, the course of performance established assignees, like Wineinger, enjoyed the contractual right to assign the contract. It found that Dairy Queen's election to allow an assignment in the past did not mean it must do so in the future. Accordingly, the court found that the agreement's language granted Dairy Queen the right to withhold approval of any proposed transfer, subject to the implied covenant of good faith and fair dealing, and granted Dairy Queen summary judgment on Wineinger's breach of contract claim.

In evaluating Wineinger's claim for breach of the implied covenant, the court began by describing Wisconsin law on the duty to act with good faith and fair dealing. In essence, conduct in violation of this duty "denie[s] the benefit of the bargain originally intended by the parties." Wineinger argued that, because the 1952 franchise agreement was silent on how much discretion Dairy Queen had, the court should fill the gap by implying a "reasonableness limitation" on the no-assignment-without-consent provision. The court cited to Wisconsin cases rejecting a reasonableness requirement unless required by the contract's language. *See, e.g.*, *India Breweries In.c v. Miller Brewing Co.*, No. 05-C-0467, 2007 WL 3012973 (E.D. Wis. Oct. 11, 2007). As a result, the court stated that, while it does not hold the implied covenant "has no teeth," the denial of consent is subject to a lower standard of review than reasonableness.

The court applied a two-step analysis. First, it analyzed whether Wineinger established a breach of the implied covenant or, at a minimum, that Dairy Queen had denied the benefit of the bargain originally intended by the parties. The court focused on Dairy Queen's justifications for imposing a new franchise agreement, including the need to modernize and standardize the franchise agreement across the franchise network.

The court recognized that a new agreement was not necessary to modernize operations, but also noted that Dairy Queen's desire to standardize the franchise agreements was not unreasonable or arbitrary. Wineinger was also not denied the benefit of his bargain, the court held, because requiring a buyer to sign a new franchise agreement did not prevent him from operating his location. And, the fact that the new franchise agreement had terms that were less beneficial to the buyer-franchisee did not render Dairy Queen's requirement arbitrary or unreasonable. Accordingly, the court granted summary judgment in Dairy Queen's favor on the claim for breach of the implied covenant of good faith and fair dealing.

Next, the court analyzed Wineinger's claim for violation of the WFDL, which prohibits a licensor or franchisor from terminating, cancelling, failing to renew, or substantially changing the competitive circumstances of a dealership agreement without good cause. Wineinger argued that Dairy Queen's decision to require a new franchise agreement amounts to a "substantial change" to the competitive circumstances of the 1952 franchise agreement without good cause.

Dairy Queen argued that because the agreement was signed in 1952, and the WFDL was not passed until 1974, the WFDL did not apply to the agreement, citing to the Wisconsin Supreme Court's holding in *Wipperfurth v. U-Haul Co. of W. Wisconsin*, 101 Wis. 2d 586, 599 (1981) that retroactive application of the WFDL is unconstitutional. Wineinger responded to this conclusion by pointing to an amendment in 1995 to argue that the WFDL does apply.

The court held that it did not need to resolve whether the WFDL applied because, even if it did, Dairy Queen did not violate the statute. First, the court held that Wineinger failed to show that Dairy Queen's actions constitute a substantial change in competitive circumstances. In so holding, the court cited to cases holding that a substantial change to the competitive circumstances of a dealership agreement means a discriminatory change or one that is "so severe as to threaten the dealership's viability." *Bresler's 33 Flavors Franchising Corp v. Wokosin*, 591 F. Supp. 1533, 1537 (E.D. Wis. 1984). The court also noted that non-discriminatory, system-wide changes do not generally satisfy this burden.

Wineinger argued that requiring a proposed successor-owner to sign a new agreement would impose additional annual royalties, advertising and sales promotion fees, and other, less favorable terms. The court noted that the changes do not change Wineinger's operations as they applied to the buyer, and noted that Wineinger had not cited to authority supporting the proposition that changing the competitive circumstances of a future owner was actionable under the WFDL.

Wineinger also argued that the change Dairy Queen required violated the WFDL because it significantly reduced the price a buyer would pay for the Sparta Dairy Queen store. Here, again, the court noted that Wineinger cited no authority to support this argument. The court noted that Wineinger had not shown that the non-discriminatory system-wide change would impair his ability to viably operate his store. The court held that no reasonable jury could find that Dairy Queen lacked an objectively ascertainable need to update its franchise agreement as new franchisees came into the system. As a result, the court granted summary judgment in Dairy Queen's favor. Based on its holding, the court issued a declaration that Dairy Queen may condition approval of a transfer of the Sparta Dairy Queen store on the new owner signing a new franchise agreement.