MISSOURI CIRCUIT COURT
TWENTY-SECOND CIRCUIT
(City of St. Louis)

MAJOR BRANDS, INC., Plaintiff, v. DIAGEO NORTH AMERICA, INC., et al., Defendants.	))))))))))	No. 1322-CC00534 Div. 18

MEMORANDUM AND ORDER

Plaintiff Major Brands, Inc., the largest distributor of alcoholic beverages in Missouri, seeks declaratory relief and damages on account of alleged wrongful conduct of defendants Diageo North America, Diageo Americas, and Mid-Continent Distributors, better known as Glazer's, in connection with the Diageo defendants' efforts to terminate Major Brands' right to distribute Diageo products and replace Major Brands with Glazer's as its primary if not exclusive Missouri distributor.

Major Brands moves for a preliminary injunction to prohibit the now-imminent termination of its distributorship and also to enjoin Glazer's alleged tortious interference with Major Brands' business relationship with Diageo. The Diageo defendants move to dismiss or stay this action, contending that the dispute is subject to a forum selection agreement requiring that any action be filed in Connecticut, and arguing that Diageo's earlier-filed federal action in Connecticut should take priority over this action.

The Court rejected out of hand the request for injunctive relief directed at Glazer's alleged tortious conduct, but expedited discovery

and held an evidentiary hearing on the motion for a preliminary injunction to enjoin termination of Major Brands' distributorship. The Court adheres to the view that the claim against Glazer's is not cognizable in equity. See, e.g., *Harris v. Union Elec. Co.,* 766 S.W.2d 80 (Mo.banc 1989).

On March 6, 2013, Diageo formally notified Major Brands in writing that its right to distribute most Diageo products would be terminated, effective June 30, 2013. Simultaneously, Diageo notified the Missouri Division of Liquor Control of the termination.

Diageo is the successor to two distillers or suppliers of alcoholic beverages for whom Major Brands acted as Missouri distributor for many years: Heublein and Joseph E. Seagram & Sons. The majority of products in the Diageo line trace to Seagram. See Def.Ex. 101A-101F. The record does not reflect the complete documentary history of Major Brands' role with regard to the Diageo products now distributed by it, but the Court finds (rejecting the testimony of the witness O'Neil on this point) that the current agreement between Major Brands and Diageo functionally is a continuation of agreements executed in 1990 and 1991 by and between Major Brands and Heublein and Seagram. The Heublein agreements contain the following forum selection clause:

> 14. GOVERNING LAW. This Agreement is to be governed and construed according to the laws of the State of Connecticut, and is to be considered a Connecticut contract. Due to the nature of the Agreement, the provisions of Connection §30-17 and regulations thereunder shall not apply. In the event there is a dispute between the parties which is the subject of litigation, jurisdiction and venue in the event of such litigation shall be solely within the State of Connecticut.

The Seagram agreement contains no forum selection clause, but calls

for the application of New York law.

For present purposes, the Court finds that there is a subsisting agreement between Major Brands and Diageo, the terms of which include the Heublein and Seagram written agreements, as modified subsequently by oral agreement and course of dealing. In essence, the Court finds that Major Brands and the Diageo defendants are parties to a commercial relationship of continuing indefinite duration, that Major Brands is a wholesaler of intoxicating liquor, duly licensed as such, and the Diageo defendants are suppliers, i.e., manufacturers or distillers. The Court also finds that the parties' continuing agreement included permission to Major Brands to use Diageo's brand names and trademarks and other related marks or trade names in the marketing and promotion of Diageo products. E.g., Def.Ex. 101, ¶¶8, 13(c). Diageo's name itself was and is rarely utilized; but the evidence is clear that Diageo's name has little, if any, value as a trade name in the promotion, sale or distribution of its products. Liquor retailers deal in brands; Major Brands' own corporate name reflects that its business depends on brand names, not on the name of a particular manufacturer, unless, as with the trade name or trademark "Seagram's," the manufacturer's name is eponymous with the beverage being marketed.

Partly as a result of the manner of regulation of distribution of alcoholic beverages in many states, such as Missouri, the relationship between a liquor manufacturer or supplier and its distributors can be highly interdependent. Suppliers and distributors are alike dependent on the success of promotions of particular brands of alcoholic beverages for their profits. Many promotions are undertaken by the

distributors at retail outlets or sponsored events; most advertising is handled by the suppliers, with financial contributions from distributors. Although distributors themselves are seldom, if ever, identifiable by the consuming public, as a matter of fact there often exists a very strong community of economic interest between liquor suppliers and their distributors. In the case of Major Brands and Diageo, the Court finds that there is indeed such a community of interest.

Prior to the March 2013 termination notice, Major Brands and Diageo had enjoyed what may be described as a "love-hate" relationship. At times Diageo minions warmly commended Major Brands for superior performance in marketing Diageo products; at other times, Diageo executives complained vigorously about failure to meet sales goals. Major Brands at times exhibited frustration and concern about its relationship with Diageo, and even contemplated life without Diageo. Def.Ex. 104. At other times, Major Brands executives were at pains to assuage the complaints of Diageo executives and took some steps to increase services promoting Diageo products. On the whole, the facts and figures in the record[1] indicate that Major Brands often failed to meet goals set by Diageo, but that Diageo never seriously

[1]The parties are extremely sensitive about the disclosure of much information regarding their business practices and revenues, and understandably so. The Court has countenanced extensive use of sealed filings to protect such information. Because the Court sees no need to go into great detail concerning these matters at this time, the Court will avoid retailing specific data, but the Court will not guarantee that its self-censorship necessarily conforms to the parties' ideal standards of secrecy. Further, the Court anticipates that at some point the parties will be obliged to prune the "sealed" record to the bare minimum essential to avoid real competitive injury. Star Chamber is no more and the Court will not resurrect it under the guise of protecting "confidential" business data.

entertained termination of Major Brands' distributorship until after two significant events: the decision of the United States Court of Appeals for the Eighth Circuit in *Missouri Beverage Co. v. Shelton Bros., Inc.,* 669 F.3d 873 (8th Cir. 2012), and an offer from Glazer's of what may be called a very sweet deal to take over Diageo's Missouri distribution.[2]

No cause for the termination of Major Brands' distributorship was stated in the March 2013 notification. Again for present purposes, the Court finds on the record to date that Diageo's dissatisfaction with Major Brands' performance was not the decisive factor in the termination. The Court finds the testimony of the witness Ivey to lack credibility in this respect. The Court finds it bizarre, to say the least, that the decision to terminate Major Brands would have been made without advice of or consultation with Diageo's managers assigned to superintend the Missouri marketing effort.

Diageo products at present account for 23% of Major Brands' gross revenues. There can be no doubt that the loss of Diageo's product line will severely affect Major Brands, particularly since at least one other liquor supplier, Bacardi, has likewise notified Major Brands

[2]The Court stayed discovery regarding Glazer's alleged misconduct in this case, in light of the Court's refusal to entertain the request for injunctive relief against Glazer's, so the evidence of the Diageo-Glazer's negotiations is attenuated. However, a simple comparison of the Glazer's distributorship agreement with the terms under which Major Brands performs is illuminating. See Pl.Ex. 23.

of its intention to terminate its distributorship rights. The record leaves little room for doubt that Major Brands is facing a critical situation. On the other hand, Major Brands recently acquired distribution rights to Pernod products, formerly handled by Glazer's. While the Pernod product volume does not equal that of Diageo, this shift suggests that the liquor distribution market is not static, and that Major Brands continues to enjoy a good reputation as an effective distributor of liquor in Missouri. Further, the record shows that there is ample data from which reasonable estimates of Major Brands' profits from the distribution of Diageo products for the foreseeable future could be computed.

Forum Selection

Defendants' motion to dismiss or stay need not detain us long. The matter of sale and distribution of alcoholic beverages in the state of Missouri can be governed only by federal and Missouri law. No federal law is implicated by the claims asserted here. The critical issue in the case is the application of Missouri's franchise statutes to the relationship between Major Brands and Diageo. Only Missouri courts are the authoritative expositors of Missouri law and only Missouri courts can have the last word on the meaning of a Missouri statute. The argument that the forum selection clauses in the Heublein contracts are enforceable in this case borders on the frivolous. "Both the general subject of liquor control and the specific statutory protection of a holder of a liquor distribution franchise carry heightened public policy considerations that outweigh any public policy considerations involved in the enforcement of a

forum selection clause." *High Life Sales Co. v. Brown-Forman Corp.,* 823 S.W.2d 493, 498 (Mo.banc 1992). Further commentary on the motion to dismiss or stay is superfluous.

Some General Rules

The grant or denial of a preliminary injunction is discretionary with the Court. That discretion is to be exercised in light of certain rubrics: the movant must show a probability of success on the merits, a likelihood of irreparable harm, a balance of hardships tilting in his favor, and either furtherance of or lack of harm to the public interest. See *State ex rel. Director of Revenue v. Gabbert,* 925 S.W.2d 838, 839 (Mo.banc 1996).

When a claim depends on the meaning of a statute (or a contract for that matter), the Court must first ascertain intent from the words used by the General Assembly, using dictionary definitions unless otherwise directed by the statute itself or its context. Only if the language is ambiguous or uncertain does the Court resort to various rules of construction. If applicable, the rules of construction include the principles that statutes *in pari materia* are construed together, that the surest guide to the intent of the legislature is to determine the object or purpose of the legislation, i.e., the mischief or condition to be addressed, and that more specific rules, e.g., the "last antecedent" rule, *noscitur a sociis,* and the like, can be resorted to as needed. See generally, *801 Skinker Blvd. Corp. v. Director of Revenue,* 395 S.W.3d 1 (Mo.banc 2013); *Parktown Imports, Inc. v. Audi of America, Inc.,* 278 S.W.3d 670 (Mo.banc 2009); *Union Elec. Co. v. Director of Revenue,* 799 S.W.2d 78 (Mo.banc 1990).

Franchise Law

It is a fact of jurisprudence that judges often disagree among themselves about what is plain and what is ambiguous. One would think that if something is plain, everyone should agree about its plainness, and if not everyone can agree, than it's not really that plain. So is the following statute plain or ambiguous?

> "Franchise" means a written or oral arrangement for a definite or indefinite period, in which a person grants to another person a license to use a trade name, trademark, service mark, or related characteristic, and in which there is a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise, including but not limited to a commercial relationship of definite duration or continuing indefinite duration, between a "wholesaler", such wholesaler being a person as defined in this section, licensed pursuant to the provisions of chapter 311 to sell at wholesale, intoxicating liquor, as defined in section 311.020, to retailers, duly licensed in this state, and a "supplier", being a person engaged in the business as a manufacturer, distiller, rectifier or out-of-state solicitor whose brands of intoxicating liquor are distributed through duly licensed wholesalers in this state, and wherein a wholesaler is granted the right to offer, sell, and distribute within this state or any designated area thereof such of the supplier's brands of intoxicating liquor, or all of them, as may be specified; except that, the term "franchise" shall not apply to persons engaged in sales from warehouses or like places of storage, other than wholesalers as above described, leased departments of retail stores, places of original manufacture, nor shall the term "franchise" apply to a commercial relationship that does not contemplate the establishment or maintenance of a place of business within the state of Missouri. As used herein "place of business" means a fixed, geographical location at which goods, products or services are displayed or demonstrated for sale . . . [§ 407.400(1), RSMo 2000 & Supp.]

Defendants think Major Brands loses because its distributorship is not a franchise as defined in the quoted statute, since there is no license or community of interest involved. Major Brands thinks it wins, because its distributorship is a franchise by definition, or, in any event, its agreement with Diageo is one that does involve licenses

and community of interest.

In regard to the meaning of § 407.400(1), Judge Wollman, a careful and thoughtful jurist, thought that the language just quoted was plain and unambiguous, and therefore did not automatically include liquor distributorships within the definition of franchise, but required liquor distributors to show that their agreements included a license to use trademarks or trade names and a community of interest before the distributorship could be deemed a "franchise" subject to special statutory protections. *Missouri Beverage Co. v. Shelton Bros., Inc.,* supra. On the other hand, Judge Sachs, also a respectable jurist, had no difficulty in concluding that § 407.400(1) defined franchise to include liquor distributorships without the need to independently establish the existence of licenses or communities of interest. *Missouri Conrad Liquor Co. v. Brown-Forman Corp.,* 1990 WL 36133 (W.D.Mo. 1990). And then there is the learned analysis by Judge Thomas of the Missouri Supreme Court, who characterized the statute in question as follows, *High Life Sales,* 823 S.W.2d at 500-501:

> Section 407.413, . . ., covers any "franchise" as defined in § 407.400(1). This definitional section is particularly complex because it contains both an original, general definition of "franchise," applying to all types of businesses and not limited to liquor franchises, as well as a specific definition added by the legislature in 1984 [sic] to specifically include liquor franchises. Moreover, the relevant portion of the statute is one long, rambling sentence containing various phrases specifying different aspects of the definition. . . .
>
> It is also helpful in analyzing the statute to identify in advance the format of the definition so that the reader knows what to look for and where to "pigeonhole" the various phrases and terms encountered in reading and analyzing the lengthy and rambling sentence. The statute first contains a general definition of "franchise" applicable generally to all types of businesses; it then contains a specific definition of liquor distribution agreements that are included. The latter definition is in terms of the parties that the agreement must be between (a

> "wholesaler" and a "supplier") and the type of products that must be distributed under such a liquor distribution agreement. . . .

With all respect to Judge Wollman, this Court concludes that § 407.400(1) is ambiguous. To borrow Judge Thomas' methodology, the Court considers that two alternative readings of the statute are permissible.

I. "Franchise" means a written or oral agreement for a definite or indefinite period . . . including but not limited to a commercial relationship of definite duration or continuing indefinite duration, between a "wholesaler" . . . and a "supplier" . . . wherein a wholesaler is granted the right to offer, sell, and distribute within this state . . . such of the supplier's brands of intoxicating liquor, or all of them, as may be specified . . .

II. "Franchise" means a written or oral arrangement for a definite or indefinite period, in which a person grants to another person a license to use a trade name . . . and in which there is a community of interest in the marketing of goods or services . . . including but not limited to a commercial relationship of definite duration or continuing indefinite duration, between a "wholesaler" . . . and a "supplier" . . . wherein a wholesaler is granted the right to offer, sell, and distribute . . . such of the supplier's brands of intoxicating liquor . . . as may be specified . . .

In the Court's view, the intention of the General Assembly can be divined from the language used, without resort to anything Missouri offers in the way of legislative history. In that sense, perhaps

Judge Wollman was right to hold that the language is plain. In any event, this Court concludes that the second construction set out above is the correct one. The participial phrase "including but not limited to" can only refer to "arrangement," but "arrangement" in turn cannot be divorced from the immediately modifying prepositional phrase beginning "in which." To adopt the first construction set out above is to elide the very definition of "arrangement" which appeared in the statute as originally enacted and was carried forward in the amended statute. In other words, to be a "franchise," an "arrangement" must entail a license and a community of interest, and any arrangement having those characteristics also includes, by the amendatory language, a "commercial relationship" between liquor suppliers and wholesalers.

The Court's construction of the statute is reinforced by the Supreme Court's analysis set out in *Brown-Forman Distillers Corp. v. McHenry,* 566 S.W.2d 194 (Mo.banc 1978).[3] In that case, distillers and suppliers sued to enjoin enforcement of the 1975 amendments to §§ 407.400, *et seq.* Interestingly, the plaintiffs in that action included Heublein and Joseph A. Seagram & Sons, Inc. The complaint was that the 1975 amendments contravened the dual subject and clear title provisions of the Missouri Constitution, and so the Supreme Court's *ratio decidendi* is not precisely applicable to the issues in

[3]Major Brands has helpfully provided portions of the record in *McHenry* in an effort to further explain the Supreme Court's holding. As a legal historian, the Court appreciates this material; but the Court is not about to try to read into the Supreme Court's opinion more than is there. Although the opinion suggests the proper construction of the 1975 amendments to the franchise statutes, the Supreme Court's holding cannot be supplemented--at least, not by a lowly trial court--in the manner advocated by Major Brands.

the case at bar. Nevertheless, in the course of upholding the amended statutes, the Supreme Court necessarily construed some of the amending provisions. In so doing, the Court declared:

> . . . the title to the bill by which chapter 407 was originally enacted in 1967 stated that it related to certain merchandising practices. . . . Subsequent legislation, House Bill 1132, enacted in 1974, related to the same subject: "merchandising practices." . . . It defined for the first time: "pyramid sales scheme" and "franchises," . . . and prohibited the cancellation of a franchise agreement without notice. . . . House Bill 810, bearing essentially the same title, repealed and reenacted with changes House Bill 1132 and both, as finally passed, related to what we believe are, as suggested by intervenor, two types of merchandising practices: "pyramid sales schemes and franchise security." *We note that while we have the view that the law adopted by the enactment of House Bill 1132 applied, before the passage of House Bill 810, to merchandising practices within the liquor industry, the passage of House Bill 810, as amended, made it clear this industry had the same protection in this area of merchandising practices as other businesses.* [566 S.W.2d at 197, emphasis supplied.]

Thus, as the Supreme Court described it, the purpose of the 1975 amendments to Ch. 407 was to make it "clear" that the liquor industry had the "same protection" as other businesses, not to give liquor distributorships the status of franchises *per se.* Indeed, the only conclusion to be drawn from the legislative history of § 407.400(1) is that the General Assembly was concerned that the definition of "franchise" could somehow be construed to exclude the liquor industry. Given that the 1974 definition of franchise excluded persons engaged in sales from warehouses, it would seem that the 1975 amendment, by expressly referring to liquor wholesalers in the definition, and by correlatively limiting the warehouse exception, was intended to remove any uncertainty about the application of Ch. 407 to liquor distributors whose business inevitably entailed sales from warehouses.

If the General Assembly had intended to define "franchise" to include any and all liquor distribution agreements, it could have said so in a much more direct manner than it did. The idea that the 1975 amendments were intended only to clarify and not to expand the definition of "franchise" was echoed in Judge Thomas' opinion in *High Life Sales Co. v. Brown-Forman Corp.,* quoted above, referring to "an original, general definition of 'franchise,' applying to all types of businesses and not limited to liquor franchises, as well as a specific definition added by the legislature in 1984 [sic] to specifically include liquor franchises." 823 S.W.2d at 500.

Thus, by this admittedly more circuitous, even tortuous, route, this Court reaches the same conclusion as Judge Wollman. A liquor distributor who seeks to invoke the protections of Ch. 407 must show (1) an arrangement, (2) in which a person grants to another a license to use a trade name, trademark, service mark, "or related characteristic," (3) in which there is a community of interest in the marketing of goods, and (4) which involves a relationship of liquor wholesaler and liquor supplier.

The Court has found, and there appears to be no dispute that the relationship between Major Brands and Diageo is a commercial relationship between a licensed liquor wholesaler and a liquor supplier. Because that relationship is not *per se* a franchise within the meaning of § 407.400(1), Major Brands must also show that its agreement with Diageo entails grant of a license to use trade names, trademarks, or a "related characteristic." Diageo contends that Major Brands cannot do so. The Court disagrees.

It is quite true that Major Brands does not wrap itself in the mantle of Diageo's name in marketing Diageo's products. But that is not the nature of the industry. The evidence is pellucid that Major Brands has permission, i.e., a license, to utilize Diageo's brand names at will in promoting sales of Diageo products. Moreover, Major Brands has used and continues to use the name "Seagram's" as authorized in 1990. "Seagram's" is inextricably linked with Diageo's predecessor and Major Brands' former supplier of most of the products now supplied by Diageo. It beggars credulity to say that Major Brands' agreement with Diageo does not entail grant of a license to use trademarks and "related characteristics."

The Court also notes that § 407.413.1 explicitly recognizes that a "brand" of liquor can itself be "franchised." In other words, in the liquor industry, a brand can itself be the franchise. What is a brand but a trademark or trade name or a "related characteristic"? (The Court has found no judicial gloss on the phrase "related characteristic," but the ordinary meaning of the phrase can only denote something like a trademark or a trade name, i.e., a brand.)

Judge Wollman has also helpfully glossed the phrase "community of interest," *Shelton Bros.,* supra, 669 F.3d at 879-880, relying on New Jersey and Wisconsin cases, because the Missouri Supreme Court has done so also: *McHenry* cited to *Carlo C. Gelardi Corp. v. Miller Brewing Co.,* 421 F.Supp. 233 (D.N.J. 1976), which construed the New Jersey franchise law's almost identical phrasing. This Court, however, concludes that the plain and ordinary meaning of "community of interest" is just that: mutuality or similarity of means and ends.

See *Random House Dictionary of the English Language*, "community," def. 6: "similar character; agreement; identity: *community of interests.*" In other words, a community of interest can exist without regard to the relative size of the parties' mutual economic interests; the question is one of similarity or identity. Even if the Court were to accept Judge Wollman's view of community of interest, seen through the prism of New Jersey and Wisconsin courts, the agreement between Major Brands and Diageo reflects a community of interest: Diageo brands account for 23% of Major Brands' revenue, or in excess of $100,000,000 per year; Missouri accounts for correspondingly substantial revenue to Diageo. E.g., Def.Ex. 122. The value and importance of the Missouri market to each of the parties is cast in sharp relief by the payments to Diageo prescribed by the agreement with Glazer's.

In short, Major Brands' agreement with Diageo constitutes a franchise. Under Missouri law, a franchise cannot be terminated without at least 90 days' advance notice, nor can it be terminated without cause as defined in the statute. §§ 407.405, 407.413.2.

Diageo has provided proper notice of termination to Major Brands. Its "cause" for termination has been found wanting by the Court. Major Brands, therefore, has established a probability of success on the merits of its claims against Diageo. The Court now turns to the other desiderata of preliminary relief.

Balance of Hardships and Public Interest

The Court has little difficulty in finding that the balance of hardships favors Major Brands. Denial of preliminary relief will have much greater impact on Major Brands than grant of such relief will

have on Diageo. Diageo will continue to derive revenue from Missouri sales no matter who the distributor is; Major Brands will lose 23% of its revenue if relief is denied.

As to the public interest, the law generally favors freedom of contract, but the General Assembly has established a "paternalistic" approach to franchise relations. The public policy enunciated in the franchise laws must be respected by the courts. Public policy and public interest in this case are congruent, and the Court can perceive no harm to the public interest if preliminary relief is granted.

The Court must perforce turn to the knottiest question presented by Major Brands' motion.

Irreparable Harm

Injunctive relief, as noted above, is discretionary and is never granted of right, absent statutory command. See *ND-Sell, Inc. v. Greater Springfield Bd. of Realtors, Inc.,* 224 S.W.3d 623 (Mo.App.S.D. 2007). Injunctive relief is designed for those situations in which an action at law will afford no real remedy for a wrong, i.e., in which there is no adequate remedy at law. Thus, a plaintiff seeking a preliminary injunction must demonstrate a likelihood of irreparable harm, which is another way of saying that the ordinary remedy of damages for breach of contract or other wrong will not suffice.

The principle that an injunction will not issue absent a likelihood of irreparable harm is not just an artifact of the historical division between law and equity. It is a necessary corollary of the right to trial by jury. If courts of equity routinely intervened to prevent breaches of contract, the action at

law for damages, triable by a jury, could become a relic, thereby undermining a vital constitutional right and limit on the power of the judiciary. Cf. *State ex rel. Leonardi v. Sherry,* 137 S.W.3d 462 (Mo.banc 2004).

The Court is aware that injunctive relief has been granted in many cases of wrongful franchise termination. The Court is also aware that such relief has been denied. See, e.g., *Haq v. America's Favorite Chicken Co.,* 921 S.W.2d 728 (Tex.Civ.App. 1996); cf. *High Life Sales Co. v. Brown-Forman Corp.,* supra (trial court denied injunctive relief). Indeed, Major Brands itself has been down this road before, and Judge Limbaugh denied relief, albeit the volume of business at stake was much smaller than in this case. *Major Brands, Inc. v. Moet Hennessy USA, Inc.,* No. 4:06ev582 SNL (E.D.Mo. 2006).

The Court's view of the irreparable harm issue is affected by a number of considerations in addition to its concern to protect the right to trial by jury.

First, the grant of a preliminary injunction to preserve the status quo until trial on the merits seems feasible, but then what? Major Brands' claim for declaratory relief calls for the Court to decree that the attempted termination of the Diageo franchise is null and void. Such a judgment will not have much effect unless it is subject to enforcement by the contempt power of the Court, and that power must be predicated on a permanent injunction. Such an injunction would yoke the parties in an uneasy alliance for an indefinite period, and would saddle the Court with an ongoing supervisory role in the parties' business. The evidence shows that

Diageo has been dissatisfied with Major Brands' performance in the past, and that Major Brands has failed to achieve certain sales goals set by Diageo. Is the Court to be expected to referee future disputes about sales goals, levels of marketing or sales effort, assignment of dedicated staff, and the like? Does the Court sit to render advisory opinions about what will constitute good cause for termination of the franchise in the future?

Judge Posner animadverted on the issue of ongoing judicial supervision of franchise relationships via injunction in *Original Great American Chocolate Chip Cookie Co. v. River Valley Cookies,* 970 F.2d 273 (7th Cir. 1992), reversing a preliminary injunction against franchise termination, albeit in circumstances where the franchisee was unsympathetic. Judge Posner alluded to the unwarranted strain on judicial resources and the adequacy of damages to compensate even for total loss of a franchisee's business. This Court also notes another serious drawback to judicial intervention in an ongoing business enterprise: courts of equity are not helicopter parents, available to swoop in whenever businessmen are at loggerheads or anyone feels aggrieved by a business partner's ruthlessness.

Major Brands cites *Home Shopping Club, Inc. v. Roberts Broadcasting Co.,* 989 S.W.2d 174 (Mo.App.E.D. 1998), for the proposition that damages and "specific performance" are not necessarily mutually exclusive remedies. The Court is acquainted with *Roberts Broadcasting*, as the Court tried the case. The situation in *Roberts* was quite different, inasmuch as the parties' contract precisely defined the obligations of the defendant, neither party

wished to terminate the contract but future breaches were threatened, the harm inflicted by the ongoing breaches was not quantifiable in money, the services to be rendered (television broadcast time) were not readily replaceable, and a simple prohibitory injunction sufficed to ensure the defendant's performance.

Next, the record shows that Major Brands itself once contemplated dropping its Diageo business, not so very long ago. Def.Ex. 104. This suggests that the loss of the Diageo business, though significant, does not inevitably presage the demise of Major Brands as a going concern.

The Court also notes that the Missouri statute governing franchise terminations expressly authorizes equitable relief in connection with failure to give notice, but appears to give primacy to damages for termination without sufficient cause. Compare § 407.410.2 with § 407.413.3. While the Court does not construe the statute as precluding the type of relief sought by Major Brands, the statute gives the Court pause, especially when the General Assembly knew quite well how to authorize injunctive relief if it wanted to. Cf. § 407.415.

Above all, in this case, the Court simply is not persuaded that Major Brands will suffer irreparable harm if a preliminary injunction is denied. The Court has no doubt that the consequences to Major Brands of the termination of its Diageo franchise will be severe, and possibly even catastrophic. As the Court sees it, however, the losses are quantifiable and can be compensated in damages, even to the point of recovery of the fair market value of the Major Brands enterprise

itself if it cannot continue as a going concern. Cf. *Ameristar Jet Charter, Inc. v. Dodson Intern. Parts, Inc.,* 155 S.W.3d 50 (Mo.banc 2005). (The Court is aware of the liquidated damages clauses in the 1990 Seagram's agreements; whether those clauses are enforceable is not currently at issue. Their existence suggests that the parties themselves at one time considered that were the appropriate remedy for breach.)

Many private wrongs can have drastic consequences. Money is the remedy for most of these, for the simple reason that it is the best remedy, certainly for economic injury. The law provides certain standards, and the consequence for breach of those standards is not a decree in equity but a jury's verdict for damages. Major Brands is facing financial harm. Financial harm can be remedied by financial compensation. To be sure, there may be effects on innocent third parties if Major Brands retrenches or succumbs, but those effects are simply not redressable by the courts.

ORDER

In light of the foregoing, it is

ORDERED that defendants' motion to dismiss or stay be and the same is hereby denied; and it is

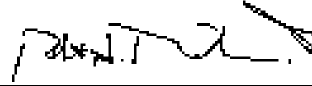
FURTHER ORDERED that plaintiff's motion for a preliminary injunction be and the same is hereby denied; and it is

FURTHER ORDERED that discovery on all claims may now proceed in accordance with the rules; and it is

FURTHER ORDERED that a case management conference shall be held on Friday, August 9, 2013, at 11:00 a.m. in Division 18, at which time

the parties shall present a scheduling order contemplating trial by jury on all claims at law within one year.

SO ORDERED:



Robert H. Dierker
Circuit Judge

Dated: June 20, 2013
cc: Counsel/parties pro se