Law Group regarding franchise law issues. We look forward to keeping you updated on the current trends in franchise court decisions around the country in both state and federal courts.

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FRANCHISE TRENDS

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Franchisor Competency, Video 4

Jackson Hewitt, Inc. v. Luke, (D.N.J. 2013)

In a suit brought by the franchisor, the franchisee asserted several counterclaims. The franchisor then moved to dismiss the counterclaims. Accepting the franchisee's factual allegations as true, the court observed that the counterclaims were merely general allegations that the franchisor had undertaken wrongful action and that it had breached various elements of the franchise agreement. Such statements, the court held, without more, are insufficient to state a cause of action. In opposing the franchisor's motion to dismiss, the franchisee sought to buttress its counterclaims by attaching a copy of a recent complaint (with more detailed allegations) that was brought against the franchisor by the Attorney General of California, but the court said that a party cannot supplement or clarify its pleadings through its opposition to a motion to dismiss-the pleadings must be sufficient when filed or they must be properly amended. Accordingly, the court dismissed the franchisee's counterclaims, but did so without prejudice, allowing the franchisee to re-file.

In conjunction with its motion to dismiss, the franchisor also sought to strike the franchisee's demand for a jury trial on the grounds that the franchise agreement entered into between the parties waived that right. The court observed that a right to a jury trial is a constitutional right and that a waiver must be voluntarily and knowingly entered into in order to be valid. Here, the court here held that it was not clear whether the waiver was a bargained-for term, nor was it clear whether the franchisee was represented by an attorney when he agreed to the waiver, and that, since the franchisor did not submit a full copy of the executed franchise agreement, the court could not determine whether the clause in question was conspicuous. Accordingly, the court denied the franchisor's motion to

strike the franchisee's request for a jury trial.

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Franchise Law – Franchise Discrimination 1:2 - Jeff Goldstein: Franchise Lawyer

Jeff Goldstein GOLDSTEIN LAW GROUP Nat'l Franchise Law

Franchise Discrimination - Video 1 of 2

Franchise Discrimination - Video 2 of 2

Franchise Law: Fraud and Good Faith in Franchise Law

McLin v. Hi Ho, Inc., (La. App. 2013)

A prospective franchisee entered into an agreement with an employee of the franchisor-who was the son of the corporation's owners-which purported to convey the exclusive rights to open a Hi Ho restaurant franchise. Within a year, however, another Hi Ho opened in the city where the prospective franchisee believed that he had the exclusive right to operate. The franchisee sought an injunction to prevent this second restaurant from operating and, in the alternative, he brought an action for detrimental reliance (in anticipation of opening, the prospective franchisee had spent money to secure a building) against the employee of the corporation and vicariously against the corporation. This case concerned the corporation's vicarious liability. The trial court found that there was no agency relationship between the franchisor and the employee who signed the agreement and granted summary judgment in favor of the franchisor.

On appeal, the court focused its analysis on whether this employee was acting as an agent of the corporation and whether, as a result, it had the authority to enter into a binding franchise agreement with the prospective franchisee. Agents possess either express, implied, or apparent authority. Here, the corporation did not give the employee the power to act as its agent, and so the court held that there was no express agency relationship. Without an express grant of authority, there cannot be implied authority. A principal, however, will be bound if its agent had apparent authority. Apparent authority arises where the principal (here, the franchisor) takes some action to make a third party (here, the prospective franchisee), believe that an individual (here, the employee), is acting on the principal's behalf. The prospective franchisee's communications were only with the employee, and the corporation had no contact with the prospective franchisee, and so the appellate court held that the corporation had not done anything which would give a third party reason to believe that the employee was acting on the corporation's behalf. As a result, the court also found that the trial court properly granted summary judgment on the prospective franchisee's detrimental reliance claim, since none of the promises on which he relied were made by the corporation.

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Husain v. Superior Court of Marin County & McDonald's Corp. (Cal. Ct. App. 2013)

Franchise Law – Franchisees' Franchise Termination Damages

C&M Hardware, LLC v. True Value Company (Wis. Ct. App. 2013)

Former franchisees brought suit against the franchisor for intentional and negligent misrepresentations which arose out of the parties' negotiation of a franchise agreement. The claims were based on the franchisor's alleged efforts to induce the franchisees to enter into the agreement. As its defense, the franchisor relied on the agreement's exculpatory and integration clauses. The franchisees argued that the clauses in question were void for being in violation of public policy. The trial court granted summary judgment to the franchisor.

On appeal, the court noted that while clauses that release parties from tort liability are not presumptively void, such clauses should be construed narrowly. Here, the court, viewing the agreement as a whole, held that the clause failed to clearly and unambiguously put the franchisee on notice of the nature of the clause and that the form in which the clause appeared in the agreement likewise did not make it clear to the franchisee that it was a highly important part of the parties' relationship. Further, the court noted that such a clause must also make sufficiently clear the nature of the tort being disclaimed. Here, the torts at issue concerned misrepresentations by the franchisor, and there was no language in the clause that would inform the signer that it was waiving liability for such misrepresentations. As to the validity of the integration clause, the court found that the clause did not make clear that its purpose was to disclaim a party's misrepresentation and, that since the franchisees specifically alleged that they

A franchisee and franchisor were engaged in a dispute over the status of three franchised restaurants. During the trial, the franchisor moved for sanctions to terminate the franchisee's complaint on the basis of the franchisee's violation of an evidentiary ruling by the court and for other, earlier, discovery related behavior. The trial court granted the motion, thus terminating the case, and the franchisee sought an order from the appellate court that would force the trial court to reinstate the case.

On appeal, the franchisor argued that the trial court's actions were justified by the state's rules of civil procedure and also by the trial court's inherent power to control proceedings before it. The appellate court stated that terminating sanctions are an extreme measure that should only be used when no other sanction would ensure compliance with a trial court's orders. It noted that the issues on which the franchisor sought sanctions concerned a cause of action that had already been dismissed, the submission of over-stated expenses by the franchisee, and the violation by the franchisee of a motion in limine. The court chastised the franchisees for submitting inflated expense numbers in discovery documents, but noted that such behavior was by way of allegation and was not an actual violation of the court's discovery order. Further, the court said that the trial judge adequately handled the situation when the franchisee violated the motion in limine. The appellate court went to great lengths to admonish the behavior of the franchisee in this case, but held firm to the fact that terminating sanctions are a truly extreme remedy and that even the facts of the present case did not justify such a sanction. It noted that in this case, the opposing party could use the franchisee's statements to impeach the franchisee, and that monetary sanctions would be a sufficient deterrent against discovery abuses. Accordingly, the court held that the trial court had exceeded its discretion in terminating the franchisee's complaint and ordered that a new trial be commenced.

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Guiboa v. Pepperidge Farm, Inc. (Cal. Ct. App. 2013)

A former distributor brought suit against a franchisor following the franchisor's termination of the distributor. The distributor brought claims for conversion, breach of contract, and breach of the implied covenant of good faith and fair dealing stemming from the franchisor's post-termination sale of the distributor's exclusive market routes. At the trial level, the jury found that the termination was for-cause and based its determination on multiple failed audits and customer complaints. The jury also determined that the franchisor was not, therefore, required to pay to the distributor the fair market value of his territory. As a result of the finding of a "for-cause" termination, the trial judge dismissed the distributor's cause of action for violation of the covenant of good faith and fair dealing. This determination was the substance of the appeal.

The distributor argued that the franchisor breached the implied covenant of good faith and fair dealing by not selling the territory as a whole but rather as five separate routes. The thrust of the argument is that there is a

relied upon performance representations by the franchisor, the integration clause did not operate to waive the franchisee's misrepresentation claims. Accordingly, the court reversed the trial court's grant of summary judgment.

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Curves International, Inc. v. Shapes Fitness, LLC (E.D. Mich. 2013)

A franchisor of women's fitness facilities sought an *ex parte* injunction to prevent a pair of its former franchisees from operating a similar business in violation of a set of restrictive covenants entered into upon the execution of the parties' franchise agreement. In its analysis, the court did not take issue with the substance of the restrictive covenants, but noted that *ex parte* injunctions, since they do not give the party to be enjoined a chance to be heard, are only granted in extreme circumstances and where money damages would not sufficiently compensate the aggrieved party. The court went on to analyze the situation between the parties and denied the franchisor's request for immediate injunctive relief.

Here, the franchisor alleged that it would suffer the loss of its employees, consumer goodwill, confidential customer lists, and that it would lose the ability to compete in that location if an immediate injunction were not granted. The court found that the loss of employees and the loss of business in a particular locale were easily compensable with money damages. As to the loss of customer lists and customer goodwill, the court noted that those presented closer questions, but nonetheless not sufficiently important interests to justify an immediate injunction. On these latter points, the court observed that the franchisor is a successful, worldwide operation and that it would not likely be substantially harmed by having to provide notice to the former franchisees and thus wait a short

difference in value between the territory as a whole and the territory separately and that the distributor should be able to make that argument to a jury. The court observed that the implied covenant of good faith and fair dealing does not operate to override a party's explicit rights under the agreement and held that the franchisor's sale of the territory was within its rights under the contract. The distributor argued that the franchisor did not undertake sufficient efforts to sell the territory as a whole, but the court recounted the testimony of several of the franchisor's employees that extensive efforts were undertaken to sell the territory. The distributor also argued that the implied covenant required the franchisor to communicate with him about the status of the sale, but the court said that no provision of the parties' agreement required the franchisor to do so. As a result of these findings, the court also denied the distributor's arguments for conversion and unfair business practices and affirmed the trial court's judgment in all respects.

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American Honda Finance, Corp. v. Simao (2d Cir. 2013)

The owner of two car dealerships appealed from an entry of summary judgment in favor of the franchisor's finance division. In order to finance the dealerships' purchases of inventory, the dealer had executed two personal guaranties. When the dealerships subsequently failed to make its payments, the finance division sued on the guaranties and was awarded summary judgment. The dealer motioned the court to allow for additional discovery before it ruled on summary judgment, but the court denied this request and entered summary judgment in favor of the finance division.

An appellate court gives broad deference to a trial court's denial of such a request and looks at what additional facts are sought, how those additional facts are likely to create a genuine issue of material fact, and what steps had the party making the request previously taken to retrieve that information and why was it unable to do so. The court observed that the dealer's request for additional discovery was very generic and viewed it as a stall tactic. The fact that the parties had engaged in some preliminary settlement negotiations was irrelevant to whether the dealer's request would be granted. The appellate court held that the trial court did not abuse its discretion and affirmed the denial of the dealer's request.

Moving to the grant of summary judgment, the dealer argued that the finance division had waived its rights to collect under the guaranties by extending credit even after the dealerships' initial defaults. The appellate court agreed with the trial court and read the guaranties to allow the finance division broad discretion in enforcing its rights under the guaranties. For instance, its continued extension of credit to the dealer as well as its settlement negotiations did not waive its right to collect. Further, the fact that the dealer had signed guaranties in both personal and corporate capacities did not render the personal guaranties at issue void. Lastly, the court held that the finance division's actions did not violate the Automobile Dealers' Day in Court Act since it gave the dealer multiple

period of time before a fuller hearing on the merits could be scheduled. Accordingly, the court denied the franchisor's motion for an *ex parte* injunction.

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notices of default before eventually pursuing legal action.

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