You are receiving this periodical based upon previous specific and general contacts with the Goldstein 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

Franchisor Competency, Video 4

GOLDSTEIN LAW GROUP, PC
JEFFREY M. GOLDSTEIN, ESQ.
www.goldlawgroup.com
202-293-3947

Franchisor Retaliation Okay if Franchisor 'More Believable' Than Franchisee

Percy Pooniwala, and Dinaz Pooniwala,v. Wyndham Worldwide, Corp., Super 8 Worldwide, Inc., Travelodge Hotels, Inc., and Days Inn Worldwide, Inc.,¶15,286. U.S. District Court, D. Minnesota. Civil No. 14-778 (May 2, 2014).

This matter was before the Court on Plaintiffs Percy Pooniwala's ("P. Pooniwala") and Dinaz Pooniwala's ("D. Pooniwala") (collectively, "Plaintiffs") Motion for Preliminary Injunction against Defendants Wyndham Worldwide Corp. to enjoin Defendants from taking actions relating to various franchise agreements. For the reasons set forth below, the Court denied the motion.

Plaintiffs had entered into a number of franchise agreements for various hotels with Defendants over the years. Wyndham Hotel Group LLC ("Wyndham Group") is the operating entity associated with Defendants Super 8, Travelodge, and Days Inn, as well as Ramada Worldwide Inc. Generally, Plaintiffs alleged that as a result of a lawsuit between Plaintiffs and Ramada Worldwide Inc. relating to the Ramada Brooklyn Park, also known as Grand Rios Water Park Resort ("Grand Rios"), Defendants were retaliating against Plaintiffs at a number of other properties franchised by Plaintiffs.

The Court considered four primary factors in determining whether any preliminary injunction request should be granted: (1) the threat of irreparable harm to the moving party; (2) the state of balance between the alleged irreparable harm and the harm that granting the injunction would inflict on the other party; 3) the likelihood of the moving party's success on the merits; and (4) the public interest. This analysis, according to the Court, was designed to determine whether the Court should intervene to preserve the status quo until it decided the merits of the case.

The primary focus of Plaintiffs' request for injunctive relief related to violations of the Minnesota Franchise Act. Under the Minnesota Franchise Act, a franchisor can terminate a relationship, but a termination must be proper, and must conform to the requirements of the Minnesota Franchise Act. Specifically, termination must be for good cause. "Good cause" is defined, in turn, by the MFA, as: failure by the franchisee to substantially comply with the material and reasonable franchise requirements imposed by the franchisor including, but not limited to: ... (3) voluntary abandonment of the franchise business; ... or (5) any act by or conduct of the franchisee which materially impairs the good will associated with the franchisor's trademark, trade name, service mark, logotype or other commercial symbol.

Defendants argued that because a franchisor has the power to properly terminate the relationship when the terms of a franchise agreement are violated, and because the franchisors allegedly showed that their terminations were proper and for "good cause," Plaintiffs cannot demonstrate a likelihood of success on the merits. The Court agreed with Defendants. "It is not disputed that Defendants had a right to terminate under the franchise agreements for failure to meet quality standards. At this stage of the litigation, Plaintiffs cannot show a likelihood of success on the merits sufficient to tip the balance in favor of granting an injunction."

In essence, even though the franchisee presented evidence that the QA inspections were defective, the Court refused to credit such evidence. "Though Plaintiffs present evidence that they repeatedly and strenuously contested the QA inspection evaluations and determinations as failing to meet the requirements under the agreement and as not constituting good cause, Defendants present even more evidence supporting their claims of good cause for the terminations. In this regard, the Court stated "Defendants point to a long history of QA inspection failures-six failures for the Super 8 Roseville and eight failures for the Travelodge Burnsville- in support of their claim that the terminations were supported by good cause. Specifically, Defendants present documents showing that the Super 8 Roseville failures date back to January 2012 and continued up to the final failure in December 2013, and that the Travelodge Burnsville failures date back to November 2010 and also continued up to the final failure in December 2013."

The Court also explicitly rejected the franchisee's claim of retaliation: Defendants also present allegations to rebut Plaintiffs' arguments that Defendants' failure to follow proper QA processes and Defendants' improper terminations amount to purposeful retaliation. Defendants allege that Plaintiffs continue to run the Days Inn Burnsville, and continue to be allowed to remedy QA failures at that facility. Plaintiffs also appear to currently continue to operate an entirely different site without QA concerns. Accordingly, the Court concludes that Plaintiffs have failed to sufficiently demonstrate a likelihood of success on the merits and therefore this factor weighs against granting the "extraordinary remedy" of

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Franchise Law: Fraud and Good Faith in Franchise Law

Franchise Law – Franchisees' Franchise Termination Damages a preliminary injunction.

The Court also concluded that the franchisees were not able to show 'irreparable harm', a requirement to obtain injunctive relief. As the Court stated: "Movant must establish that irreparable harm will result if injunctive relief is not granted and that such harm will not be compensable by money damages. The irreparable harm must be "certain and imminent such that there is a clear and present need for equitable relief."

The Court in turn examined the detailed explanations of each of the parties as to how the granting or denial of the requested preliminary injunctive relief would impact upon them in particular. "In this case, both parties are being significantly harmed by the conduct alleged by the parties. However, the Court concludes that in considering the balance of harms, the scales do not 'tip[] decidedly toward' the moving party. Thus, though Plaintiffs can show irreparable harm, the balance of the harms factor weighs slightly against granting a preliminary injunction."

The Court on this legal issue accepted entirely the franchisor's explanation - and rejected just as completely the franchisee's rendition -- of irreparable harm.

Plaintiffs argue that they will suffer, and are already suffering, irreparable harm unless: (1) the termination of their two franchise agreements is stopped; and (2) the assignment of the outstanding franchise agreement goes forward. Plaintiffs contend that without a preliminary injunction, even if Plaintiffs ultimately win on the merits, the loss of goodwill and customers will not be recoverable and could not be adequately compensated by money damages. Specifically, Plaintiffs point to the damage to their customer relations and loss of customers and goodwill already suffered since Defendants shut down reservation systems and caused a number of customers to be diverted to other hotels. Plaintiffs argue that this is particularly true if they lose large, long-standing, key accounts because customers are being diverted elsewhere. Based on the above, the Court concludes that the loss of goodwill, significant loss of customers, and lost customer relationships are sufficient to constitute irreparable harm.

Defendants, however, counter that when weighing the balance of harms, the scales tip in favor of Defendants. Defendants argue that if a preliminary injunction is granted, they will suffer harm due to the ongoing trademark infringement caused by Plaintiffs' continued use of their marks and names at properties that are associated with poor quality as found in customer reviews and that repeatedly fail QA inspections. The Court agrees that this constitutes harm. Also, where there is a likelihood of confusion by improper use of marks and names, irreparable injury may be established. Finally, allowing Plaintiffs, who allegedly cause the harm outlined above, to obtain a license for a new franchise would cause similar harm to Defendants.

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Unlike Traditional Franchisees, Utility Tractor Franchisees Have Non-Renewal Protection

The Charles Machine Works, Inc., an Oklahoma Corporation, v. Valley Ditch Witch, Inc., ¶15,287. U.S. District Court, W.D. Oklahoma. (May 2014).

A utility tractor dealer's request to dismiss all three of a manufacturer's requests for declaratory relief under the Oklahoma equipment dealer law was denied. The manufacturer asserted in its suit that it is authorized under Oklahoma law and the Dealer Agreement to not renew the parties' contract without cause, or in the alternative, did not renew the contract for cause and, thus, was not liable. The dealer disagreed.

Under Oklahoma statutory law, "contracts are unlawful which are .... [c]ontrary to an express provision of law .... [or] [c]ontrary to the policy of express law, though not expressly prohibited. Under the version of the Fair Practices of Equipment Manufacturers, Distributors, Wholesalers and Dealers Act ("the Act") in effect at the time the parties signed the Dealer Agreement, a supplier is prohibited from terminating or failing to renew a dealer agreement without cause. In addition, a supplier may not require a dealer to assent to a release or a waiver which would relieve the supplier from liability imposed by the act.

Having carefully reviewed the parties' submissions, the Court found that defendant's request to dismiss all three of plaintiff's requests for declaratory relief should be denied. Plaintiff asserts that it is authorized under Oklahoma law and the Dealer Agreement to not renew the contract without cause, or in the alternative, did not renew the contract for cause and, thus, is not liable. The Court also found that whether plaintiff had cause is still at issue.

However, the Court also concluded that plaintiff's request for declaratory relief under (b) should be dismissed because the Act clearly requires that a decision of non-renewal must be for cause. In addition, the Act prohibits plaintiff from requiring defendant to assent to a waiver of liability under the Act. Thus, the language in the Dealer Agreement that attempts to waive this right is a violation of the express provision of the business code and, consequently, amounts to an unlawful provision that is unenforceable under Oklahoma law.

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More Franchisee Dis-Information To Grease the Efficient Franchise Purchase Information Market

The most serious mistake that potential franchisees make is to rely exclusively upon their franchisors to provide them with information regarding potential franchise investments. The Franchise Disclosure Document (FDD) for sure provides some information, although far too little. Indeed, the FDD is deceptively useless if prospective franchisees limit their due diligence solely to the FDD and any other information given to them by franchisors. In this regard, Item 20 of the FDD was supposed to serve the altruistic and efficiency-promoting purpose of providing the potential franchisee with a gateway to obtaining other valuable sources of information about the franchise system, most notably contact information for current and former franchisees of the system.

For very many reasons, even though Item 20 allows a potential franchisee to glean some crude measures of turnover and terminations, it mysteriously requires no meaningful disclosure of past franchisees that left the system more than a year in the past. Further, the contact information for such former franchisees is obviously almost always stale, consisting of business phone numbers to locations that are of course no longer in existence. Also, franchisors are not required to provide a full list of all current franchisees in all cases. Further, franchisors are permitted under the FTC Rule to gag current and former franchisees with legal documents that prevent them from speaking with prospective franchisees. So, anyway, yesterday I read an article by a person hawking validation videos to franchise companies to assist them with selling franchises to the public. She got it right on two points. First, almost every franchisee would want to obtain information from current and former franchisees before purchasing: 'Most all prospects want to hear from existing franchisees about their experiences and get answers to their burning questions.' Second, she also understood that almost every franchisor would like to completely control with whom franchisees speak and the particular information disclosed by the current or former franchisee: 'If you let prospects call on a list of your key owners over and over, those franchisees would never get their work done!' She concludes, that, rather than have potential franchisees waste everyone's time investigating the franchise opportunity, the franchisor should itself cherry pick their franchisee rosters, and 'Choose some of your best, most experienced and diverse owners and film them addressing the same issues and talking points. When edited into a final video, you will have a totally credible presentation of your franchise from the owner's point of view.' Maybe we should allow this person and others in the same business to create summaries of the FDD to give to potential franchisees as well so that potential franchisees don't have to 'waste their time' reading the FDDs.

Anytime Fitness Franchisee Exorcised About Court's Enforcement of Post-Term Covenant Ban on Competitive Exercise

Anytime Fitness, LLC v. Edinburgh Fitness LLC, D.C. Minn. (2014)

A federal Court in Minnesota held that a fitness center franchisor Anytime Fitness, LLC (AF) was entitled to a preliminary injunction against a former franchisee, its operator Mark Ravich, a competing fitness center, and another individual, enjoining the former franchisee and Ravich from further violations of their covenants not to compete with AF and enjoining the defendants from infringing on AF's trademarks.

In essence, the franchisee, Ravich allegedly opened a competing brand of fitness centers in the location of the former franchise, in violation of the agreement's non-compete provisions. Under Minnesota law, courts uphold non-compete agreements that are for the protection of the legitimate interest of the party in whose favor they are imposed, reasonable as between the parties, and not injurious to the public. The franchisor claimed that Ravich and the former franchisee breached their post-term obligations not to compete.

Two points were somewhat unique about this decision. First, the franchisee had a very strange provision included in the franchise agreement itself that actually permitted the franchisee to operate a competing operation under certain circumstances during the tenure of the franchise. Nevertheless, the Court distinguished the purpose of that amended provision during the term of the franchise agreement as opposed to a time after the termination of the franchise agreement:

The Court finds unpersuasive Defendants' arguments that the Amendment is to be read to essentially nullify the provision relating to competition. The evidence before the Court supports AF's view that the Amendment was intended to allow Ravich to continue to engage in his primary business of commercial property ownership and management, thereby allowing him to work with tenants that have a fitness center or to take over the businesses of lessees in his shopping center, for example, his Eagan tenant, as articulated by Ravich himself. This is different, however, from Ravich's and Edinburgh's current conduct of owning and operating a competitor's fitness center in the same location as the previous franchise-this is precisely the type of conduct a non-compete agreement is intended to prohibit.

Second, the Court specifically addressed the ownership and use of the alleged confidential member data in considering the franchisor's argument that Ravich and Edinburgh Fitness were misusing data from the Brooklyn Park ANYTIME FITNESS®, including all member data. The Court concluded that on the evidence before it, "AF is likely to succeed on the merits of its claim for declaratory judgment that AF has ownership over the confidential membership data to the extent that Defendants use the membership data to run the Fit 12 Brooklyn Park. This Court agrees with the interpretation of paragraph 9.N. described by the Ramsey County District Court, which stated that a franchise agreement, with an identical provision to the provision in this case "defines the member information as being owned by [AF], and it cannot be used in any way not authorized by [AF], and mining those names and the information regarding the individual members of the ... franchises and transferring them without any contact with those members to a different location, or contacting them using the confidential information for the purpose of transferring them to another health club, is not an authorized use of the information"

According to the Court, AF presented evidence that Defendants took the names and information of members of the Brooklyn Park ANYTIME FITNESS® and transferred those members to their new Fit 12 Brooklyn Park center. This, according to the Court, was not an authorized use of the data and is likely in violation of the parties' Agreement.

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Jeff Goldstein
Goldstein Law Group www.goldlawgroup.com

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GOLDSTEIN, P.O. Box 1707, Leesburg, VA 20177 MAIN: 202-293-3947 FAX: 202-315-2514
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