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RECENT FRANCHISE FEDERAL COURT DECISIONS.

Pai v. DRX Urgent Care, LLC, United States District Court, D. New Jersey. March 04, 2014 Slip Copy 2014 WL 837158 (Court dismissed all franchisee plaintiffs' claims and stated: "Here, Plaintiffs' Complaints read as a lament for what they now consider have been a poor business decision. While this realization may be unfortunate for the Plaintiffs, their complaints fall short of stating any viable legal claim against Defendants. Therefore, for the reasons stated above, Defendants' motions to dismiss in both cases are granted."

In their complaints, the Pai Plaintiffs and Fabbro Plaintiffs relied upon identical allegations. First, they alleged that NEXDRX1 and Fabbro relied on the FDD's representations of initial startup costs and capital that the franchise deemed necessary to operate the franchise. NEXDRX1's start-up costs, however, had allegedly exceeded $1 million, which is an amount nearly double the projections contained within the FDD. Plaintiffs further believed that their business required an additional $300,000 in capital infusion beyond this $1 million. Plaintiffs also alleged that the range of working capital projected by the FDD fails to include certain operating expenses, such as the salary of a Medical Director. Fabbro's start-up costs have exceeded $820,000, which is an amount nearly forty percent over the projections contained within the FDD. Plaintiffs also alleged that the range of working capital projected by the FDD fails to include certain operating

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expenses, such as the salary of a Medical Director. Plaintiffs pointed to the 2012 version of the FDD, which estimates start-up costs and working capital necessary to operate a Doctors Express franchise to be nearly double the amount estimated in the 2008 FDD, as an admission by DRX that its earlier estimates were too low.

Plaintiffs also alleged that when DRX owned the Doctors Express system, it "initiated material and system-wide changes, designating a vendor to provide required services as a mandatory contract, despite the fact that the contract increases Plaintiff's (and presumable others') costs on an annual basis of at least $30,000." Plaintiffs also alleged that DRX has refused to produce any audited financial statements, despite a formal request to provide such an accounting. In particular, Plaintiffs alleged that DRX promised them a fully audited financial statement pertaining to the allocation and spending of franchisee advertising monies upon request at the annual franchise conference. DRX, however, has failed to prove an audited formal accounting but rather "disseminated a two-page unaudited 'summary' style document that fails to state, with particularity, the use and purpose of advertising monies collected from Plaintiffs and other franchisees.")

H & R Block Tax Services LLC v. Acevedo-Lopez, United States Court of Appeals, Eighth Circuit. February 12, 2014 742 F.3d 1074 (District court's findings were insufficient to allow meaningful appellate review of its denial of franchisor's motion for preliminary injunction requiring franchisee to comply with post-termination covenants in franchise agreement for tax preparation services, and thus, remand was required; district court's order contained cursory statement that franchisor failed to demonstrate that it would suffer irreparable harm absent a preliminary injunction, and a statement that district court had considered the four factors for determining whether to grant a preliminary injunction, and even if the record permitted court of appeals to infer why district court concluded that franchisor's initial showing of irreparable injury was inadequate, the court of appeals, without adequate findings and reasons, could not evaluate whether summary denial of franchisor's motion without an evidentiary hearing was an abuse of discretion, when other procedural alternatives were clearly available.)

Cain v. Shell Oil Co., United States District Court, N.D. Florida, Tallahassee Division. January 10, 2014 --- F.Supp.2d ---- 2014 WL 103254 (Terms of convenience store's franchise agreement with franchisor did not create an agency relationship by contract, as required to support store patron's premises liability action under Florida law against franchisor stemming from injuries sustained by patron when gunfight broke out in store's parking lot; the franchise agreement set standards and benchmarks for the store's operation that store was responsible for satisfying by its own means and in its own discretion, and the agreement did not give franchisor a right to control the store's operations, rather, agreement merely gave franchisor the right to terminate or not to terminate the agreement.)

Dunkin' Donuts Franchised Restaurants, LLC v. Claudia I, LLC, United States District Court, E.D. Pennsylvania. February 10,

RECENT COURT COMPLAINTS FILED BY FRANCHISORS AGAINST FRANCHISEES.

MEINEKE CAR CARE CENTERS LLC V. ASAR INCORPORATED LLC ET AL, March 24, 2014 NC U.S. DIST. CT., WEST (DEFENDANTS BREACHED THE FRANCHISE AGREEMENT BY FAILING TO PROVIDE ALL REPORTS OF GROSS REVENUES TO PLAINTIFF AND PAY ALL OF THE ROYALTIES AND ADVERTISING CONTRIBUTIONS ACCRUED PRIOR TO THE DATE OF TERMINATION OF SAID AGREEMENT.)

DIRECTBUY INC V. ANCJ, LLC ET AL, March 24, 2014 IN U.S. DIST. CT., (DEFENDANTS BREACHED THE FRANCHISE AGREEMENT BY FAILING TO PAY PLAINTIFF)

RAMADA WORLDWIDE INC. V. ABEL LODGING, LLC ET AL, March 20, 2014 NJ U.S. DIST. CT. (DEFENDANT BREACHED THE FRANCHISE AGREEMENT BY MAKING UNAUTHORIZED USE OF PLAINTIFF'S MARK FOR MARKETING, PROMOTING AND RENTING ROOMS AT THE FACILITY)

MISTER SOFTEE OF QUEENS INC. ET AL V. TSIRKOS, March 20, 2014 NY U.S. DIST. CT., SOUTH (DESPITE TERMINATION OF THE FRANCHISE AGREEMENT, DEFENDANT WRONGFULLY CONTINUED TO OPERATE HIS ICE CREAM TRUCKS AND SOLD ICE CREAM, SHAKES AND SUNDAES USING PLAINTIFF'S 'MISTER SOFTEE' TRADEMARKS AND TRADE DRESS WITHIN THE TERRITORY OF PLAINTIFF'S FRANCHISEES, RESULTING IN DAMAGES TO THE PLAINTIFF AND THE FRANCHISEES)

AMERICAN DAIRY QUEEN CORPORATION V. YS&J ENTERPRISES, INC. ET AL, March 13, 2014 NC U.S. DIST. CT., EAST (DEFENDANTS CONTINUED TO USE PLAINTIFF'S 'DAIRY QUEEN' AND 'ORANGE JULIUS' TRADEMARKS AFTER TERMINATION OF FRANCHISE AGREEMENT).

JACKSON HEWITT INC. V. SHARIF, March 06, 2014 NJ U.S. DIST. CT. (DEFENDANT BREACHED THE FRANCHISE AGREEMENT BY FAILING TO PAY

2014 --- F.Supp.2d ---- 2014 WL 512998 (Franchisor brought action against franchisee and its members alleging breach of franchise agreement. Franchisee brought counterclaim against franchisor, alleging fraud and tort claims and filed third party complaint against property owner. Franchisor and property owner moved for summary judgment on counterclaim and third party complaint. (The District Court held that: (1) there was no evidence that franchisee reasonably relied on alleged misrepresentation by franchisor and property owner; (2) any representations by franchisor's employee that sublease could not be renegotiated was not actionable in fraud; (3) franchisee's claim for fraud in the performance of contract was barred by gist of the action doctrine; and (4) there was no evidence of prospective contractual relation between franchisor and franchisee. Motions granted in part and denied in part.)

RECENT STATE FRANCHISE COURT DECISIONS.

Gator Apple, LLC v. Apple Texas Restaurants, Inc., Court of Appeals of Texas, Dallas. March 05, 2014 --- S.W.3d ---- 2014 WL 1008067 (Provision in franchise agreement stipulating damages amount for breach of agreement for interference with employee relations was liquidated damages provision, rather than penalty, and thus was enforceable under Kansas law pursuant to choice of law provision in agreement, absent evidence regarding value of subject matter of franchise agreement, value of any specific employee to franchise, or whether damages amount was reasonable in light of those values. Franchisee, either directly or as third-party beneficiary of franchisor, did not waive its right to assert its breach of contract claim against competitor for interference with employee relations by providing releases to former employees to discuss employment opportunities with franchisor, accepting releases in order to hire employees from other franchisees and franchisor, and routinely electing not to enforce requirements of its franchise agreements relating to letters of release; franchise agreement specifically provided that any waiver of breach or default under agreement would not be deemed waiver of any subsequent or continuing breach or default.)

Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corporation, Court of Appeal, Second District, Division 6, California. November 26, 2013 221 Cal.App.4th 867 (Closure of motorcycle dealership did not bar dealership's claims against motorcycle manufacturer for breach of contract and breach of the implied covenant of good faith and fair dealing arising out of manufacturer's refusal to approve sale to buyer, despite manufacturer's claim that closure was a material breach of the franchise agreement,

PLAINTIFF ROYALTY FEES, ADVERTISING AND MARKETING FEES, ELECTRONIC FILING FEES AND OTHER FEES TO PLAINTIFF AS A RESULT OF TERMINATION OF SAID FRANCHISEAGREEMENT.)

SUPER 8 MOTELS, INC. V. AMBROSIA LANDS HOSPITALITY, INC. ET AL, February 26, 2014 NJ U.S. DIST. CT. (DEFENDANT REPEATEDLY FAILED TO MEET ITS FINANCIAL OBLIGATIONS TO SWI, IN BREACH OF ITS OBLIGATIONS OF THE FRANCHISE AGREEMENT.)

THE UPS STORE, INC. ET AL V. HAGAN ET AL, February 25, 2014 NY U.S. DIST. CT., SOUTH (DEFENDANTS CONTINUED TO USE THE MARKS OF PLAINTIFFS DESPITE TERMINATION OF THE PARTIES' FRANCHISE AGREEMENTS.)

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which specified that closure was a ground for termination; statute prevented manufacturer from taking action to prevent dealership from selling its franchise and imposed a duty on manufacturer to act reasonably in connection with a sale, there was substantial evidence that manufacturer acted in bad faith by encouraging dealership to complete a sale to buyer, representing that it would consider the sale even if consummated after the closure of the dealership, and informing dealership that a reopening was not required to obtain manufacturer's approval of the sale.)

Abbo v. Wireless Toyz Franchise, L.L.C. Court of Appeals of Michigan. February 04, 2014 Not Reported in N.W.2d 2014 WL 470076 (Wireless Toyz Franchise, L.L.C. (WTF) awarded David Abbo a Wireless Toyz franchise. Abbo opened a Wireless Toyz retail store in Colorado and subsequently signed a development agent agreement committing to open additional Wireless Toyz stores. When the franchise relationship soured, Abbo filed a nine-count complaint against WTF seeking to rescind both contracts and asserting a variety of contract and tort claims. A jury considered Abbo's allegations during a hard-fought, 12-day trial featuring more than two dozen witnesses and myriad exhibits. The trial judge denied defendants' directed verdict motions and permitted the jury to consider all of Abbo's averments. The jury found in Abbo's favor on only one claim, rejecting eight others. The trial judge retired and a different judge overturned the jury's verdict by entering a judgment of no cause of action. We reverse and reinstate the jury's verdict.)

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Thanks for your interest in our Newsletter, and we look forward to answering any questions you might have either on the cases discussed in this issue of Franchise Trends, or on general trends in franchise law.

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