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Recent Developments in Franchising and Hospitality Law

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There have been a variety of developments in franchising in the last two years that affect the hospitality industry. We survey below court decisions from 2009 and 2010 in the following areas: liquidated damages; intellectual property; fraud; injunctions; breach of contract; and registration and disclosure issues. Lastly, we address federal legislation that is expected to go into effect in 2011, which requires nutritional disclosures on menus and menu boards of restaurants and other retail food establishments.

I. Liquidated Damages

A. *Super 8 Motels, Inc. v. Abu M. Rahmatullah*, 2009 U.S. Dist. LEXIS 81931 (S.D. Ind. Sept. 9, 2009). In *Super 8 Motels, Inc.*, the court granted summary judgment to a hotel franchisor on its claims for liquidated damages against a franchisee. The parties had entered into a franchise agreement for the franchisee's operation of a 125-room hotel located in Indianapolis. The agreement was for a 20 year term, during which time the franchisee was permitted to use the brand's trademarks and service marks. Five years into the 20-year term, the franchisee's hotel failed to pass a number of quality assurance inspections. Consequently, the franchisor terminated the agreement. The franchisor sued the franchisee to recover liquidated damages it alleged it was entitled to pursuant to the parties' franchise agreement. The court rejected the franchisee's argument that the franchisor was not entitled to liquidated damages because it allegedly licensed another franchise within five miles of his hotel. It found that the franchisee had presented no genuine issue of material fact for purposes of summary judgment.

B. *La Quinta Corp. v. Heartland Properties, LLC*, Bus. Franchise Guide (CCH) ¶ 14,376 (6th Cir. 2010). In this case, the Sixth Circuit affirmed a grant of summary judgment in favor of a hotel franchisor in a dispute regarding the hotel franchisor's implementation of a new computerized reservations system. In 1994, the franchisee and its guarantors entered into a franchise agreement to operate an inn in Kentucky. At that time it also signed a license agreement which granted the franchisee a license to use the brand's system which included its reservation system and other intellectual property. In 2004, the franchisor notified its franchisees that it was rolling out a new software reservation system. The franchisee, upset with the change, refused to provide the franchisor with access to its facilities to install the system and it neither signed the new software license agreement nor made the software operational at its hotel. The franchisor notified the franchisee that it was terminating the agreement and the franchisee sued for breach of the license agreement and other claims. The franchisor also sued and the claims were consolidated in federal court.

The court found in favor of the franchisor noting that the terms of the original franchise agreement and license agreement contemplated new system roll-outs like the one implemented

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by the franchisor in 2004. It found that the terms of the license agreement were unambiguous and required the franchisee to participate in the new roll out and bear certain costs of installing and running the new system. It determined that the franchisee had failed to proffer any contractually acceptable excuses to avoid an award of liquidated damages to the franchisor pursuant to the terms of the parties' franchise agreement. It noted that the franchise agreement was terminated because of the franchisor's noncompliance and awarded liquidated damages based on the period of loss proffered by the franchisor.

II. Intellectual Property

A. ***Dunkin' Donuts Franchised Restaurants LLC v. Fatima & Ali, Inc.*****, Bus. Fran. Guide (CCH) ¶ 14,235 (S.D. Fla. Aug. 13, 2009).** This case involved a motion for a preliminary injunction filed by the plaintiffs, who were various Dunkin' Donuts corporations (collectively referred to as "Dunkin'"), that filed claims against its former franchisees for breach of their respective franchise agreements and personal guarantees, trademark and trade dress infringement, and unfair competition. The franchisee-defendants continued to operate their franchised Dunkin' Donuts stores after they were terminated from the system by Dunkin' for non-payment of fees.

The Court granted the preliminary injunction for each claim finding that Dunkin' established a likelihood of success on the merits, rejecting the defendants' argument that the appropriate standard is a "clear likelihood of success." Regarding breach of contract, the Court decided that there was a binding franchise agreement that provided for termination of the agreement if franchisee defaults were not cured by the franchisee after notice. Defendants defaulted by failing to make timely payments to Dunkin. The default continued after Dunkin' provide the opportunity to cure, and then the defendants continued to operate their Dunkin' Donuts stores after Dunkin' terminated their franchises. Thus, Dunkin established a substantial likelihood of success for its breach of contract claims.

On the claims of trademark and trade dress infringement and unfair competition, the Court found that it was "undisputed that Plaintiffs own the Dunkin' Donuts Marks and trade dress and that Defendants continued to use them after termination, without consent." Moreover, it was undisputed that Dunkin's trade dress is inherently distinctive, and that unauthorized use of the marks and trade dress was "likely to cause confusion among customers, who will wrongly believe Defendants to be operating a franchised Dunkin' Donuts shop…and that Dunkin' endorses Defendants' operation of their shops." Thus, Dunkin' also established a substantial likelihood of success for these claims.

Finally, the Court noted that Dunkin' would suffer irreparable harm without an injunction. The Court reasoned that defendants' unauthorized use of Dunkin's intellectual property would cause Dunkin' to lose control of its "reputation, trade and goodwill among its customers" and would divert business from other licensed franchisees --, all issues in further support of the preliminary injunction.

B. ***TGI Friday's Inc. v. Great Northwest Restaurants, Inc.*****, 2009 U.S. Dist. LEXIS 73768 (N.D. Tex. Aug. 20, 2009).** This case analyzed a trademark infringement action filed by

the plaintiff TGI Friday's Inc. ("TGIF") against its former franchisees ("Defendants"). TGIF sought a preliminary injunction enjoining the Defendants from "continuing to use its trademarks and service marks" in connection with their restaurants. As part of the action, TGIF asserted trademark infringement, false designation of origin, and unfair competition.

TGIF had franchise agreements with the Defendants which were all very similar, and included provisions that Defendants "must immediately cease use of TGIF's marks upon termination of the agreements." TGIF, as it was permitted to do via the franchise agreements, terminated the Defendants' licenses for non payment of royalties. Importantly, the Defendants admitted to the fact that they stopped paying royalties to TGIF, and that they "did not cease using TGIF's marks" after they received notice of termination.

After analyzing the four factors that TGIF was required to establish for a preliminary injunction, the Court granted TGIF's request. The factors are: (1) substantial likelihood of success on the merits; (2) substantial threat of irreparable injury; (3) the threatened injury outweighs the threatened harm to Defendants in the injunction is granted; and (4) granting the injunction will not disserve the public interest. The most important piece of the Court's analysis focused on the first and second factors.

With regard to the first factor, the Court noted that there was no dispute that "the proprietary marks referred to in the franchise agreements and registered by TGIF are owned by TGIF and are legally protected." Moreover, the Defendants admitted that they were using TGIF's marks, in commerce in connection with the sale of goods, and without TGIF's permission. The Court found that such a scenario evidences a "likelihood of consumer confusion between licensed TGI Friday's restaurants and [Defendants'] restaurants." Such a showing illustrated that TGIF was likely to succeed on the merits of its trademark infringement claim. As to the second factor, the Court found that while it is appropriate to "presume irreparable injury upon a finding of likelihood of confusion," it is not necessary where a plaintiff establishes "a substantial threat of irreparable injury." Here, Defendants' unauthorized use of TGIF's marks resulted in TGIF's loss "of control over its valuable trademarks and the quality of the restaurants operating under its name." It is this loss of control "which poses a substantial threat of injury to TGIF's reputation and goodwill" in its brand. This kind of injury is irreparable because it cannot be remedied through monetary compensation.

In so holding, the Court rejected Defendants' argument that TGIF's termination of the franchise agreements was wrongful, and thus Defendants were within their rights to continue using the marks. Defendants asserted that TGIF's decision to change distributors caused Defendants' costs to raise substantially, which resulted in their inability to pay royalties to TGIF. The court found that such "vague allegations do not diminish TGIF's likelihood of success on the merits," and that even assuming Defendants' claim was meritorious, they would not be excused from performing under the franchise agreement, and meeting their obligation to stop using TGIF's marks if the agreement was terminated. The Court also rejected Defendants' claims that their use was not unauthorized because TGIF "continued to inspect their restaurants, to send them menus and promotional materials, and to list the restaurant locations on their website." The Court held that such action is not a waiver of TGIF's rights, or evidence that it assented to Defendants' continued operation. Citing precedent, the Court noted that in cases

where a franchisee continues to operate without authorization, it is natural for a franchisor to "attempt to monitor the franchisee . . ." which should not intrude its "right or entitlement to a preliminary injunction."

Finally, the Court rejected the argument that TGIF's reputation was not harmed because they continued to meet TGIF's standards of operation. When a likelihood of confusion exists, as it did here, the franchisor's lack of control "over the quality of the defendant's goods or services constitutes an immediate and irreparable injury, regardless of the actual quality of those goods or services." For all of the above reasons, the Court granted TGIF's request for a preliminary injunction.

C. *Doctor's Associates Inc. v. Agnello*, 2009 U.S. Dist. LEXIS 81321 (S.D.N.Y. Aug. 27, 2009). This case discussed what damages are available to a plaintiff in a trademark infringement action under Lanham Act. The Court, in a brief opinion reviewing a damages award, discussed the types of damages available, and the proper method of computation. First, the Court reiterated the statutory language that permits damages, and noted that plaintiffs are permitted to recover: (1) a defendant's profits, (2) any damages sustained by the plaintiff, and (3) costs related to the action. Importantly, however, the Court noted that a showing of bad faith is required to recover an infringer's profits. Finally, the Court made clear that it is within the Court's discretion to triple a recovery based on profits if the actual award is deemed inadequate, so long as the final award is based only on compensation, and is not punitive.

Based on these principles, the Court upheld in part, and reversed in part, the lower court's damages award. The Court found that while it was appropriate to find lost profits of $16,345.94, and to triple that amount to $49,037.83, it was improper for the lower court to further increase the award to $90,000, based in part on the defendant's "failure to appear at a deposition." Such an increase constituted a penalty rather than compensation, and was afoul of the Lanham Act's damages provisions. Lastly, the Court concluded that the $7,859.61 in attorney's fees and expenses was properly awarded.

D. *Little Caesar Enters., Inc. v. Little Caesar's VA, Inc.*, Bus. Fran. Guide (CCH) ¶ 14,199 (E.D. Va. Aug. 27, 2009). This case involved a franchisor, Little Caesar Enterprises, Inc. ("Little Caesar"), that sent a cease and desist letter to an unauthorized transferee to demand that he stop operating his formerly-franchised pizza restaurant. Little Caesar subsequently requested a preliminary injunction from the Court, which was based partially on trademark infringement claims.

The original franchise agreement indicated that a Ms. Ross was to be the sole, 100% owner of the franchise. After a complicated set of circumstances, Ms. Ross transferred her ownership interest in the franchised Little Caesar's restaurant to a Mr. Krever, who was never listed as an approved franchisee/owner of the business. Little Caesar had no knowledge of, and did not approve, the transfer. After learning of the unauthorized transfer, Little Caesar terminated the franchise agreement, and sent a cease and desist letter to Mr. Krever informing him that he was not an authorized franchisee, that the franchise agreement would be terminated, and that he must "immediately and permanently discontinue the use or display of Little Caesar trade dress, trademark, or any mark or name that is confusingly similar to that of Little Caesar."

Mr. Krever eventually "de-identified" with Little Caesar by changing the name of his restaurant to "Family Pizza Plus," but he continued to use "Little Caesar ingredients . . . to prepare the pizza's" he was selling, and continued to display Little Caesar signage, equipment, boxes, and other trade dress and aspects of Little Caesar's intellectual property.

The Court ultimately granted the injunction finding that Mr. Krever held his business out as a Little Caesar's franchise without authorization or permission, and continued to "display Little Caesar trademarked and promotional images, offer for purchase proprietary Little Caesar food items, and use Little Caesar brand ingredients, equipment and boxes." Therefore, despite changing the name of the restaurant to "Family Pizza Plus," Mr. Krever's operation of his restaurant continued to pose a "substantial threat to plaintiff's goodwill and established reputation" by "trading on the knowledge and customer base of the restaurant during its time as a Little Caesar's." Specifically, the preliminary injunction was awarded because Mr. Krever's unauthorized use of Little Caesars trademarks and trade dress would cause purchasers to be "confused and mistaken" that Family Pizza Plus was actually a Little Caesar's Pizza. Thus, Little Caesar was "very likely to prevail on their trademark infringement claim," and the preliminary injunction as necessary to prevent "irreparable injury" to Little Caesar.

The trademark infringement claims were very important to the Courts decision to grant the preliminary injunction. Specifically, the Court concluded that "[u]nauthorized use of trademarks raises the specter of loss of reputation and business good will for the owners of the misappropriated trademarks . . .," and "[t]rademark infringement primarily represents an injury to reputation." Moreover, "many courts have held that continued trademark use by one whose trademark license has been cancelled satisfies the likelihood of confusion test and constitutes trademark infringement." As a result, the Court determined that the preliminary injunction was necessary and appropriate.

E. *Days Inn Worldwide, Inc. v. Adrian Motel Co.*, LLC, 2009 U.S. Dist. LEXIS 90393 (E.D. Mich. Sept. 30, 2009). In this case, Plaintiff Days Inn Worldwide, Inc. ("Days Inn") moved for summary judgment on various claims including breach of contract, unfair competition, and trademark infringement. The claims were based largely on the fact that the franchisee breeched the franchise agreement by selling the franchise to a third party without prior authorization from Days Inn.

Regarding the breach of contract claim, because the franchise agreement clearly indicated that any sales or transfers of the franchise must first be approved by Days Inn, the franchisee breached the contract by selling its hotel business to a third party (the "Kalabat Defendants") without first seeking Days Inn's approval.

Because of the unauthorized sale, the Court found that the Kalabat Defendants had violated federal trademark infringement and unfair competition laws. The Kalabat Defendants were operating the hotel under the Days Inn name and trademarks, but without authorization from Days Inn, and without a valid franchise agreement. Thus, there were "no genuine issues of material fact" that the Kalabat Defendants were unauthorized to operate under the Days Inn name and trademarks, and that customer confusion was likely to result. Additionally, the Court

found that the Days Inn marks were famous and distinctive prior to the Kalabat Defendants' infringing commercial use, and that dilution was likely because the Kalabat Defendants were using marks that were identical to those owned by Days Inn. Thus, there were no issues of material fact regarding the trademark dilution claim.

Finally, Days Inn also attempted to hold a corporate officer of the Kalabat Defendants, Mr. Kalabat, individually liable for its Lanham Act claims. While "employees and corporate officers can be held individually liable under the Lanham Act when the employee or corporate officer personally takes part in the infringing activity or directs others to do so," there were genuine issues of material fact as to whether Mr. Kalabat "had the right and ability to supervise the infringing activity and/or participated in that activity." His affidavit asserted that while he was an officer of the defendant, he did not personally own or operate the hotel, and was not involved in the day-to-day operations. Thus it was not appropriate to hold him personally liable at the summary judgment stage.

F. *Shakey's USA, Inc. v. Tutto's Pizza Corp.*, 2009 U.S. Dist. LEXIS 90472 (E.D. Cal. Sept. 30, 2009). Shakey's USA, Inc. ("Shakey's") was a pizza parlor franchisor, and who sued Defendants Tutto's Pizza Corp., CM Restaurant Group, Inc., and others for trademark and trade dress infringement. Defendants took over operation of a Shakey's restaurant from a formerly licensed franchisee, after Shakey's terminated the franchise agreement. The Court decided that a default judgment should be entered in Shakey's favor against Defendants.

To determine whether a default judgment is appropriate, courts consider: (1) the possibility of prejudice to the plaintiff; (2) the merits of plaintiff's substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at stake; (5) possibility of disputes regarding materials facts; (6) whether the default was due to excusable neglect; and (7) the strong policy favoring decisions on the merits. After weighing these factors, the Court found that default judgment was appropriate given that Shakey's owned valid, registered and protectable trademarks which Defendant's used without authorization. Shakey's sufficiently alleged all of the elements of trademark and trade dress infringement, and there was no evidence suggesting a dispute over any material facts. Finally, there was also no evidence that the Defendants' failure to respond was due to the result of any excusable neglect. Thus, Defendants were creating confusion as to the "origin of the products" which would lead "the public to patronize a restaurant using Shakey's marks" without permission. As a result, if the default judgment was denied, Shakey's "would be left without a remedy or means to prevent future violations" which would result in great prejudice.

In carrying out the order, the Court recommended that Shakey's receive actual damages of $36,950 which was based on franchise fees that Shakey's should have received during the time that Defendants were operating the restaurant without Shakey's permission. The Court also awarded treble damages and attorney's fees because Defendants' infringement was willful. (Defendants ignored Shakey's cease and desist letter that was sent months prior to commencement of the action, and also redesigned and repainted their restaurant to conform with Shakey's redesign specifications, even though they did not have a license to do so.) Finally, the Court recommended a permanent injunction to prevent Defendants from "any future infringement of Shakey's trademarks and to enjoin use of Shakey's trade dress."

G. *Domino's Pizza Franchising, LLC v. Yeager*, 2010 U.S. Dist. LEXIS 5340 (E.D. Mich. Jan. 25, 2010). Plaintiffs were two related Domino's Pizza companies ("Domino's") who are franchisors of the Domino's Pizza brand. Domino's sued one of its franchisees, Calvin Yeager ("Yeager"), who was the president of two corporations that operated Dominos Pizza franchises. Domino's asked the Court for a preliminary injunction based on its claims of trademark infringement and breach of contract.

Domino's and Yeager entered into two separate franchise agreements allowing Yeager to operate two Domino's Pizza franchises, Valley Pizza and Lakeside Pizza. Because Yeager defaulted under the franchise agreements, Domino's terminated those agreements in November of 2009. Domino's filed this action alleging that Yeager failed to comply with its post-termination obligations as set forth in the franchise agreements, and sought a preliminary injunction to prevent Yeager and his restaurants from "using, advertising or displaying any of Domino's trademarks, service marks, or copyrighted materials," and to "return the Operations Manual and Customer Lists to Domino's, to transfer the telephone numbers to Domino's," and to stop operating their pizza carry-out an delivery businesses . . . ."

Regarding the trademark infringement claims under the Lanham Act, the Court found that Domino's showed a strong likelihood of success on the merits because Domino's owns the Domino's Pizza trademarks and service marks, Domino's terminated the franchise agreements (and Yeager's license to use Domino's trademarks and service marks) with Yeager in November 2009, and since termination, Yeager continued to use the Domino's trademarks without authorization. The Court found that such unauthorized use was "likely to cause confusion among the consumer public," which supported its decision to grant the preliminary injunction. Moreover, absent a preliminary injunction, Domino's would likely suffer irreparable harm to its goodwill based on Yeager's continued unauthorized use of the Domino's name and trademarks.

In seeking a preliminary injunction to enforce the post-termination non-compete provisions of the franchise agreements, Domino's showed, and Yeager did not dispute, that Yeager was obligated to, among other things, stop using the Domino's trademarks and to return the Domino's Operations Manual and Customer Lists. The Court decided that the non-compete provisions were likely to be upheld because they were "reasonable under the circumstances" given that they were limited in both geographic scope (10 miles) and duration (one year), and because any hardships imposed on Yeager were minimal.

Finally, the Court found that the preliminary injunction was warranted because: (1) requiring Yeager to stop its unauthorized use of the Domino's marks and to comply with its post-termination contractual obligations would not cause substantial harm to third parties; and (2) it is in the public interest because the public has a "valid interest in remaining free from confusion about the source of products it purchases."

H. *Cold Stone Creamery, Inc. v. Gorman*, 361 F. App'x 282 (2d Cir. Jan. 2010). In this case, the Second Circuit Court of Appeals reviewed the validity of a preliminary injunction. The underlying facts indicated that, after terminating one of its franchisees for failure to pay rent, Cold Stone discovered that the former franchisee was opening a new store at another

location, and was using Cold Stone's trademarks, signs, wall paper, menu boards, and cups. Cold Stone sued the former franchisee alleging trademark infringement, breach of contract, and other claims.

The franchisee claimed that he was not the owner of the new location or the allegedly infringing property. However, the Court found that he did in fact own the infringing property at one point in time, due to his status as a former franchisee. Further, the Court found the franchisee violated the franchise agreement by "selling rights to use [Cold Stone's] trademarked property after Cold Stone terminated the franchise and lease agreements . . . in direct violation of those agreements." Based on this evidence, the Court found that Cold Stone demonstrated "that it was likely to succeed on the merits" with regard to its trademark infringement action, and that it "would suffer irreparable injury in the absence of an injunction."

III. Fraud

A. *Qdoba Restaurant Corp. v. Taylors, LLC*, 2010 U.S. Dist. LEXIS 27394 (D. Colo. Mar. 23, 2010). Qdoba Restaurant Corporation, a nation-wide Mexican restaurant, franchisor sued one of its franchisees for breach of its franchise agreements after the franchisee closed seven franchise restaurants. The franchisee counterclaimed for fraudulent inducement, negligent misrepresentation, violation of the Florida Franchise Act, the Florida Deceptive and Unfair Trade Practices Act, and other claims. When Qdoba moved for summary judgment on all the claims and counterclaims, the court had to decide the core question of whether Qdoba misrepresented facts in the form of sales projections to the franchisee as an inducement to enter into a development agreement for the seven restaurants. The court granted the franchisor summary judgment on its breach of contract claim and the franchisee's counterclaims.

The court explained that the franchisee had to prove the following elements to demonstrate fraud in the inducement on the part of Qdoba: (1) misrepresentation of a material fact; (2) knowledge of the falsity of the statement; (3) intention that the representation would induce another to rely and act on it; (4) injury as a result of the party's justifiable reliance on the representation. It also explained that whether a party had made a fraudulent inducement was a question of fact, but under certain circumstances, summary judgment could be appropriate.

The franchisee claimed that Qdoba's factual misrepresentations included its website statements that its restaurants offered an excellent sales-to-investment ratio, sales projections from a program called MapInfo and statements made to the franchisee by Qdoba's CEO. The court concluded that the franchisee had provided no evidence to establish that any of the alleged misrepresentations were untrue or that the website statements related particularly to existing franchises in the area. It noted that sales projections provided by the software program were considered opinions insufficient to support a fraud claim. The court rejected the remainder of the franchisee's counterclaims since it found the franchisee had not come forward with sufficient evidence to demonstrate misrepresentations of material fact in conjunction with the parties' development agreement or franchise agreements.

B. *McCullum v. McAlister's Corp. of Miss.*, 2010 U.S. Dist. LEXIS 36354 (E.D. La. Apr. 13, 2010). Plaintiffs, employees of franchisee New Orleans Deli & Dining, LLC ("New Orleans Deli"), sued New Orleans Deli and its franchisor, McAlister's Deli Select ("McAlister's") in state court for breach of contract, negligence, fraud, unjust enrichment and conversion claiming they were denied wages and tips by McAlister's and its supervisory employees. The plaintiffs alleged that they were denied wages and tip by McAlister's. After removing the matter to federal district court, the franchisor filed a motion to dismiss, or in the alternative, for summary judgment on the employees' claims. The court granted McAlister's motion to dismiss with respect to the breach of contract, negligence and fraud claims but denied the motion as to the latter claims.

The court determined that plaintiffs had failed to state a claim for relief against McAlister's for breach of contract since they did not have an employment contract with McAlister's. The court dismissed the negligence claim because the plaintiffs' claims amounted to a claim for conversion as opposed to negligence. Finally, the court agreed with McAlister's that the plaintiffs' claim for fraud should be dismissed because plaintiffs failed to plead fraud with particularity as required by Federal Rule of Civil Procedure 9(b).

C. *Sherman v. Ben & Jerry's Franchising, Inc.*, 2009 U.S. Dist. LEXIS 72663 (D. Vt. Aug. 10, 2009). The plaintiffs were former owners of Ben & Jerry's franchises in Virginia who filed a twelve-count complaint alleging that the franchisor and its corporate affiliate had committed a number of wrongs including fraudulently inducing them to enter into a Ben & Jerry's franchise agreement. They also alleged that the defendants drove their shops into failure because the franchisor refused to provide continued support, siphoned customers away by distributing products through local restaurants and alienated customers with political campaign materials.

The franchisees claimed that the franchisor induced them to purchase their franchises my misrepresenting earnings data. To establish that claim under Vermont law which governed the parties agreement, plaintiffs had to prove that the franchisor made an intentional misrepresentation of fact which: (1) affected the essence of the transaction, (2) was false when made, (3) was known to be false by the maker, (4) was not open to the defrauded party's knowledge and (5) was relied upon by the defrauded party to his or her detriment.

After considering plaintiffs' claims, the court rejected the fraudulent inducement claim because it determined that plaintiffs had explicitly disclaimed reliance on any representation outside of the franchise agreements. It explained also that the franchise documents contained several specific, clearly stated warnings and disclaimers regarding plaintiffs' expected profits. It explained that under the law of Vermont, a party could not sue on a claim her or she was defrauded into entering a contract on representation that a seller had expressly disclaimed and a buyer had expressly acknowledged. The court however declined to dismiss plaintiffs' claim that they were induced to enter their franchise agreements after the franchisor made alleged assurances that it would limit the sales of its products near the plaintiffs' stores. The franchisor had argued that the claim was barred because of the economic loss rule; however the court found it failed to provide precedent whether the economic loss rule applied to fraud in the inducement claims.

The plaintiffs' remaining fraud claims including one for fraudulent nondisclosure were dismissed where the court found the plaintiffs had failed to plead fraud with particularity as required under Vermont Rule of Civil Procedure 9(b). The court also granted the defendants' motion to dismiss claims related to Item 19 of the Uniform Franchise Offering Circular because the plaintiffs did could not, as a matter of law, demonstrate justifiable reliance on the Item 19 disclosures. Finally, the court found there was insufficient nexus to the state of Vermont to grant plaintiffs standing as a Vermont customer in order to maintain their claim under the Vermont Consumer Fraud Protection Act.

D. ***Lake Wright Hospitality, LLC v. Holiday Hospitality Franchising, Inc.*, 2009 U.S. Dist. LEXIS 73903 (E.D. Va. Aug. 20, 2009).** In *Lake Wright Hospitality*, the district court granted summary judgment to the defendants and affirmed all of the findings of facts and conclusions of law reached by a magistrate judge after a de novo review of the judge's report and recommendation regarding a dispute between a hotel franchisor and a franchisee. In the underlying case plaintiff, the hotel franchisee claimed that the defendants, Holiday Hospitality Franchising, Inc., Intercontinental Hotels Group PLC, and Six Continental Hotels, Inc. induced it to open a hotel under the Holiday Inn Select brand name despite their secret plans to cease using the brand.

The plaintiff filed a complaint which alleged breach of the implied covenant of good faith and fair dealing, breach of contract, violation of the Virginia Retail Franchise Act, actual/constructive fraud and fraud in the inducement. In reviewing the report, the court found that the case record was completely devoid of any evidence to support plaintiff's fraud theory. It concluded that the plaintiff's fraud case verged on frivolous even after a cursory review of the statements the plaintiff alleged were frivolous. Notably, the plaintiffs' evidence consisted of only a few email chains which the court determined did not in any way support their fraudulent inducement claims. The court even noted the fact the plaintiff's hotel continued to be successful even after the defendants' alleged trickery.

E. ***Century Pacific, Inc. v. Hilton Hotels Corp.*, 354 F. App'x 496 (2d Cir. Nov. 25, 2009).** Plaintiff-appellant Century Pacific, Inc., ("Century Pacific") a hotel operator of a Red Lion Hotel, sued defendants Hilton Hotels, Doubletree Corporation and Red Lion Hotels in federal district court, for, among other causes of action, common law fraud, negligent misrepresentation and fraudulent omission. Century Pacific alleged that, prior to converting its hotel to the Red Lion franchise; it was given oral assurances by the defendants that Hilton would not sell the Red Lion Brand. The district court granted summary judgment in favor of the defendants concluding that the plaintiff could not show by clear and convincing evidence that the defendants had the requisite intent to defraud Century Pacific. It also held that Century Pacific could not show that its reliance on the defendant's purported misrepresentations was reasonable.

On appeal, Century Pacific argued that the district court misapplied New York law when the court found that its reliance on the defendants' alleged misrepresentation was unreasonable, and that there was insufficient evidence of the defendants' fraudulent intent. The Second Circuit affirmed the judgment of the district court. The Second Circuit rejected Century Pacific's argument that the district court improperly expanded New York law on reasonable reliance. It

agreed with the lower court that Century Pacific's reliance on the defendants' alleged oral representation was unreasonable in light of the fact that: (1) Century Pacific was a sophisticated party, represented by counsel, (2) Century Pacific was aware that its agreement granted the defendants the right to sell the Red Lion brand; and (3) Century Pacific was only partially successful in attempting to remove Hilton's right to sell the brand from the contract.

IV. Injunctions

A. *Chick-Fil-A, Inc. v. CFT Dev. LLC*, 652 F. Supp. 2d 1252 (M.D. Fla. 2009), aff'd 2010 U.S. App. LEXIS 5875 (11th Cir. Mar. 19, 2010). This is a case where Chick-Fil-A, operator of a fried chicken restaurant, looked to enforce a restrictive covenant in real property against a neighboring Chinese-food restaurant, Panda Express. The covenant prohibited the defendant's property from being used as the site of a quick service restaurant deriving 25% or more of its gross sales from the sale of chicken. The court found that Panda Express was a quick service restaurant, as that term was used in the covenant, and that more than 25% of its food sales involved chicken. According to the court, "[i]n restaurant industry custom and usage, the term quick-service restaurant is generally understood to mean restaurants that have 'counter service,' rather than waiter or waitress service, and which serve food that is prepared and paid for in advance. Panda Express is such a restaurant." The court rejected the defendant's argument that it was a "fast casual" restaurant as opposed to a "quick service" restaurant, as "the 'fast casual' classification of restaurants in the food service industry is an evolving concept of relatively recent origin (the last five years or so)," and therefore would not have been contemplated at the time the restrictive covenant was drafted.

The court also held that Florida law recognized the validity and enforceability of restrictive covenants, and that the plaintiff was entitled to the full protection of this particular covenant. The court held that the covenant was unambiguous, valid, and clearly enforceable against the defendant. Accordingly, because violation of the restrictive covenant was found to cause the plaintiff irreparable injury, the plaintiff was entitled to a permanent injunction against the operation of the Panda Express restaurant on the adjacent property.

B. *Dunkin' Donuts Franchised Restaurants LLC v. Fatima & Ali, Inc.*, Bus. Fran. Guide (CCH) ¶ 14,235 (S.D. Fla. Aug. 13, 2009). As described further in Section II.A. above, this case involved a motion for a preliminary injunction filed by Dunkin' Donuts to stop its former franchisees from continuing to operate their franchised Dunkin' Donuts stores after they were terminated. The Court granted the preliminary injunction after rejecting the defendants' argument that the appropriate standard is a "clear likelihood of success" rather than "substantial likelihood of success." The court also rejected the defendants' argument that Dunkin' waived its contract claims by continuing to treat them as franchisees. The court pointed to Dunkin's conduct, such as sending default and termination notices. The court was not swayed by the defendants' unclean hands defense because, according to the court, a franchisor's right to terminate a franchise agreement exists independently of any claims the franchisee might have against the franchisor.

The court also held that Dunkin' would suffer irreparable harm without an injunction because the defendants' unauthorized use of Dunkin's intellectual property would cause Dunkin'

to lose control of its reputation, trade, and goodwill and divert business from other Dunkin' franchisees.

V. Breach of Contract

A. *Bird Hotel Corp. v. Super 8 Motels, Inc.*, 2010 U.S. Dist. LEXIS 14124 (D.S.D. Feb. 16, 2010). A Super 8 Motel franchisee filed a class action against its franchisor for allegedly violating the franchise agreement by charging extra fees under the franchisor's new customer rewards program. The franchise agreement permitted the franchisor to charge a 2% fee for the franchisee's participation in Super 8's customer loyalty program. The franchise agreement also required the franchisee to abide by the system's "Rules of Operation." After being acquired by a corporation that owned multiple hotel chains, the franchisor began charging Super 8 franchisees a 5% fee for its new customer loyalty program.

The court rejected the franchisor's argument that it had the right to charge additional fees because the fees listed in the franchise agreement were not exclusive of other fees. The court also rejected the argument that the new loyalty program was permissible since it was described in the Rules of Operation, which the franchisor had the right to revise from time to time. The court held that the franchise agreement terms governed the fees and did not permit the franchisor to charge more than 2% for the customer loyalty program. Super 8's decision to increase the fee to 5% through the Rules of Operation, "amounts to a unilateral revision of the terms of the contract and not, as argued by Super 8, to a revision of the system standards and rules of operation." The franchisee was granted summary judgment on the issue, and the case was sent to trial on the issue of damages.

B. *National Franchisee Ass'n v. Burger King Corp.*, 2010 U.S. Dist. LEXIS 50721 (S.D. Fla. May 20, 2010). The plaintiff, an association of Burger King franchisees (the "Association"), sought a declaratory judgment against Burger King Corporation ("BKC"), the franchisor, that BKC did not have the contractual right to set a maximum price on a product that was below the franchisee's cost of producing that product. The Association also claimed that BKC breached its duty of good faith. Relying on the Eleventh Circuit decision in *Burger King Corp. v. E-Z Eating*, 572 F.3d 1306 (11th Cir. 2009), the District Court held that BKC did not breach the franchise agreement by setting maximum prices because the agreement permitted BKC to make changes to "product specifications" and the franchisee was required to "accept and comply" with any changes to BKC's operating manual. However, the court denied BKC's motion to dismiss the duty of good faith claim because the complaint "plausibly" stated a claim based on BKC setting maximum prices that were below the franchisee's costs.

In a subsequent holding in the case, the District Court dismissed the Associations bad faith claim. *National Franchisee Ass'n v. Burger King Corp.*, 2010 U.S. Dist. LEXIS 123065 (S.D. Fla. Nov. 19, 2010). The court found that the franchise agreement specifically granted BKC "broad discretion in framing business and marketing strategy by adopting those measures it judges are needed to help the business successfully compete." The Association failed to allege any facts suggesting that BKC did not believe that the prices would be helpful to the businesses competitive position, but, for some other reason, deliberately adopted prices that would injure the Association members' operations. The court added that, even if taken as true that the cost of the

product was higher than the maximum price set by BKC, "there is nothing inherently suspect about a such a pricing strategy for a firm selling multiple products. There are a variety of legitimate reasons why a firm selling multiple products may choose to set the price of a single product below cost. Among other things, such a strategy might help build goodwill and customer loyalty, hold or shift customer traffic away from competitors, or serve as 'loss leaders' to generate increased sales on other higher margin products."

C. *Ramada Worldwide, Inc. v. Hotel of Grayling, Inc.*, 2010 U.S. Dist. LEXIS 65186 (D.N.J. June 30, 2010). The plaintiff, Ramada Worldwide, Inc. ("Ramada"), is the franchisor of Ramada hotels and sued one of its franchisees for failing to pay past due fees, among other things. The franchisee counterclaimed that Ramada breached the parties' contract by failing to provide signage, install a computer and software management system, place the hotel on third party reservation system websites, and provide training.

The court granted Ramada summary judgment on its claims as well as the counterclaims, having rejected much of the franchisee's evidence based on the parol evidence rule and "sham affidavit" rule. The parol evidence rule was used to exclude oral communications allegedly between the parties prior to signing the agreement, while the sham affidavit rule was used to exclude the franchisee's self-serving affidavit created solely to defeat summary judgment without specific facts revealing a genuine issue of material fact.

In dismissing the franchisee's counterclaims, the court held that the franchisee failed to terminate the franchise agreement on the basis that it was not receiving required services from Ramada, and instead continued to receive the benefits of the agreement without paying the required fees. "Under settled franchise law, '[u]nder no circumstances may the non-breaching party stop performance *and* continue to take advantage of the contract's benefits.' *S&R Corp. v. Jiffy Lube Int'l, Inc.,* 968 F.2d 371, 376 (3d Cir. 1992) (emphasis in original)."

VI. Registration and Disclosure Issues

A. *Sherman v. Ben & Jerry's Franchising, Inc.*, 2009 U.S. Dist. LEXIS 72663 (D. Vt. Aug. 10, 2009). As discussed further in Section III.C. above, the plaintiffs in this case were former owners of Ben & Jerry's franchises in Virginia who filed a twelve-count complaint alleging that the franchisor and its corporate affiliate had committed a number of wrongs including fraudulently inducing them to enter into a Ben & Jerry's franchise agreement.

Among other things, the franchisees claimed that the franchisor induced them to purchase their franchises my misrepresenting earnings data. The court rejected the fraudulent inducement claim because it determined that plaintiffs' franchise agreement explicitly disclaimed reliance on any representation outside of the franchise agreements. The court also found that the franchise documents contained several specific, clearly stated warnings and disclaimers regarding plaintiffs' expected profits. It explained that, under the law of Vermont, a party could not sue on a claim her or she was defrauded into entering a contract on representation that a seller had expressly disclaimed and a buyer had expressly acknowledged.

B. *Colorado Coffee Bean, LLC v. Peaberry Coffee Inc.*, 2010 Colo. App. LEXIS 210 (Colo. Ct. App. Feb. 18, 2010). In this case, the plaintiffs were Peaberry Coffee franchisees who sued the franchisor for fraudulent nondisclosure, negligent misrepresentation, and violation of the Colorado Consumer Protection Act. The plaintiffs alleged that the franchisor sought to exploit a failed business model by selling franchises while fraudulently not disclosing that the franchisor operated at a significant loss and the company-owned businesses were unprofitable.

The court found that the franchisor had actively concealed material financial facts but that the plaintiffs failed to prove reasonable reliance on the undisclosed information. The court also held that documents related to the franchise agreements clearly stated that only gross revenues for the company-owned stores were being disclosed and that gross revenues is not indicative of profit. The court also pointed out that the cost information for the company-owned stores was publicly available, making it possible for the franchisees to calculate profits and, therefore, it was unreasonable for them to rely on any undisclosed information. Also important to the court's determination were the exculpatory provisions and stipulations in the franchise agreement.

C. *Burgers Bar Five Towns, LLC v. Burger Holdings Corp.*, 897 N.Y.S.2d 502 (N.Y. App. Div. 2010). The parties entered into a license agreement where the plaintiff was permitted to open a single kosher hamburger restaurant, in exchange for a fee, using the defendant's name and logo. Under the terms of the agreement, the plaintiff was required to purchase all of its supplies from the defendant and pay the defendant royalties. The plaintiff alleged that the defendant violated the New York Franchise Sales Act by failing to register a Franchise Disclosure Document with the state. The trial court granted summary judgment in favor of the plaintiff and awarded rescission damages and attorneys' fees. On appeal, the appellate court reversed the trial court's holding on the ground that the Franchise Sales Act exempted from the registration requirements the sale of a single franchise. The court also held that the plaintiff was unable to prove actual damages.

D. *Something Sweet, LLC v. Nick-N-Willy's Franchise Co.*, LLC, 156 Wash. App. 817 (2010). Plaintiff was a franchisee of the Nick-N-Willy's franchise system and sought relief against the franchisor and its local developers on the basis of alleged violations of the Washington Franchise Investment Protection Act ("FIPA"). The plaintiff claimed that the franchisor failed to disclose a material fact before selling the franchise to the franchisee and that the developers were subfranchisors who failed to properly register a franchise offering with the state.

At the time the franchisee purchased its franchise, Nick-N-Willy's was offering two types of pizza franchises – an "outlet" take-and-bake style and an eat-in "restaurant style. The franchisee, who purchased an outlet-style franchise argued that Nick-N-Willy's violated FIPA by failing to disclose the material fact that it was planning to discontinue the outlet style of franchise. However, the trial court found that there was nothing in the franchise agreement that prohibited it from ceasing to offer new franchises of a certain type, and the franchisor continued to support its existing outlet franchises, so there was no material effect on the franchisee. The court also rejected the franchisee's argument that the area developers who sold the franchise to the franchisee were "subfranchisors" who failed to register the franchise offering with the state.

The court found that, even if the developers were subfranchisors, FIPA did not require them to register an offering that had already been registered by the franchisor. The court also relied on the fact that the developers were not parties to the franchise agreement, so no additional disclosures were required by them. The trial court granted summary judgment on all counts in favor of the franchisor, and the appellate court affirmed.

VII. New Menu Labeling Requirements Under the Patient Protection and Affordable Care Act

On March 23, 2010, the President signed into law the Patient Protection and Affordable Care Act (Public Law 111-148) (the "Act"). Section 4205 of the Act requires chain restaurants and similar retail food establishments with 20 or more locations doing business under the same name and offering for sale substantially the same menu items to disclose nutrient content information for standard menu items appearing on restaurant menus and menu boards, including drive-through menu boards. Other nutrient information – total calories, fat, saturated fat, cholesterol, sodium, total carbohydrates, sugars, fiber and total protein – also must be made available in writing upon a customer's request. The Act also applies to vending machine operators that own or operate 20 or more vending machines by requiring those operators to disclose nutrient content information for certain articles of food sold from vending machines. Restaurants not subject to the requirements of Section 4205 of the Act can voluntarily elect to be subject to the requirements through biannual registration. The full text of Section 4205 of the Act can be found in Exhibit A to this Article.

The Act charges the U.S. Food and Drug Administration ("FDA") with the responsibility to implement the provisions of Section 4205. The FDA must issue proposed regulations by no later than March 23, 2011 and is currently accepting comments, data, and other relevant information from interested parties. This comment period will allow franchisor companies and other pundits in the franchise industry, such as the International Franchise Association, to submit comments and seek clarification on the implementation of the new labeling requirements. For example, how do franchise systems handle menu labeling where their franchisees do not have identical menus throughout the system? What does it mean that the restaurants of a single chain offer "substantially the same menu items"? How will a franchisor or individual franchisees determine the calorie and other information for certain foods where those food items are purchased from different suppliers? These and other questions are surely to result from this new legislation and could prove very burdensome and costly for both franchisors and franchisees.

EXHIBIT A

PATIENT PROTECTION AND AFFORDABLE CARE ACT

SEC. 4205. NUTRITION LABELING OF STANDARD MENU ITEMS AT CHAIN RESTAURANTS.

(a) Technical Amendments- Section 403(q)(5)(A) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 343(q)(5)(A)) is amended—

(1) in subitem (i), by inserting at the beginning "except as provided in clause (H)(ii)(III),"; and

(2) in subitem (ii), by inserting at the beginning "except as provided in clause (H)(ii)(III),".

(b) Labeling Requirements- Section 403(q)(5) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 343(q)(5)) is amended by adding at the end the following:

"(H) Restaurants, Retail Food Establishments, and Vending Machines-

"(i) GENERAL REQUIREMENTS FOR RESTAURANTS AND SIMILAR RETAIL FOOD ESTABLISHMENTS- Except for food described in subclause (vii), in the case of food that is a standard menu item that is offered for sale in a restaurant or similar retail food establishment that is part of a chain with 20 or more locations doing business under the same name (regardless of the type of ownership of the locations) and offering for sale substantially the same menu items, the restaurant or similar retail food establishment shall disclose the information described in subclauses (ii) and (iii).

"(ii) INFORMATION REQUIRED TO BE DISCLOSED BY RESTAURANTS AND RETAIL FOOD ESTABLISHMENTS- Except as provided in subclause (vii), the restaurant or similar retail food establishment shall disclose in a clear and conspicuous manner--

"(I)(aa) in a nutrient content disclosure statement adjacent to the name of the standard menu item, so as to be clearly associated with the standard menu item, on the menu listing the item for sale, the number of calories contained in the standard menu item, as usually prepared and offered for sale; and

"(bb) a succinct statement concerning suggested daily caloric intake, as specified by the Secretary by regulation and posted prominently on the menu and designed to enable the public to understand, in the context of a total daily diet, the significance of the caloric information that is provided on the menu;

"(II)(aa) in a nutrient content disclosure statement adjacent to the name of the standard menu item, so as to be clearly associated with the standard menu item, on the menu board, including a drive-through menu board, the number of calories contained in the standard menu item, as usually prepared and offered for sale; and

“(bb) a succinct statement concerning suggested daily caloric intake, as specified by the Secretary by regulation and posted prominently on the menu board, designed to enable the public to understand, in the context of a total daily diet, the significance of the nutrition information that is provided on the menu board;

“(III) in a written form, available on the premises of the restaurant or similar retail establishment and to the consumer upon request, the nutrition information required under clauses (C) and (D) of subparagraph (1); and

“(IV) on the menu or menu board, a prominent, clear, and conspicuous statement regarding the availability of the information described in item (III).

“(iii) SELF-SERVICE FOOD AND FOOD ON DISPLAY- Except as provided in subclause (vii), in the case of food sold at a salad bar, buffet line, cafeteria line, or similar self-service facility, and for self-service beverages or food that is on display and that is visible to customers, a restaurant or similar retail food establishment shall place adjacent to each food offered a sign that lists calories per displayed food item or per serving.

“(iv) REASONABLE BASIS- For the purposes of this clause, a restaurant or similar retail food establishment shall have a reasonable basis for its nutrient content disclosures, including nutrient databases, cookbooks, laboratory analyses, and other reasonable means, as described in section 101.10 of title 21, Code of Federal Regulations (or any successor regulation) or in a related guidance of the Food and Drug Administration.

“(v) MENU VARIABILITY AND COMBINATION MEALS- The Secretary shall establish by regulation standards for determining and disclosing the nutrient content for standard menu items that come in different flavors, varieties, or combinations, but which are listed as a single menu item, such as soft drinks, ice cream, pizza, doughnuts, or children’s combination meals, through means determined by the Secretary, including ranges, averages, or other methods.

“(vi) ADDITIONAL INFORMATION- If the Secretary determines that a nutrient, other than a nutrient required under subclause (ii)(III), should be disclosed for the purpose of providing information to assist consumers in maintaining healthy dietary practices, the Secretary may require, by regulation, disclosure of such nutrient in the written form required under subclause (ii)(III).

“(vii) NONAPPLICABILITY TO CERTAIN FOOD-

“(I) IN GENERAL- Subclauses (i) through (vi) do not apply to--

“(aa) items that are not listed on a menu or menu board (such as condiments and other items placed on the table or counter for general use);

“(bb) daily specials, temporary menu items appearing on the menu for less than 60 days per calendar year, or custom orders; or

“(cc) such other food that is part of a customary market test appearing on the menu for less than 90 days, under terms and conditions established by the Secretary.

“(II) WRITTEN FORMS- Subparagraph (5)(C) shall apply to any regulations promulgated under subclauses (ii)(III) and (vi).

“(viii) VENDING MACHINES-

“(I) IN GENERAL- In the case of an article of food sold from a vending machine that--

“(aa) does not permit a prospective purchaser to examine the Nutrition Facts Panel before purchasing the article or does not otherwise provide visible nutrition information at the point of purchase; and

“(bb) is operated by a person who is engaged in the business of owning or operating 20 or more vending machines, the vending machine operator shall provide a sign in close proximity to each article of food or the selection button that includes a clear and conspicuous statement disclosing the number of calories contained in the article.

“(ix) VOLUNTARY PROVISION OF NUTRITION INFORMATION-

“(I) IN GENERAL- An authorized official of any restaurant or similar retail food establishment or vending machine operator not subject to the requirements of this clause may elect to be subject to the requirements of such clause, by registering biannually the name and address of such restaurant or similar retail food establishment or vending machine operator with the Secretary, as specified by the Secretary by regulation.

“(II) REGISTRATION- Within 120 days of enactment of this clause, the Secretary shall publish a notice in the Federal Register specifying the terms and conditions for implementation of item (I), pending promulgation of regulations.

“(III) RULE OF CONSTRUCTION- Nothing in this subclause shall be construed to authorize the Secretary to require an application, review, or licensing process for any entity to register with the Secretary, as described in such item.

“(x) REGULATIONS-

“(I) PROPOSED REGULATION- Not later than 1 year after the date of enactment of this clause, the Secretary shall promulgate proposed regulations to carry out this clause.

“(II) CONTENTS- In promulgating regulations, the Secretary shall--

“(aa) consider standardization of recipes and methods of preparation, reasonable variation in serving size and formulation of menu items, space on menus and menu boards, inadvertent human error, training of

food service workers, variations in ingredients, and other factors, as the Secretary determines; and

“(bb) specify the format and manner of the nutrient content disclosure requirements under this subclause.

“(III) REPORTING- The Secretary shall submit to the Committee on Health, Education, Labor, and Pensions of the Senate and the Committee on Energy and Commerce of the House of Representatives a quarterly report that describes the Secretary’s progress toward promulgating final regulations under this subparagraph.

“(xi) DEFINITION- In this clause, the term “menu” or “menu board” means the primary writing of the restaurant or other similar retail food establishment from which a consumer makes an order selection.”

(c) National Uniformity- Section 403A(a)(4) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 343-1(a)(4)) is amended by striking “except a requirement for nutrition labeling of food which is exempt under subclause (i) or (ii) of section 403(q)(5)(A)” and inserting `except that this paragraph does not apply to food that is offered for sale in a restaurant or similar retail food establishment that is not part of a chain with 20 or more locations doing business under the same name (regardless of the type of ownership of the locations) and offering for sale substantially the same menu items unless such restaurant or similar retail food establishment complies with the voluntary provision of nutrition information requirements under section 403(q)(5)(H)(ix)”.

(d) Rule of Construction- Nothing in the amendments made by this section shall be construed--

(1) to preempt any provision of State or local law, unless such provision establishes or continues into effect nutrient content disclosures of the type required under section 403(q)(5)(H) of the Federal Food, Drug, and Cosmetic Act (as added by subsection (b)) and is expressly preempted under subsection (a)(4) of such section;

(2) to apply to any State or local requirement respecting a statement in the labeling of food that provides for a warning concerning the safety of the food or component of the food; or

(3) except as provided in section 403(q)(5)(H)(ix) of the Federal Food, Drug, and Cosmetic Act (as added by subsection (b)), to apply to any restaurant or similar retail food establishment other than a restaurant or similar retail food establishment described in section 403(q)(5)(H)(i) of such Act.