HUSKING THE POTENTIAL OF THE NEBRASKA FRANCHISE PRACTICES ACT

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Nebraskan businesses have suffered significantly during the ongoing Covid-19 pandemic with hundreds of businesses forced to close shop.[1] Although Nebraska's economy is projected to rebound,[2] businesses face an uncertain future with compounding issues. The Covid-19 pandemic has proven to be an impetus for suppliers and manufacturers to rethink their distribution strategy. Inflation, the uncertain length of the pandemic, and nationwide supply chain disruptions affecting the distribution of everything from automobiles[3]

1. Nate Kauffman & John McCoy, *Nebraska Small Businesses Still Face Challenges*, FEDERAL RESERVE BANK OF KANSAS CITY (Dec. 18, 2020), https://www.kansascityfed.org/omaha/nebraska-economist/nebraska-small-businesses-still-face-challenges/; *see generally* Josie Shafer et al., *Covid-19 Impact on Nebraska Businesses: Nebraska Business Response Survey Report*, UNIVERSITY OF NEBRASKA - OMAHA (May 2020), https://www.unomaha.edu/college-of-public-affairs-and-community-service/center-for-public-affairs-research/documents/covid-impact-on-nonprofit-sector-round-one.pdf.

2. *Nebraska's Economy Will Continue to Expand, Forecast Shows*, UNIVERSITY OF NEBRASKA-LINCOLN BUREAU OF BUSINESS RESEARCH (Dec. 3, 2021), https://business.unl.edu/news/nebraska-s-economy-will-continue-to-expand-forecast-shows/?contentGroup=Bbr_reports&regionName=tile; Eric Thompson, *Nebraska Monthly Economic Indicators: May 25, 2022*, UNIVERSITY OF NEBRASKA-LINCOLN BUREAU OF BUSINESS RESEARCH (May 25, 2022) https://business.unl.edu/research/bureau-of-business-research/documents/lei-n-052522.pdf.

3. Michael Wayland, *Chip Shortage Expected to Cost Auto Industry $210 Billion in Revenue in 2021*, CNBC (Sept. 23, 2021), https://www.cnbc.com/2021/09/23/chip-shortage-expected-to-cost-auto-industry-210-billion-in-2021.html; Christopher R. Boll, *Grab Your Popcorn – The Chip Shortage and Other Disruptions Are Expected to Continue into the Near and Medium Term*, 12 NAT'L L. REV. 109 (Apr. 19, 2022), https://www.natlawreview.com/article/grab-your-popcorn-chip-shortage-and-other-disruptions-are-expected-to-continue-near.

to Christmas trees[4] have created an environment ripe for manufacturers to fundamentally alter their distribution network. Adding these complications to an already increasingly Amazon-ified economy[5] spells trouble, and Nebraska businesses are no exception.

Thankfully, enacted in 1978, the Nebraska Franchise Practices Act ("NFPA") provides Nebraska-based businesses a powerful defense against these concerns.[6] Although only ten sections in length, the NFPA possesses enormous potential for franchisees in an uncertain economic environment. The NFPA protects franchisees—broadly written to potentially include many Nebraskan dealers, distributors, and retailers—from termination, cancellation, and non-renewal, absent good cause and proper notice. The statute allows franchisees to bring an action seeking damages and injunctive relief for violations of the NFPA.[7] By all means, the NFPA appears to be a godsend for most Nebraska businesses, but the statute is significantly underutilized.

This article introduces the "husked" potential of the NFPA, and attempts to explain the bounds of the statute's protection and how the courts may treat the NFPA, absent controlling case law. Part I introduces the NFPA and franchise law in general. Part II examines the requirements for a franchisee to be protected under the NFPA. Part III explains the protection afforded such businesses that qualify. Finally, Part IV provides guidance to attorneys representing businesses which are heavily reliant on their relationships with manufacturers or suppliers.

I. THE NFPA AND FRANCHISE LAW IN GENERAL

A. The Nebraska Franchise Practices Act

The Nebraska Franchise Practices Act, codified in Nebraska Statute sections 87-401 through 87-410, was enacted in 1978 for the purpose of providing "certain safeguards" for franchisees from the termination of their franchise without justification or notice.[8] Senator Neil Simon, who introduced the bill, cited unsavory and illegal prac-

4. Laura Reiley, *Oh, Christmas Tree, Not You, Too: Supply Chain Problems Come to the Fir Trade*, Wash. Post (Nov. 11, 2021), https://www.washingtonpost.com/business/2021/11/26/christmas-tree-shortage/.

5. *See, e.g.*, Alec MacGillis, Fulfillment: Winning and Losing in One-Click America (2021); *see also* Martin Feth, *B2B Distributors Can Survive the Age of Amazon*, BCG (July 12, 2021), https://www.bcg.com/publications/2021/b2b-distributors-strategic-approach-to-digital-business-model.

6. Nebraska Franchise Practices Act, Neb. Rev. Stat. §§ 87-401 to 87-410.

7. Neb. Rev. Stat. § 87-409.

8. *Floor Debate on L.B. 202*, Neb. Unicameral, 85th Leg., 2d Sess., 6993 (Feb. 28, 1978) [hereinafter, *Floor Debate 202*].

tices in the beer and fast food franchising industries.[9] Other legislators voiced concern over the coercion and exploitation of small distributors who are "at the mercy of the large [franchisor] enterprise."[10] The statute itself expressly declares the necessity of protecting the public interest by defining the relationship and responsibilities of franchisors and franchisees because of the effect that such franchise arrangements have on Nebraska's general economy, the public interest, and public welfare.[11] Accordingly, the NFPA provides substantive rules regulating when a franchisor may terminate, cancel, or fail to renew the franchise.

Absent "good cause"—defined as the failure to substantially comply with the requirements of the franchise—the franchisor cannot discontinue the franchise.[12] Even if good cause exists, the franchisor must still comply with the statute's notice requirements by providing the franchisee sixty days' advance notice of the adverse action and setting forth "all the reasons" for such action.[13] The franchisor is also prohibited from limiting a franchisee's right of free association,[14] changing the management of the franchisee,[15] and imposing unreasonable standards of performance.[16] Moreover, the franchisor cannot contract-out of these protections or require the franchisee to waive or release the franchisor from liability under the NFPA.[17]

Despite these otherwise strong protections, the NFPA is among the least litigated franchise acts in the country, and there is a significant lack of meaningful case law.[18] For example, there are only six published decisions on the NFPA across the country, whereas there are nearly 150 published and 230 unpublished decisions interpreting

9. *Floor Debate 202*, *supra* note 8, at 6991.
10. *Floor Debate 202*, *supra* note 8, at 6993.
11. NEB. REV. STAT. § 87-401.
12. NEB. REV. STAT. § 87-402(8), 404(1).
13. NEB. REV. STAT. § 87-404(1).
14. NEB. REV. STAT. § 87-406(2).
15. NEB. REV. STAT. § 87-406(3).
16. NEB. REV. STAT. § 87-406(5).
17. NEB. REV. STAT. § 87-406(1). However, the statute does not require a franchise agreement to be indefinite, nor does it prohibit a franchisor from providing that the franchise is not renewable or that the franchise is only renewable if either party meets certain reasonable conditions. NEB. REV. STAT. § 87-404(1). As explained later, the ability for a franchisor to contract around renewal is a powerful tool to evade the NFPA's termination requirements.
18. This is surprising, given what Senator Hefner predicted during floor debate that due to the breadth of the law, "it will be a dream come true for trial attorneys." *Floor Debate 202*, *supra* note 8, at 6993. This critique of franchise laws is not unique to Senator Hefner. *See* Joseph J. Fittante, Jr., *"Community of Interest": Clarity or Confusion?*, 22 FRANCHISE L.J. 160, 160 n.15 (2003) ("However, one might argue that Governor Lucey should have hailed the WFDL as the 'Lawyers Employment Act,' judging by the vast amount of litigation generated by the WFDL, specifically litigation revolving around the types of business relationships covered by the WFDL.").

the nearly identical New Jersey Franchise Practices Act ("NJFPA"). This discrepancy is significant because the NFPA is directly based on the NJFPA and only slightly differs in its requirements.[19] Because of the similarities between the statutes, when questions under the NFPA arise, it is likely that Nebraska courts will turn for guidance to the developed body of case law interpreting the NJFPA.[20]

B. The Broader Franchising World

Every state has enacted some sort of franchise statute regulating certain business relationships.[21] These statutes often dictate the grounds upon which termination, cancellation, and nonrenewal are appropriate.[22] The fundamental purpose of franchise statutes is to protect the grantee from unfair treatment and exploitation by the grantor, who possesses greater economic and bargaining power.[23] For example, a distributor that earns ninety percent of its profits from a single manufacturer, does not operate within the archetypal "dog-eat-dog" competitive market. Instead, the business must survive in an all too Damoclean environment, with a single misstep potentially bringing about the end. Franchise statutes are meant to provide such businesses with security in their operations and investments.

In the views of some, franchise statutes are a classic "doing harm by doing good" and are routinely chastised as protectionist, inefficient, and futile.[24] A key aspect of most franchise statutes is the anti-

19. *Banking, Commerce, and Insurance Committee Meeting: Hearing on LB 202*, Neb. Unicameral, 85th Leg. 2d Sess. 25 (1978) (statement of Senator Simon) ("Now this bill that we have before us today, LB 202, is enacted from similar legislation in the State of New Jersey.").

20. *See* FirsTier Bank v. Triplett, 497 N.W.2d 339, 342 (Neb. 1993) (stating that other jurisdictions' opinions were persuasive in case of first impression in Nebraska under Uniform Commercial Code); *see also* W. Michael Garner, Franchise and Distribution Law and Practice § 5:28 (2021).

21. *See* 3-4 Gladys Glickman, Franchising, ch. AL-WY (2021) (identifying all relationship and specific industry statutes across the country).

22. *Id.*

23. *See, e.g.*, Wis. Stat. § 135.025(2)(b); N.J. Stat. Ann. 56:10-2 ("It is therefore necessary in the public interest to define the relationship and responsibilities of franchisors and franchisees in connection with franchise arrangements and to protect franchisees from unreasonable termination by franchisors that may result from a disparity of bargaining power between national and regional franchisors and small franchisees.").

24. *See, e.g.*, Tracey A. Nicastro, *How the Cookie Crumbles: The Good Cause Requirement for Terminating a Franchise Agreement*, 28 Val. U. L. Rev. 785, 800-16 (1994); *see also* James A. Brickley et al., *The Economic Effects of Franchise Termination Laws*, 34 J.L. & Econ. 101 (1991); Uri Benoliel, *The Expectation of Continuity Effect and Franchise Termination Laws: A Behavioral Perspective*, 46 Am. Bus. L.J. 139, 143-47 (discussing the Law and Economics view on franchising regulation); *see also* Kenosha Liquor Co. v. Heublein, Inc., 895 F.2d 418, 419 (7th Cir. 1990) ("Multi-factor tests could imply jury trials in all cases, but no one wants (or can believe the state legislature created) a vapid law, uncertain in every application.").

waiver provision, preventing franchisors from contracting around the statute's protections.[25] This feature is viewed as an unnecessary paternalistic restraint on the freedom to contract, resulting in significant economic harm.[26] In fact, prior to the passage of the NFPA, the law of Nebraska was purportedly that "any person might do or refuse to do business with whomsoever he desired."[27]

While the term "franchise" typically calls to mind popular fast food restaurants, that perspective is short-sighted. Across the country, the manner by which franchise statutes refer to the protected party in a commercial relationship is not uniform. Some statutes, like the NFPA, refer to the protected party as a "franchisee,"[28] while others refer to the protected party as a "dealer,"[29] "retailer,"[30] or "distributor"[31] among other nomenclature. This reflects the differing circumstances in which a protected franchise may exist. Generally, there are three kinds of franchises:

1. *Product Franchises*, where a franchisee distributes goods and services of the franchisor which bear the franchisor's trademark. These franchisees include "automobile and truck dealers, gasoline service stations, and soft drink bottlers."
2. *Package or Business Format Franchises*, where "the franchisee is licensed to do business under a prepackaged business format established by the franchisor and identified with the franchisor's trademark." Examples of format franchises include the aforementioned and

25. *See* Nicole Liguori Micklich & Michael V. Pepe, *Can't Give It Away: Statutory Prohibitions That Protect Franchisees From Releases,* 30 FRANCHISE L.J. 144, 152 (2011); *see also* GARNER, *supra* note 20, at § 10:47.

26. Donald P. Horwitz & Walter M. Volpi, *Regulating the Franchise Relationship,* 54 ST. JOHN'S L. REV. 217, 271-76 (1980) ("Legislation regulating the franchise relationship would do away with both of these rights, introducing long-abandoned, quasifeudal status relations into the commercial world. . . . In attacking the central core of freedom to contract, however, legislation regulating the franchise relationship fatefully signals the introduction into our legal order the revolutionary and ominously paternalistic notion that even merchants do not know, and cannot be trusted to determine, what is in their own best economic interests.").

27. McArtor v. Mobil Oil Corp., 324 N.W.2d 399, 400 (1982); McDonalds Corp. v. Markim, Inc., 306 N.W.2d 158, 162-63 (1981) ("'Any person may do business with whomsoever he desires. Also, he may refuse business relations with any person whomsoever, whether the refusal is based on reason, whim, or prejudice. And where, by the terms of a contract, it is specified that either party may terminate the agreement at any time, such termination may likewise be had as stipulated and upon the conditions in such contract contained.' This appears to be a statement of the common law of Nebraska relating to franchise agreements prior to the enactment of the Nebraska Franchise Practices Act.") (quoting Barish v. Chrysler Corp., 3 N.W.2d 91 (1942)).

28. NEB. REV. STAT. § 87-402.

29. WIS. STAT. § 135.02.

30. MO. REV. STAT. § 407.895.

31. MD. CODE ANN. COM. LAW § 11-1301.

ubiquitous McDonald's and other popular chain businesses.

3. *Fractional Franchises*, where franchisees market a franchisor's trademark and goods and services, but the fractional franchisor "exerts minimal control over the franchisee's business operations, and the franchisee often operates under [its] own trade name." These franchisees include businesses selling a variety of products from different manufacturers and suppliers. It is in these circumstances where franchisors run into "hidden" or "accidental" franchise issues.[32]

States across the country have enacted two types of franchise statutes to protect parties in these circumstances: relationship statutes and specific industry statutes. For the most part, relationship statutes, like the NFPA, stem from the advent of state regulation of franchising in the 1970s,[33] and extend protection to grantees that either act pursuant to an authorized marketing plan or have a community of interest with the grantor.[34]

Many state relationship statutes contain broad definitions that allow the statute to apply to a wide range of business relationships not ordinarily considered by the public to be franchises, such as distributorships, trademark licenses, distribution agreements, and joint marketing agreements.[35] Given the breadth of potential franchise, courts

32. Kevin S. Dittmar, *Foerster, Inc. v. Atlas Metal Parts — The Wisconsin Supreme Court Takes a Narrow View of the Dealer's Financial Interest Protected by the Wisconsin Fair Dealership Law*, 1985 WIS. L. REV. 155, 167-68 (1985); *see also* Megan Center, *Accidental Franchises: It Takes a Community (of Interest)*, 39 FRANCHISE L.J. 545, 545-46 (2020); James R. Sims III and Mary Beth Trice, *The Inadvertent Franchise and How to Safeguard Against it*, 18 FRANCHISE L.J. 54, 57 (1998).

33. In 1971, Delaware and New Jersey were the first two states to adopt franchise relationship statutes, and within a decade twelve other states followed suit. *See* James A. Brickley et al., *The Economic Effects of Franchise Termination Laws*, 34 J.L. & ECON. 101, 113 (1991). In 1964, Puerto Rico became the first U.S. territory to adopt a franchise statute targeted against unlawful terminations. *See* P.R. LAWS ANN. tit. 10 §§ 278 et seq.; *see also* Richard M. Krumb, *Protectionism in Puerto Rico: The Impact of the Dealers' Contracts Law on Multinational Companies Planning Operations in Puerto Rico*, 25 CASE W. RES. J. INT'L L. 79, 117-18 (1993) (discussing the passage, subsequent interpretation and economic effect of Puerto Rico's Dealers Contracts Law). For a detailed history of franchising from sovereign grants to the Singer Sewing Machine Co. to contemporary franchises like McDonald's and Dominos, *see* David Gurnick & Steve Vieux, Franchising Law Symposium, *Case History of the American Business Franchise*, 24 OKLA. CITY U.L. REV. 37 (1999).

34. David Gurnick, Jeffery S. Haff & Craig Miller, *41st Annual Forum on Franchising: Franchising – Litigating the Definitional Elements*, A.B.A., 12-18 (2018), https://www.americanbar.org/content/dam/aba/events/franchising/2018/fr_8_paper.pdf.

35. Roland J. Santoni, *Franchising: A Critical Assessment of State and Federal Regulation*, 14 CREIGHTON L. REV. 67, 70–72 (1980); see *also* Mark H. Miller, *Unintentional Franchising*, 36 ST. MARY'S L.J. 301, 305–06 (2005). As the Seventh Circuit has noted: "Legal terms often have specialized meanings that can surprise even a sophisticated party. The term 'franchise,' or its derivative 'franchisee' is one of those words."

have extended franchise protection to a range of businesses from golf professionals[36] to construction equipment dealers[37] to slot machine distributors[38] and seemingly everything in between.[39]

As the name betrays, specific industry statutes are narrower in application and purpose than their relationship statute counterparts and generally protect product franchises. The most common form of a specific industry statute is a statute directed toward protecting motor vehicle dealers. Alcohol, petroleum, and farm equipment are other examples of common specific industry statutes.[40] For its part, Nebraska has enacted four specific industry statutes: Motor Vehicle Industry Regulation Act,[41] Nebraska Equipment Business Regulation Act ("NEBRA"),[42] Motor Fuel Dealers Succession Act,[43] and Beer Distribution Act.[44] These statutes provide similar protection as the NFPA, but the NFPA is inapplicable to relationships covered under any of these statutes.[45]

For example, the NEBRA provides that a grantor may only cancel a dealership upon good cause, ninety days' notice, and the dealers' failure to cure the purported issues within sixty days of receipt of the notice.[46] Unfortunately, the NEBRA is limited to dealers of equip-

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To-Am Equip. Co., Inc. v. Mitsubishi Caterpillar Forklift Am., Inc., 152 F.3d 658, 659–60 (7th Cir. 1998).

36. Benson v. City of Madison, 2017 WI 65, ¶53, 376 Wis. 2d 35, 897 N.W.2d 16.

37. FMS, Inc. v. Volvo Constr. Equip. N. Am., Inc., 557 F.3d 758, 765 (7th Cir. 2009).

38. *See* Atlantic City Coin & Slot Serv. Co. v. I.G.T., 14 F. Supp. 2d 644, 674 (D.N.J. 1998).

39. Or, in the words of former Wisconsin Governor Patrick Lucey:

> [The Wisconsin Fair Dealership Law] is intended to protect the thousands of small businessmen in Wisconsin who are franchisees. These businessmen operate filling stations, building materials and supply houses, lumber yards, sports equipment stores, motels, hotels and restaurant chains. They sell farm implements, clothing, furniture, and many other types of goods under a franchise system. The intent in this legislation is to protect these Wisconsin businessmen from pressure from a franchisor which is not in their best interest.

Press Release, Office of Governor, (April 6, 1974)(on file with author).

40. Rossell Barrios, Kerry L. Bundy, & Ronald K. Gardner, *29th Annual Forum on Franchising: Legal Issues Arising From Dealer and Distributor Relationships*, A.B.A., 6-8 (2006), https://www.americanbar.org/content/dam/aba/events/franchising/2006/legal_issues.pdf; *see also* Gary W. Leydig, *Survey of State Dealer Laws*, 11-19 (2017), https://www.leydiglaw.com/wp-content/uploads/2017/06/Survey-Of-State-Dealer-Laws.pdf. For more on specific industry laws, *see* GLICKMAN, *supra* note 21, at §2.02(c).

41. NEB. REV. STAT. §§ 60-1401 to 1441.

42. NEB. REV. STAT. §§ 87-701 to 711.

43. NEB. REV. STAT. §§ 87-411 to 414.

44. NEB. REV. STAT. §§ 53-201 to 223.

45. NEB. REV. STAT. § 87-407 ("Sections 87-401 to 87-410 shall not apply to franchises which are subject to any other statute of this state.").

46. NEB. REV. STAT. § 87-705(2)-(3).

ment used for "agricultural, horticultural, livestock, grazing, forestry, or industrial purposes."[47]

The Motor Vehicle Industry Regulation Act provides a number of procedural safeguards. The Act requires that in order to terminate or discontinue a motor vehicle dealership, the franchisor must file an application with the Nebraska Motor Vehicle Industry Licensing Board and then establish good cause for termination in a hearing before the board.[48] The Nebraska Beer Distribution Act,[49] enacted in 1989, provides that before a supplier can terminate or fail to renew an agreement with a wholesaler, the supplier must act in good faith—defined as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade"[50]—and must provide thirty days' notice providing good cause for termination or discontinuation.[51] If the reason for termination is that the wholesaler failed to comply with a reasonable, material provision of the agreement, the wholesaler must be given thirty days to submit a corrective plan of action and ninety days to cure.[52]

While the NFPA is inapplicable to businesses covered under any of the specific industry statutes, nothing precludes a business from having protected franchises under both the NFPA and one of the specific industry statutes. For instance, a wholesaler which distributes both beer and non-alcoholic beverages may have two protected franchises: (1) in the distribution of beer under the Beer Distribution Act and (2) in the distribution of non-alcoholic beverages under the NFPA. In some circumstances, a franchisee may have multiple franchises with the same franchisor.

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47. NEB. REV. STAT. § 87-703(5); *see also* Fontenelle Equip., Inc. v. Pattlen Enter., Inc., 629 N.W.2d 534, 541-42 (2001) (holding that lawn and garden equipment falls outside "agricultural" and "horticultural" equipment).

48. NEB. REV. STAT. §§ 60-1420, 60-1424. Nebraska is one of ten states completely outlawing vehicle manufacturers from selling directly to consumers. The prohibition of direct sales has come under fire in recent years due to the popularity (and the lobbying efforts) of Tesla. *See e.g.*, Cole Epley, *Tesla is knocking on Nebraska's door, hoping lawmakers will let it in*, AP NEWS (Feb. 1, 2018), https://apnews.com/article/9688effb21a546ada83c75a091dd9f69; Lindsay Vanhulle, *Future of auto dealer franchise law is up for debate*, AUTO. NEWS (June 6, 2022), https://www.autonews.com/dealers/future-auto-dealer-franchise-law-debate. That said, legacy car manufacturers are also preparing for the brave new world of direct sales to consumers. *See* Paul Stenquist, *Why You Might Buy Your Next Car Online*, N.Y. TIMES (June 21, 2022), https://www.nytimes.com/2022/06/21/business/tesla-online-sales-dealerships.html (last accessed July 6, 2022). It is also worth noting that the rules of civil procedure relating to discovery and inspection apply to hearings before the board. NEB. REV. STAT. § 60-1428.

49. NEB. REV. STAT. §§ 53-201–223.

50. NEB. REV. STAT. § 53-208.

51. NEB. REV. STAT. § 53-218(3).

52. NEB. REV. STAT. § 53-218(4).

All told, whether a franchise exists is a legal determination, which is not limited to fast food restaurants or salon chains. If a business is substantially reliant on its relationship with another business, it is critical for attorneys to assess whether that relationship is protected under the NFPA.

II. WHEN IS A NEBRASKAN BUSINESS PROTECTED UNDER NFPA?

A Nebraska business is protected under the NFPA when it (1) satisfies the definition of a franchise under Section 87-402 and (2) demonstrates that it meets the location and sales requirements of Section 87-403. First, a business meets the definition of a franchise under two circumstances. Non-alcoholic beverage distributors are protected where "any arrangement, agreement, or contract, either expressed or implied" exists "for the sale, distribution, or marketing of nonalcoholic beverages at wholesale, retail, or otherwise."[53] All other non-excluded businesses are protected where there is (1) a written agreement; (2) a grant of a license to use a franchisor's trade symbols; (3) payment of a franchise fee; and (4) the existence of a community of interest in the marketing of goods or services.[54]

Second, if a business satisfies the definitional requirements in either circumstance, attention turns to three additional requirements: (1) the franchisee must establish or maintain a place of business within Nebraska; (2) gross sales of products or services between the franchisor and franchisee must exceed $35,000 for the twelve months preceding any lawsuit; and (3) "when more than twenty percent of the business's gross sales are intended to be or are derived from such franchise."[55]

A. Meeting the Definitional Requirements

The NFPA's definition of a franchise functionally divides Nebraska franchises into two categories: (1) non-alcoholic beverage distributors and (2) all other non-exempt businesses. Non-alcoholic beverage distributors are franchisees within the meaning of the NFPA when there is "any arrangement, agreement, or contract, either expressed or implied, for the sale, distribution, or marketing of nonalcoholic beverages at wholesale, retail, or otherwise."[56] Other non-exempt businesses, that is, businesses that are not regulated by spe-

53. Neb. Rev. Stat. § 87-402(1)(b).
54. Neb. Rev. Stat. § 87-402(1)(a).
55. Neb. Rev. Stat. § 87-403.
56. Neb. Rev. Stat. § 87-402(1)(b).

cific industry statutes (e.g., NEBRA, Beer Distribution Act, etc.) are franchises when there is:

> a written agreement for a definite or indefinite period, in which a person grants to another person for a franchise fee a license to use a trade name, trademark, service mark, or related characteristics and in which there is a community of interest in the marketing of goods or services at wholesale or retail or by lease, agreement, or otherwise.[57]

Notably, there is not much overlap between the two categories in terms of requirements. While non-alcoholic beverage distributors can become franchisees merely through an implied agreement, other non-exempt business must meet the four definitional requirements mentioned above: (1) a written agreement, (2) a grant to license a trademark, (3) a franchise fee, and (4) a community of interest. While the non-exempt businesses are much more common, the category of non-alcoholic beverage distributors presents some curious legal issues, especially if no written agreement is required.

1. Non-Alcoholic Beverage Distributors

By the plain language of the statute, a non-alcoholic beverage franchise exists where there is an agreement, expressed or implied, for the sale, distribution, or marketing of non-alcoholic beverages at wholesale, retail or otherwise.[58] Given that a distributor of non-alcoholic beverages is not required to demonstrate the payment of a franchise fee or the existence of a community of interest in order to be protected, this test is far less strenuous than the test applied to other business relationships.

In *Shasta Beverages*,[59] the Nebraska Supreme Court held that the NFPA does not categorically exclude unwritten agreements.[60] There, the court was tasked with interpreting whether a franchise

57. NEB. REV. STAT. § 87-402(1)(a).
58. NEB. REV. STAT. § 87-402(1)(b).
59. 337 N.W.2d 783 (1983).
60. Regnev, Inc. v. Shasta Beverages, Inc., 337 N.W.2d 783, 784-85 (Neb. 1983). Although Nebraska's statute of frauds would bar enforcement of oral agreements in excess of $500, the Nebraska Supreme Court did not consider the statute of frauds when it concluded that the NFPA does not categorically exclude unwritten agreements. NEB. U.C.C. § 2-201. Therefore, it is unclear whether only oral franchise agreements under $500 would be permissible, for example, or whether the specific express acknowledgement of implied agreements for non-alcoholic beverage distributors prevails over the more general statute of frauds. At least one district court in the Eighth Circuit explicitly rejected an argument that even though a state's franchise practices act permitted oral agreements, it nevertheless still needed to comply with the state's statute of frauds. *See* Otto Dental Supply, Inc. v. Kerr Corp., No. 4:06CV01610WRW, 2008 WL 410630, at *6 (E.D. Ark. Feb. 13, 2008). *But see* Ackerman Buick, Inc. v. Gen. Motors Corp., 66 S.W.3d 51, 61 (Mo. Ct. App. 2001) (affirming summary judgment because oral franchise agreement was unenforceable under U.C.C. statute of frauds).

could be evinced from two appointment letters. The first read "[w]e are pleased that you are very enthusiastic about representing Shasta in many outlets we are now calling on . . . ," before referring to the various accounts which were assigned to the distributor.[61] The second letter, issued a year later, referred to certain "military accounts" assigned to the distributor and a "redistribution fee" to be paid for such accounts.[62]

The trial court determined that these letters constituted the entirety of the parties' relationship and found summary judgment appropriate because the letters did not require the distributor to maintain a place of business in Nebraska.[63] The Nebraska Supreme Court reversed this decision determining that the NFPA did not exclude unwritten agreements for the distribution of non-alcoholic beverages and there was uncertainty regarding the parties' relationship that could not be resolved on summary judgment.[64]

At the time of the *Shasta Beverages* decision, both distributors of beer and non-alcoholic beverages were exempt from the written agreement requirement. Since then, the Nebraska Legislature enacted the Beer Distribution Act[65] and simultaneously excluded distributors of beer from the NFPA.[66] However, the legislature left intact broad

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61. *Regnev*, *Inc*., 337 N.W.2d at 784 (1983).

62. *Id.* at 231.

63. *Id.* at 232.

64. *Id.* at 232-33.

65. NEB. REV. STAT. §§ 53-201 to 223. A similar beer distribution act was struck down as unconstitutional. *See* U.S. Brewers' Ass'n, Inc. v. State, 220 N.W.2d 544, 549 (1974). There, manufacturers of beer and liquor challenged the constitutionality of a law requiring that a manufacturer must prove, to the satisfaction of the Nebraska Liquor Control Commission, that good cause exists to terminate a distributor. *Id.* at 330. The law was enacted on two separate grounds: (1) to foster and promote temperance and obedience to the law, and (2) to protect distributors. With respect to the first purpose, the Supreme Court of Nebraska found that, as written, the regulatory regime lacked a reasonable relationship to protecting the "public health, safety and welfare".

> The effect of the act upon temperance or obedience to the law is remote and speculative. It would not regulate the retail distribution of products and would have little or no effect upon consumption of the product by the public. The only possible effect of the act in this regard is that it would transfer control of the distribution of a particular product from the manufacturer of that product to the distributor. There is no reason to believe that distributors collectively desire to sell less products than do the manufacturers. There is no reasonable relationship between the act and the fostering or promoting of temperance and obedience to the law, and it cannot be justified on that ground. . . . We conclude that the act in question is an unreasonable invasion of the personal and property rights of the plaintiffs and must be declared unconstitutional.

Id. at 333-35.

Then, turning to the protectionist elements of the statute, the Court found that the act "go[es] beyond any other statute of which [they] are aware" and is "an unreasonable invasion of the personal and property rights of the plaintiffs and must be declared unconstitutional." *Id.* at 334-35.

66. 1989 Neb. ALS 371, 1989 Neb. LB 371.

franchise protection to both retail sellers and wholesale distributors of nonalcoholic beverages.

Thus, nearly every restaurant, gas station, and supermarket in the state may be protected under the non-alcoholic beverage distributor category of the NFPA. A business routinely purchasing and selling anything from popular energy drinks to cold brew coffee will be protected under the NFPA, so long as the business meets the location and sales requirements discussed below in Section B.[67] Although it seems unlikely that a retail establishment may be terminated by a franchisor, it is entirely possible that these franchises would be protected from constructive termination if the beverage manufacturer, or even wholesale distributor, raised prices or changed processes.[68] While the parameters of the NFPA's reach are exemplified by assessing how many retail businesses fall within its purview, this focus should not be interpreted as a concession that qualifying nonalcoholic distributors are left out of the mix. Like the retailers they service, distributors of nonalcoholic beverages may also inure NFPA-protection from their manufacturer's adverse action.

2. Other Non-Exempt Businesses

The NFPA provides an entirely separate definition of a franchise for all other non-exempt businesses. As stated, to qualify for franchise protection, (1) a written agreement; (2) a grant to license a trade name, trademark, service mark, or related characteristic; (3) a franchise fee; and (4) a community of interest in the marketing of goods or services must all be found in the relationship between the business and the purported franchisor.

a. Written Agreement

Facially, requiring a written agreement would preclude the proverbial handshake agreement and thereby limit the protection offered by the NFPA. However, section 87-402 does not specify or require a particular level of formality, and in the days of constant email communication, the written agreement requirement hardly limits the NFPA's

67. NEB. REV. STAT. § 87-403; *see also Regnev, Inc.*, 337 N.W.2d at 785 (implying that the locational and sales requirements still applied to the franchise).

68. *See* Maintainco, Inc. v. Mitsubishi Caterpillar Forklift Am., Inc., 975 A.2d 510, 520 (N.J. Super. Ct. App. Div. 2009) (holding that termination in the NJFPA "includes constructive termination in accordance with traditional contract law principles, and it would 'undercut the remedial purposes of the Act by allowing a franchisor to engage in such blatant attempts to 'ditch,' or constructively terminate a franchisee, but escape liability under the Act because it did not entirely succeed."); *but see* Robert Emerson, *Franchise Terminations: "Good Cause" Decoded*, 51 WAKE FOREST L. REV. 103, 110 n.32 (2016) ("constructive termination remains extremely difficult for most courts to find.").

scope. It is reasonable to assume the written agreement does not have to be any more extensive than permitting the franchisee to use the franchisor's trade symbols in the promotion and distribution of goods or services. For instance, a series of emails from a manufacturer to a distributor arranging for distribution of a product and the use of certain trade symbols to promote the product may very well constitute a written agreement under Section 87-402.

Case law from around the country supports that Nebraska's Statute of Frauds[69] would not bar enforcement of such an email agreement.[70] However, even if the Statute of Frauds barred the enforcement of the purported agreement (and thus eliminated the NFPA claim), franchisees may still claim refuge in equity under partial performance, promissory estoppel, and implied contract theories. For example, "where performance is good evidence that there was a contract and the party otherwise would be without a remedy for its reliance, the court may remove the bar of the statute to permit proof and enforcement of the contract."[71] Or, in some circumstances, the franchisor may be estopped from invoking the Statute of Frauds if it acceded to the purported franchisee's conduct as franchisee.[72] For example, in *Donut Holdings, Inc. v. Risberg*,[73] after the expiration of a ten-year franchise agreement, the Nebraska Supreme Court nevertheless recognized an "implied in fact contract" because the franchisee continued using the franchisor's system and the franchisor continued accepting payment of royalty and advertising fees.[74]

Moreover, it is unlikely that the written agreement requirement requires that there are specific terms providing for the location of the franchise. Although the trial court in *Shasta Beverages* found that the parties' agreement failed to demonstrate that the distributor was required to maintain a place of business in Nebraska,[75] the trial court's interpretation of the NFPA was wrongheaded. The Nebraska Supreme Court did not affirm this interpretation, and Section 87-403 (discussed in greater detail below) only requires that the "performance" of the franchise, not the written agreement, "contemplates or requires the franchisee to establish or maintain a place of business within the state of Nebraska."[76] Reading a locational requirement into the written agreement requirement is further faulty, considering

69. NEB. REV. STAT. § 36-202.

70. *See, e.g.*, Cloud Corp. v. Hasbro, Inc., 314 F.3d 289 (7th Cir. 2002); 10 WILLISTON ON CONTRACTS § 29:23 (4th ed.).

71. GARNER, *supra* note 20, at § 8.22.

72. *Id*.

73. 885 N.W.2d 670, 674 (Neb. 2016).

74. Donut Holdings, Inc. v. Risberg, 885 N.W.2d 670 (Neb. 2016).

75. *Regnev, Inc.*, 337 N.W.2d at 785.

76. NEB. REV. STAT. § 87-403.

that the sales requirements found in the same section would logically be extraneous to the written agreement.[77] If carried forward, the trial court's interpretation would also effectively erase the carve-out for oral agreements. Therefore, it is unlikely that courts would require the written agreement to include language about the location of the franchise.

Accordingly, nothing in the NFPA precludes a series of emails from satisfying the written agreement requirement, and thus it is incumbent on the purported franchisee to demonstrate that it has sufficiently "made its bed" with its franchisor. If a franchisee can demonstrate that a series of emails is sufficient to be a written agreement, then the franchisee may evade the franchisor's best defense to NFPA claims.

However, potential franchisees must make certain that the franchise agreement is truly between the franchisor and their own businesses, especially in the event of a transfer. In *Western Convenience*,[78] Western purchased a convenience store property that included a Burger King restaurant and the previous owner agreed "to transfer any right to the Burger King franchise, if any and if any rights are transferable."[79] When Burger King canceled its regularly scheduled bi-weekly delivery of products, Western sued for injunctive relief and damages.[80] The court sided with Burger King because the original franchise agreement between Burger King and Western's predecessor expressly prohibited an assignment or transfer of franchise rights without Burger King's written consent.[81] Because Burger King had not consented to the assignment of the franchise to Western, there was no written agreement between Burger King and Western, and there can be no NFPA claim without a franchise agreement.[82]

b. Grant of a License to Use a Trademark

Despite the minimal formality necessary to satisfy the written agreement requirement, the agreement must still grant a license to use a trade name, trademark, or service mark.[83] An agreement merely about advertising materials, for example, would not likely suf-

77. *See* NEB. REV. STAT. § 87-403.

78. No. 8:07CV270, 2007 WL 2682245, at *2 (D. Neb. Sept. 7, 2007).

79. Western Convenience Stores, Inc. v. Burger King Corp., No. 8:07CV270, 2007 WL 2682245, at *1 (D. Neb. Sept. 7, 2007).

80. *Western Convenience Stores, Inc.*, 2007 WL 2682245, at *3.

81. *Id*. at *4-5.

82. *Id*.

83. Recall that the express language of the statute requires a written agreement in which one party grants to the other "a license to use a trade name, trademark, service mark, or related characteristics." NEB. REV. STAT. § 87-402(1)(a).

fice. Although there are no published decisions regarding this requirement of the NFPA, New Jersey courts interpreting the NJFPA's written agreement requirement have drawn a distinction between permission to advertise and the grant of a license:

> Moreover, no license was granted to [the purported grantee] because [the grantor] merely provided [it] with advertising materials such as window and counter displays. [ ] *Colt*, 844 F.2d at 119 ("The [m]ere furnishing of advertising materials . . . does not fulfill the letter or intent of the Franchise Practices Act.") (quoting *Finlay*, 146 N.J. Super. at 219) (internal quotation marks omitted).
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> . . . .
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> The NJFPA license "is one in which the franchisee wraps himself with the trade name of the franchisor and relies on the franchisor's goodwill to induce the public to buy." *Liberty Sales Assocs., Inc. v. Dow Corning Corp.*, 816 F. Supp. 1004, 1010 (D.N.J. 1993). "The trademark, tradename reference means and implies use of that name in the very business title of the franchisee and a holding out or perhaps representation to the public of some special relationship or connection. Simply selling goods or distributing materials which bear the manufacturer's name or trademark does not license use of the trademark." *Finlay*, 146 N.J. Super. at 219 (internal quotation marks omitted).[84]

If, given the similarities between the NJFPA and the NFPA, Nebraskan courts adopt a similar interpretation, franchisees must be prepared to prove an actual license and not merely permission to use some of the franchisors' marketing materials.

c. Franchise Fee

The NFPA broadly defines a "franchise fee" to include "any payment made by the franchisee to the franchisor other than a payment for the purchase of goods or services, for a surety bond, for a surety deposit or for security for payment of debts due."[85] Here, the NFPA, like most state statutes, specifically excludes certain types of payments from being considered franchisee fees.[86] However, the NFPA exclusions are not as extensive as the exclusions found in other statutes,[87] nor is there a statutory de minimis dollar value.[88]

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84. Orologio of Short Hills, Inc. v. Swatch Group (U.S.) Ltd., Inc., 2015-2 Trade Cas. (CCH) ¶ 79247, 2015 WL 4496653 (D.N.J. 2015), *aff'd in part, rev'd in part on other grounds*, 653 Fed. Appx. 134, 2016-2 Trade Cas. (CCH) ¶ 79840 (3d Cir. 2016).

85. NEB. REV. STAT. § 87-402(5).

86. *See* GARNER, *supra* note 20, at § 5.8. New York is the only state which requires a franchise fee but does not explicitly exclude any specific payments. *Id.*

87. *See e.g.,* Maryland Franchise Registration and Disclosure Law, MD. CODE ANN. BUS. REG. § 14-201(f)(3) (excluding the purchase of goods at wholesale price, the pay-

There are only three federal decisions interpreting the NFPA which discuss this element, and none provides significant guidance. In *Jones Distributing*,[89] a distributor of appliances brought suit against a manufacturer, alleging wrongful termination of a distributorship agreement.[90] One of the many assertions brought by the distributor was that the manufacturer violated the NFPA, but the United States District Court for Iowa held that the NFPA did not apply because the distributor never paid a franchise fee.[91] The court sided with the manufacturer who successfully argued that the alleged "indirect franchise fees"—such as training at distributor facilities, required participation in advertising of distributor products, and required maintenance of excess amounts of inventory—were merely ordinary business expenses and did not constitute a franchise fee.[92] Although the court did not go into greater detail, presumably these would fall under the "payment for the purchase of goods or services" exception in the statute.

In *Home Pest*,[93] the United States District Court for Nebraska took a narrow approach to the franchise fee requirement, finding that no franchise existed where the agreement did not include an explicit franchise fee in exchange for a license to use a trade name or trademark.[94] There, none of the fees mentioned in the agreement were for a surety bond or for security for payment of debts due.[95] Instead, the payments were strictly related to the purchase of the purported franchised item.[96] Several years later, in *Western Convenience*, the same court found that the payment of "royalties" did not demonstrate that the purported franchisee paid a franchise fee.[97] Rather, the court found the royalties to be "separate and distinct obligations" owed by

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ment of a reasonable service charge to the issuer of a credit card, the amount paid to a licensed trading stamp company, the purchase of goods on consignment, the repayment by a franchisee of a bona fide loan, the purchase of goods at retail price subject to a commission or compensation plan that in substance is a wholesale transaction, the purchase of supplies or fixtures at fair market value needed to enter into the business, and the amount paid for sales demonstration material and equipment sold at no profit by the seller).

88. Sandra Gibbs, *Hidden Franchise Fees: Seeking a Rational Paradigm*, 39 FRANCHISE L.J. 493, 500 (2020) (comparing the franchise fee requirements of eighteen states).

89. 943 F. Supp. 1445 (N.D. Iowa 1996).

90. Jones Distributing Co., Inc. v. White Consol. Indus. Inc., 943 F. Supp. 1445 (N.D. Iowa 1996).

91. *Jones Distributing Co., Inc.*, 943 F. Supp. at 1457.

92. *Id*.

93. No. 8:02CV406, 2004 WL 240556, at *2 (D. Neb. Feb. 6, 2004).

94. Home Pest & Termite Control, Inc. v. DOW Agrosciences, LLC, No. 8:02CV406, 2004 WL 240556, at *2 (D. Neb. Feb. 6, 2004).

95. *Id.* at *2.

96. *Id.*

97. *Western Convenience.*, 2007 WL 2682245, at *5.

the predecessor franchisee to the franchisor.[98] Unfortunately, the court's analysis of this point is short, but it can be inferred that the payment of royalties was not a unique additional requirement placed on the purported franchisee by the franchisor and thus was not a franchise fee.

These decisions seem to misapprehend the interplay between the NFPA and traditional contract law. In doing so, the court seems to treat NFPA protection as a feature of a particular contract, not a substantive body of law applying to relationships irrespective of contractual language. The NFPA explicitly provides that a franchise fee can be any payment, except those paid in the "purchase of goods or services, for a surety bond, for a surety deposit or for security for payment of debts due."[99] The NFPA by no means requires that payment to be a feature of the parties' contract. As such, these decisions fail to recognize the true extent of the statute.

In other Midwest states,[100] whether a "franchise fee" has been paid under franchise laws has been extensively litigated and could provide guidance to Nebraskan courts. For example, in interpreting the Minnesota Franchise Act, courts apply a "reasonableness test" and have found that requirements to purchase excess inventory and product price mark-ups could constitute franchise fees.[101] Interpreting the Illinois Franchise Disclosure Act, the Seventh Circuit came to a similar conclusion when it determined that excess inventory, training costs, and discounted goods and services may constitute indirect fees.[102] Elsewhere, courts have found the franchise fee element satisfied where the franchisee purchased new equipment, inventory or supplies, or expended on advertising and training at the grantor's behest.[103] The critical distinction in these cases is whether the payment was an ordinary business expense or a payment pursuant to a separate additional obligation imposed by the franchisor.

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98. *Id*.

99. NEB. REV. STAT. § 87-402(5).

100. Interestingly, there is no franchise fee requirement in the NJFPA, so Nebraska courts cannot turn to its New Jersey counterparts for guidance on this element.

101. GARNER, *supra* note 20, at § 5.8.; Coyne's & Co. v. Enesco, LLC, 553 F.3d 1128, 1131-32 (8th Cir. 2009); *see also* Wave Form Systems Inc. v. AMS Sales Corp., 73 F.Supp. 3d 1052, 1062 (D. Minn. 2014).

102. Wright-Moore Corp. v. Ricoh Corp., 908 F.2d 128, 136 (7th Cir. 1990).

103. Gibbs, *supra* note 88, at 503-08.

d. Community of Interest

Nebraska is one of eight states employing a community of interest standard.[104] The NFPA does not define "community of interest," and worse yet, there is currently no published Nebraska case law on the community of interest standard.[105] Because community of interest is not a term tossed around colloquially and subject to common definition, courts across the country have applied different tests in teasing the distinction between the pedestrian vendor-vendee relationship and the protected franchisor-franchisee relationship.

Some states feature considerably generous community of interest tests. Under the Minnesota Franchise Act, the purported franchisee need only demonstrate that it and the franchisor share an interest in the profit or sale of the goods and services.[106] A similar standard is found in the Hawaii Franchise Investment Law, which defines community of interest as a "continuing financial interest between the franchisor and franchisee in the operation of the franchise business."[107] By contrast, some states, like Wisconsin, require a much more thorough examination of the parties' relationship. The Wisconsin Fair Dealership Law requires there to be a "continuing financial interest" and "interdependence" between the parties, and the Wisconsin Supreme Court has set forth an extensive ten factor test to aid in assessing the totality of the parties' relationship.[108]

In New Jersey, courts have found a community of interest exists under the NJFPA where there is (1) a substantial, franchise-specific investment and (2) the franchisee was required to make the investment by the nature of the franchise.[109] Specific franchise investments may be tangible, such as a franchise signage, or intangible, such as

104. Gurnick, *supra* note 34, at 15. The other seven states with a community of interest standard are: Hawaii, Minnesota, Mississippi, Missouri, New Jersey, South Dakota, and Wisconsin. *Id.*

105. In *Western Convenience*, the court mentions it as an element, but provides no discussion of it whatsoever. In *Home Pest,* the court merely states that the parties' agreement "obviously contemplates that Home and Dow would have a 'community of interest in the marketing' of the Sentricon system" but provides no further explanation. *Home Pest*, 2004 WL 240556, at *2. In addition to Nebraska, the courts of Hawaii and Mississippi also have yet to determine when a community of interest is established under their respective statutes.

106. *See* Martin Inv., Inc. v. Vander Bie, 269 N.W.2d 868, 874 (Minn. 1978); *see also* Unlimited Horizon Mktg., Inc. v. Precision Hub, Inc., 533 N.W.2d 63, 66 (Minn. Ct. App. 1995).

107. HAW. REV. STAT. § 482E-2.

108. Ziegler Co. v. Rexnord, Inc., 139 Wis. 2d 593, 605-06 407 N.W.2d 873 (1987); *see also* Missouri Beverage Co. v. Shelton Bros., 669 F.3d 873, 879-80 (8th Cir. 2012) (finding that a community of interest under the Missouri Franchise Act requires that the purported franchisee to make significant franchise-specific investments).

109. *See* Cooper Dist. Co. v. Amana Refrig., Inc., 63 F.3d 262, 269 (3d Cir. 1995); Instructional Sys., Inc. v. Comput. Curriculum Corp., 614 A.2d 124, 142 (N.J. 1992).

"business goodwill associated with operating under the franchisor's name."[110] For example, the court found the plaintiff plausibly pled a community of interest where the distributor made large investments of "resources, reputation, and goodwill" in order to develop a market specifically for the supplier's wine.[111] But, under the NJFPA, a lack of control or lack of required expenditures may defeat a purported franchisee's claim.[112] No community of interest was found where the supplier never imposed a required minimum percentage of products be purchased, the supplier allowed the dealer to sell competitor's products, participation in the supplier's advertising program was optional, there was no required minimum expenditure on advertising, and the sale of supplier's products did not require specialized, non-transferable knowledge.[113]

If Nebraskan courts look to NJFPA decisions in interpreting the "community of interest" element, hopeful franchisees in Nebraska must be prepared to show a franchise-specific investment, whether tangible or intangible. A franchisee does not have to demonstrate that its success is inextricable to selling the franchisor's goods and services, but the franchisee should be prepared to demonstrate all efforts undertaken to sell and promote the franchisor's products.

B. Satisfying the Additional Requirements

1. Place of Business in Nebraska

Every Husker fan understands that "There Is No Place Like Nebraska."[114] Intentionally or not, the NFPA reflects this sentiment in requiring that the franchisee establish or maintain a place of business within the State of Nebraska.[115] The statute defines "place of business" as "a fixed geographical location at which the franchisee displays for sale and sells the franchisor's goods or offers for sale and sells the franchisor's services. Place of business shall not mean an office, a warehouse, a place of storage, a residence, or a vehicle."[116]

This section provides a harsh limitation to the NFPA's applicability. The NFPA is not unique in requiring that a business be situated within the state; however, unlike other states, the NFPA's inquiry is focused on the kind, and not the degree, of the business's presence.

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110. *Instructional Sys*., 614 A.2d at 141.
111. Am. Ests., Inc. v. Marietta Cellars, Inc., No. 10–6763–WJM. 2011 WL 1560823, at *6 (D.N.J. Apr. 25, 2011).
112. S. States Co-op, Inc. v. Glob. AG Assocs., Inc., No. 06-1494. 2008 WL 834389, at *5 (E.D. Pa. 2008).
113. *S. States Co-op, Inc*., No. 06-1494. 2008 WL 834389, at *5–6.
114. Harry Pecha, Dear Old Nebraska U (1924).
115. Neb. Rev. Stat. § 87-403.
116. Neb. Rev. Stat. § 87-402(7).

For example, the situated-in-Wisconsin analysis under the Wisconsin Fair Dealership Law ("WFDL") does not require the purported franchisee to operate a retail location within Wisconsin.[117] Rather, the inquiry is focused on whether the purported franchisee has sufficient contacts with the state—and this is not necessarily an exacting standard.[118]

By contrast, the NFPA seems to value the showroom and retail models over other forms of distribution. For example, an Iowa-headquartered distributor could sell 90% of its product in Nebraska, but be unable to claim protection under the NFPA, absent a showroom or a retail store. For this reason, the place of business requirement appears to contravene the ultimate purpose of the NFPA. To further illustrate: just ponder the injustice to distributors based out of Carter Lake![119]

Potential franchisees should also be wary of a strict reading of the statute, which excludes a business model in which the performance of services occurs at customers' homes. The definition of "place of business" in the NFPA is identical to that in the NJFPA.[120] New Jersey courts have interpreted this definition according to its plain and obvious meaning, noting that the use of the conjunctive "and" in the definition requires that the goods or services must be both offered for sale and sold in that fixed geographical location, excluding geographic locations only used for solicitation.[121] In *Greco Steam Cleaning*,[122] the court held that a carpet cleaning business which only used its physical

117. *See* Baldewein Co. v. Tri-Clover, Inc., 2000 WI 20, ¶ 30, 233 Wis. 2d 57, 606 N.W.2d 145.

118. *Id.* at ¶ 30. Recently, the Eastern District of Wisconsin found that a dealer deriving between 2.3% and 4.8% of its sales from a grantor was enough to create a triable issue whether the dealership was situated in Wisconsin. Brio Corp. v. Meccano S.N., 690 F. Supp. 2d 731, 753-54 (E.D. Wis. 2010).

119. For the unfamiliar, when Nebraska was granted statehood in 1867, the Missouri River was designated the boundary between Iowa, Missouri and what is today, South Dakota. Daniel Henry Ehrlich, *Problems Arising from Shifts of the Missouri River on the Eastern Border of Nebraska*, 54 NEBRASKA HISTORY 340, 341 (1973). In 1877, the river changed course and severed Carter Lake from the rest of Iowa, leaving it on the Nebraska side of the river. *Id.* at 345. In 1892, Nebraska brought suit against Iowa to clarify its boundary. *See* Nebraska v. Iowa, 143 U.S. 359 (1892). Exploring the laws of accretion and avulsion, the Supreme Court of the United States (erroneously) found that Carter Lake remained part of Iowa, despite the city clearly being in Nebraska. *Id.* Seeing issues on the horizon, Nebraska and South Dakota entered into an interstate compact to renegotiate if the Missouri River were to change course again. H.R.J. RES. 393, 101st Cong. (1989) (enacted). Nebraska has recently locked horns with Colorado over the South Platte River Basin. *See* Grant Schulte, *Nebraska Will Spend $500 Million to Claim South Platte River Water from Colorado*, AP NEWS (Jan. 10, 2022), https://coloradosun.com/2022/01/10/nebraska-colorado-south-platte-river-canals/.

120. N.J. STAT. ANN. § 56:10-3(f).

121. Greco Steam Cleaning, Inc. v. Assoc.'d Dry Goods Corp., 608 A.2d 1010, 1013 (N.J. Super. 1992).

122. 608 A.2d 1010 (N.J. Super 1992).

office space to conduct financial aspects of its business at a fixed but performed its service at customers' homes or places of business, would not fall under this definition.[123] Crucially, there was no evidence that the space was used to sell the services of the alleged franchise to customers.[124]

2. $35,000 over Twelve Months

The NFPA requires that purported franchisees purchase at least $35,000 in products or services from the franchisor in the twelve months prior to bringing a claim under the statute.[125] Franchisees should be aware that this provision effectively writes out sales representatives from claiming protection because sales representatives typically do not purchase products from the franchisor and merely facilitate the sale. The NFPA requires that the purported franchisee take on inventory and not just facilitate transactions.

Relatively speaking, the amount required here is meager, and most purported franchisees will be able to demonstrate average monthly purchases of more than $3,000.[126] Much like the Seventh Amendment's $20 requirement for jury trials, the NFPA's require-

123. *Greco Steam Cleaning*, 608 A.2d at 1013.

124. *Id.*; *see also* GARNER, *supra* note 20, at § 5.29.

125. NEB. REV. STAT. § 87-403.

126. An earlier commentator lamented that this requirement precluded most business format or package franchises from protection under Act considering that even with a 7% royalty fee such franchises would need to gross $500,000 in revenue to meet the $35,000 threshold. Ronald J. Santoni, *Franchising: A Critical Assessment of State and Federal Regulation*, 14 CREIGHTON L. REV. 67, 74 (1980). This critique has not withstood the test of time. For example, in 2019, the average McDonald's franchisee grossed over $2.9 million in sales. *See The QSR 50*, QSR MAGAZINE (2020), https://www.qsrmagazine.com/content/qsr50-2020-top-50-chart. McDonald's franchisees are required royalties of 4% of sales, advertising expenses of not less than 4% of sales, and monthly rent on purportedly average of 10.7% of sales. *See* Erik Larson, *McDonald's Accused of Gouging Franchisees on $3 Billion Rent,* BLOOMBERG (May 2, 2017), https://www.bloomberg.com/news/articles/2017-05-02/mcdonald-s-accused-by-union-of-inflating-franchisee-rents; *Your Future. Made at McDonald's: Your Pathway to Becoming a McDonald's Franchisee*, MCDONALDS 1, 24 (2019), https://www.mcdonalds.com/content/dam/usa/nfl/documents/franchising/Your_Path_to_Becoming_a_McDonalds_Franchisee.pdf. Based on the analysis of 2,425 brands, Christina Niu of FRANdata determined that franchises across 29 unique industries on average pay 6.0% of their sales as a royalty. *See* Christina Niu, *A Look at Franchise Royalty Fees*, FRANDATA (2018), https://frandata.com/downloading-an-examination-of-average-royalty-fees-from-2012-2018/. That 6% figure does not account for advertising fees and potential rent payments like those seen in the above McDonald's example. In 2019, of the top fifty quick service franchises in the country, only Baskin Robbins and Subway failed to average over $500,000 in annual sales per franchise. *See The QSR 50*, QSR MAGAZINE (2020), https://www.qsrmagazine.com/content/qsr50-2020-top-50-chart. As such, it seems more than likely that the average, somewhat successful franchisee would meet the $35,000 a year requirement.

ment was perhaps more meaningful in yesteryear.[127] In 1978 when the statute was enacted, $35,000 was roughly equivalent to $175,000 in today's money.[128] Absent the Nebraska legislature tweaking this figure to accommodate for inflation, franchisees face a low bar to clear.

Potential franchisees should be aware, though, that this provision could effectively create a one-year statute of limitations in bringing claims under the NFPA. Normally, in Nebraska, a party would have five years to bring a breach of contract claim on a written agreement[129] and three years to bring relevant claims residing in tort.[130] Although there are no published cases on this element of the NFPA, a strict reading of the statute would seem to require that the threshold be met in the twelve months before the franchisee actually serves its complaint.

The United States District Court for the District of New Jersey wrestled with this same question and flip-flopped. In 1997, the court read the statute narrowly and held that the NJFPA did not apply to a greeting card shop that stopped selling the franchisor's cards over a year before the action was instituted because the shop consequently had no gross sales over the twelve months immediately preceding the suit.[131] However, in a 2011 decision, the court rejected that view and held that a franchisee need only meet the requirement for the last twelve months that the franchise existed, and if that requirement was met, the plaintiff would then have the usual six years from the alleged violation to bring its claim.[132]

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127. U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, then according to the rules of the common law.").

128. *See* U.S. BUREAU OF LAB. STAT., CPI INFLATION CALCULATOR, https://www.bls.gov/data/inflation_calculator.htm.

129. NEB. REV. STAT. § 25-205(1) ("Except as provided in subsection (2) of this section, an action upon a specialty, or any agreement, contract, or promise in writing, or foreign judgment, can only be brought within five years."); NEB. REV. STAT. § 25-206 ("An action upon a contract, not in writing, expressed or implied, or an action upon a liability created by statute, other than a forfeiture or penalty, can only be brought within four years.").

130. *See* NEB. REV. STAT. § 25-207 ("The following actions can only be brought within four years: (1) An action for trespass upon real property; (2) an action for taking, detaining or injuring personal property, including actions for the specific recovery of personal property; (3) an action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated; and (4) an action for relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud, except as provided in *sections 30-2206* and *76-288* to *76-298*."); NEB. REV. STAT. § 25-212 ("An action for relief not otherwise provided for in Chapter 25 can only be brought within four years after the cause of action shall have accrued.").

131. Windsor Card Shops, Inc. v. Hallmark Cards, Inc., 957 F. Supp. 562, 568-69 (D.N.J. 1997).

132. Am. Estates, Inc. v. Marietta Cellars Inc., Civ. No. 10–6763–WJM, 2011 WL 1560823, at *5 (D.N.J. Apr. 25, 2011). For an explanation of the public policy reasons on

If interpreted strictly, the NFPA's commencement requirement would be shorter than those found in other franchise statutes.[133] Nebraskan franchisees are advised to act quickly in bringing a suit under the NFPA, or else, they should be prepared to argue public policy reasons against the express terms of the statute.

3. Twenty Percent Sales Requirement

The NFPA only applies "when more than twenty percent of the franchisee's gross sales are *intended to be* or are derived from such franchise."[134] Thus, there are two avenues for purported franchisees to satisfy this requirement: actual revenues and expected revenues.

a. Actual Revenue Approach

A strict twenty percent actual revenue requirement limits the applicability of the NFPA in two related ways. First, the twenty percent of gross sales figure is a high bar to clear for many multi-line distributors. Consider a business which deals exclusively with six manufacturers: A, B, C, D, E and F. This business could meet every other NFPA requirement, yet if it fails to draw twenty percent from any of its manufacturers, it will receive no protection under the Act.

Second, the use of gross sales opposed to net profits or gross profits further limits the number of protected relationships. Returning to that example, suppose Manufacturer A makes up nineteen percent of the business's gross sales, but forty percent of its gross profits and sixty percent of its net profits.[135] Certainly, in this situation, the purported franchisee would be at the mercy of Manufacturer A and could be ruined without its relationship with the manufacturer. Despite that, Manufacturer A would still be able to terminate the business without complying with the notice and good cause provisions of the

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which to adopt this reading of the statute, see Tynan v. Gen. Motors Corp., 591 A.2d 1024, 1035–36 (N.J. Super. Ct. App. Div. 1991) (Cohen, J.A.D., dissenting in part) ("Reading [the statute] to impose a limitations period yields incongruous results, especially as a part of an act whose purpose is to protect franchisees from arbitrary termination and consequent destruction of their businesses. A franchise doing $35,001 in annual business has six years to sue its franchisor for a minor but illegal action when the franchisee can comfortably survive. . . . But, if the majority is correct, a franchisee whose illegal treatment by the franchisor is so horrendously effective that it destroys the business altogether has only 12 months to sue. No purpose is served by giving less rights to the mortally wounded than to the barely scratched.") (citation omitted).

133. *See, e.g.*, MINN. STAT. § 80C.17(5) (three-year statute of limitations). *But see* WIS. STAT. 893.93(3)(b) (one year statute of limitations).

134. NEB. REV. STAT. § 87-403 (emphasis added).

135. This circumstance can arise when a business sells an item at a significant mark-up or the item itself does not require any additional direct costs and the costs apportionable to the item are significantly less than the sales price.

NFPA. As such, the twenty percent sales requirement seems to unduly frustrate the purpose of the NFPA's protection.

b. Intended Revenue Approach

However, a purported franchisee who yearly and systematically forecasts its sales and profits may be able to demonstrate protection under the NFPA, even if its actual gross sales fail to meet the twenty percent threshold. Given that there is no Nebraska law discussing what "intended to be . . . derived" means or how it is demonstrated, New Jersey law can help fill in the gaps. Interpreting the NJFPA's identical statutory provision, the New Jersey district court found that a genuine issue of material fact existed where the purported franchisee derived less than three percent of its gross sales from its franchise but intended to derive more than twenty percent of its gross sales.[136] There, the court found that the purported franchisee's booking of three million dollars in shipments was enough to reasonably infer that the parties intended for the purported franchisee's gross sales to eclipse twenty percent of its overall revenues.[137]

III. THE PROTECTIONS PROVIDED BY THE NFPA

The NFPA substantively regulates the rights and obligations of the franchisor generally and with respect to termination or discontinuation. Outside of the discontinuation context, the NFPA subjects the franchisor to six prohibitions, regulating the franchisor's ability to restrict the franchisee's business. As explained later, there is some logical connection between these prohibitions and constituting good cause.

Once a business satisfies the above requirements, good cause and notice protection attaches to its relationship with the franchisor. To that end, the NFPA provides that a franchisor may not discontinue a franchise unless the franchisor has good cause and issues a statutorily-compliant notice. Good cause is only vaguely defined by the statute yet is litigated often enough to provide litigants with guidance more meaningful than "you know it when you see it." For its part, the notice requirements are carefully spelled out in the statute.

136. Ocean City Express Co. v. Atlas Van Lines, Inc., 194 F. Supp. 3d 314, 323-24 (D.N.J. 2016).

137. *Ocean City Express Co.*, 194 F.Supp. 3d at 323.

A. Enumerated Protections

The NFPA provides five substantive prohibitions restricting the rights of the franchisor to manage the franchise as it pleases, enumerated as six subparts in section 87-406.

1. Non-Waiver Provision

The NFPA has a non-waiver provision that supersedes contrary contractual agreements. This right is so nice, the NFPA essentially states it twice. Section 87-406(1), prohibits franchisors from requiring franchisees from assenting "to a release, assignment, novation, waiver or estoppel" which would relieve any person from liability imposed in the NFPA.[138] Then, in Section 87-406 (6), the statute prohibits franchisors from providing "any term or condition in any lease or other agreement ancillary or collateral to a franchise" which directly or indirectly violates the NFPA.[139] Accordingly, contracts that state that the NFPA does not apply or that the franchisee waives its rights under the law are paper tigers. The lone exception to this rule is that franchisors are permitted to provide in franchise agreements that the franchise is "not renewable or that the franchise is only renewable if the franchisor or franchisee meets certain reasonable conditions."[140]

2. Free Association

Nebraska is one of ten states that prohibits franchisors from restricting the right of "free association among franchisees for any lawful purpose."[141] Nebraska franchisees also have the constitutional right of association that has been construed to include freedom of litigious association.[142] As such, Nebraska franchisees would be able to join in class action lawsuits to defend their rights in an abusive system.[143] Granted, this right is more meaningful for franchisees in larger systems than it is for accidental franchisees.

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138. Neb. Rev. Stat. § 87-406(1).
139. Neb. Rev. Stat. § 87-406(6).
140. Neb. Rev. Stat. § 87-404(1).
141. Neb. Rev. Stat. § 87-406(2). The other states are Arkansas, California, New Jersey, Illinois, Washington, Hawaii, Michigan, Iowa and Rhode Island. Ark. Stat. § 4-72-206(a)(2); Cal. Corp. § 31220; N.J. Stat. Ann. § 56:10-7; 815 Ill. Comp. Stat. 705/17; Wash. Rev. Code Ann. § 19.100.180(2)(a); Haw. Rev. Stat. Ann. § 482E-6(2)(a); Mich. Comp. Laws. Serv. § 445.1527(a); Iowa Code § 537A.10(10); R.I. Gen. Laws § 19-28.1-16.
142. *See, e.g.*, United Transp. Union v. State Bar of Mich., 401 U.S. 576 (1971); NAACP v. Button, 371 U.S. 415 (1963); *see also* Robert W. Emerson, *Franchising and the Collective Rights of Franchisees*, 45 Vand. L. Rev. 1503, 1516-20 (1990).
143. *See* James B. Egle & Isaac S. Brodkey, *Encroachment in the Era of Digital Delivery Platforms: Impact of Delivery Apps on Brick and Mortar Exclusive Territories*, 41 Franchise L.J. 195, 207-10 (2021) (discussing the issues posed by lack of policing the use of third-party delivery services in a franchise system).

3. Management Change

The franchisor cannot require or prohibit a franchisee from changing its management without good cause and written notice.[144] Good cause in this respect is subject to the same definition as good cause in the discontinuation of a franchise. Absent any difference, a franchisor who can terminate a relationship on good cause can also force a change in the management of a franchise.

4. Sale of Equity

The franchisor cannot restrict the sale of any equity in the franchise so long as the "basic financial requirements of the franchisor are complied with and any such sale, transfer, or issuance does not have the effect of accomplishing a sale of the franchise."[145] Effectively, this prohibition allows franchisees to, among other things, award employees with equity, develop strategic partnerships, and raise capital to the extent that the fundamental ownership of the franchise remains the same. Although the statute does not identify when a "sale of the franchise" occurs, it is reasonable to assume that a franchisee "sells" the franchise when he or she is no longer the majority owner.[146]

5. Standards of Performance

The franchisor may not impose unreasonable standards of performance upon the franchisee.[147] This prohibition ensures that franchisors cannot pretextually generate good cause by increasing the franchisee's performance requirements tenfold from one year to the next. By the same token, the franchisor is prohibited from introducing new, unattainable performance requirements. As discussed in the following section, this prohibition supplies a reasonableness requirement to the good cause inquiry.

B. GOOD CAUSE

The NFPA provides that a franchisor shall not "terminate, cancel, or fail to renew a franchise without good cause" and provides that good cause is "limited to failure by the franchisee to substantially comply

144. NEB. REV. STAT. § 87-406(3).
145. NEB. REV. STAT. § 87-406(4).
146. *See* Western Convenience Stores, Inc. v. Burger King Corp., No. 8:07CV270, 2007 WL 2682245 (D. Neb. Sept. 7, 2007)(holding that no franchise agreement existed between Burger King and operator that purchased a Burger King franchise from predecessor franchisee without Burger King's consent).
147. NEB. REV. STAT. § 87-406(5).

with the requirements imposed upon him or her by the franchise."[148] The good cause requirement is the principal protection offered by the NFPA. To exemplify the extent of this protection, courts in other jurisdictions have gone so far as to reject the franchisor's bona fide business reasons for termination as grounds for good cause.[149] Contrary to the beliefs of some,[150] this requirement strikes a balance between the "freedom to contract" and protectionist crowds. Requiring good cause does not handcuff the franchisor from terminating an incompetent franchisee. By contrast, the good cause requirement ensures that so long as the franchisee achieves, the franchisor cannot discontinue the franchise.

Generally, there are two forms of good cause: (1) per se and (2) definitional. Per se good cause is found in the statute, either explicitly listed or provided through implication in another part of the statute. Definitional good cause is considered the franchisee's failure to comply with reasonable and material requirements of the franchise.[151]

1. Per Se Good Cause

The NFPA does not explicitly list per se good cause scenarios, however, it can be inferred that the termination circumstances altering the notice requirements constitute good cause per se. Section 87-404 sets forth seven exceptions to the notice requirement where the grounds for termination are based on: (1) the "voluntary abandonment by the franchisee of the franchise relationship"; (2) "the conviction of the franchisee in a court of competent jurisdiction of an indictable offense directly related to the business conducted pursuant to the franchise"; (3) "insolvency, the institution of bankruptcy or receivership proceedings";[152](4) "default in payment of an obligation or failure to account for the proceeds of a sale of goods by the franchisee to the franchisor or a subsidiary of the franchisor"; (5) "falsification of

148. NEB. REV. STAT. §§ 87-404(1), 87-402(8).

149. *See e.g.* Westfield Centre Serv., Inc. v. Cities Serv. Oil Co., 432 A.2d 48, 56 (N.J. 1981); Gen. Motors Corp. v. Gallo GMC Truck Sales, Inc., 711 F. Supp. 810, 816-17 (D.N.J. 1989); Instructional Sys. v. Comput. Curriculum Corp., 826 F. Supp. 831, 838 (D.N.J. 1993). Wright-Moore Corp. v. Ricoh Corp., 908 F.2d 128, 137 (7th Cir. 1990). But *see* Morley-Murphy Co. v. Zenith Elecs. Corp., 142 F.3d 373, 375-76 (7th Cir. 1998).

150. *See* Nicastro, *supra* note 24, at 804-16.

151. Leon F. Hirzel, *An Analysis of Franchise Agreement Terminations and Nonrenewals for Failure to Meet Minimum Performance Standards*, 37 FRANCHISE L.J. 123, 127 (2017).

152. *See* Kevin J. Smith, *Bankruptcy and the Franchise Agreement: When All, or Only Some, of the Partners of a Franchisee Files Bankruptcy*, 28 CAP. U.L. Rev. 775, 776 (2000) ("Often within the franchise agreements and states' statutes, bankruptcy and insolvency is included as a 'good cause' for the franchisor to terminate the franchise agreement"); Kumon N. Am., Inc. v. Timban, Civil No. 13-4809 (RBK/KMW), 2014 WL 2812122, at *1 (D.N.J. June 23, 2014) (failed to pay royalty payments).

records or reports required by the franchisor"; (6) "the existence of an imminent danger to public health or safety"; or (7) "loss of the right to occupy the premises from which the franchise is operated by either the franchisee or the franchisor."[153] Many of these instances constitute good cause in other jurisdictions.[154]

2. Definitional Good Cause

The NFPA defines good cause as "failure by the franchisee to substantially comply with the requirements imposed upon him or her by the franchise."[155] Unsurprisingly, this is the same standard found in the NJFPA,[156] and similar to statutes around the country[157] and the Nebraska Equipment Business Regulation Act.[158] Interestingly, the Nebraska Motor Vehicle Industry Regulation Act directs the board to consider failure to substantially comply with reasonable and material requirements of the franchise as only one of eight factors when determining if the franchisor had good cause for termination.[159]

153. NEB. REV. STAT. § 87-404(1).

154. *See* David A. Eisenberg, *Balancing a Relationship - "Good Cause" Termination of Franchise Agreements in Michigan*, 72 U. DET. MERCY L. REV. 369, 389-90 (1994) (collecting case where the following have been considered good cause for termination: "1) nonpayment or late payments of debts or obligations by the franchisee; 2) lack of veracity and underreporting of sales; 3) violation of quality standards and procedures; 4) failure to maintain clean premises; 5) failure to devote attention to the business; 6) unsatisfactory service to customers; 7) failure to maintain specified hours of operation; 8) failure to maintain business office as agreed; 9) transfers of franchise in violation without franchisor's permission or transfers to competitor; 10) death of franchisee; 11) insolvency or bankruptcy of the franchisee; 12) failure to meet performance quotas; and 13) breach of noncompetition provisions.")(citations omitted); *see also* Emerson, *supra* note 68, at 111-12 (listing the principal reasons that courts have found good cause following a thorough study of more than 300 franchise termination cases).

155. NEB. REV. STAT. § 87-402(8).

156. N.J. STAT. ANN. § 56:10-5.

157. Emerson, *supra* note 68, at 108 ("Most legislatures and courts define 'good cause' narrowly as the failure of a franchisee or dealer to comply substantially with the requirements under a franchise agreement.").

158. *See* NEB. REV. STAT. § 87-705(1)(k) ("A supplier shall be deemed to have good cause to terminate, cancel, or not renew a dealer agreement when a dealer: . . . Has consistently failed to substantially comply with essential and reasonable requirements imposed by the dealer agreement, but only if that requirement is also generally imposed upon similarly situated dealers in Nebraska.").

159. The eight factors for consideration are: (1) amount of business transacted by franchisee; (2) investment necessarily made and obligations incurred; (3) permanency of the investment; (4) whether disruption is injurious to the public welfare; (5) whether the franchisee has adequate facilities, equipment, parts, and personnel to provide customer care for vehicles sold; (6) whether the franchisee refuses to honor warranties of the franchisor; (7), failure by the franchisee to substantially comply with reasonable and material requirements of the franchise; and (8) bad faith by the franchisee in complying with those terms. NEB. REV. STAT. § 60-1433. The Act elsewhere provides three factors that do *not* constitute good cause: (1) the fact that a franchisor desires further penetration of the market; (2) the change of ownership or executive management of the franchisee's dealership, unless the franchisor proves such a change will be substantially

Despite the seemingly universal recognition that a franchisee must substantially comply with the requirements of the franchise, two questions arise: (1) what are those requirements? and (2) what is substantial compliance?

The first question is fundamentally a question of kind. Latent in the NFPA's good cause provision is a condition that the performance requirements are reasonable and material. Section 87-405 provides that a franchisor cannot impose "unreasonable standards of performance on the franchisee." Consequently, good cause cannot be founded on the failure to comply with an impermissible unreasonable standard of performance.

Next, materiality is necessary for the good cause provision to function in the first place. Without considering materiality, good cause is reduced to showing little more than substantial compliance with every single requirement. The New Jersey District Court, for example, has held that substantial compliance under the NFJPA does not require perfect adherence to every term of the agreement, but at minimum requires the franchisee to refrain from acting in direct defiance of a term of the agreement.[160] Naturally, requirements vary in importance. Many would agree that the essential purpose of a franchise relationship is to sell and promote the franchisor's products within a particular area. As such, a franchisor faces significant difficulty convincing a court that it has good cause to terminate a franchisee that routinely exceeds its sales and promotional goals, but fails to meet its peripheral obligations. By contrast, that franchisor would have a much easier time convincing a court good cause exists where a franchisee posts declining sales every year, notwithstanding the franchisee exceeding its other requirements.

Identifying these requirements differs across the levels for formality. In more formal arrangements, it is usually answered by looking at the specific charges in the franchise agreement, communications at review meetings, and other goals and expectations explained throughout the relationship. In more informal relationships, an accidental franchisor may not have any set or delineated requirements for the franchisee, meaning that the requirements must be constructed from past dealings opposed to specific expectations.

Whether a party substantially complied is a question of degree, which does not lend itself to swift determinations. Consider the following example: a software distributor is obligated in its distributorship agreement to establish an internet presence on all major social

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detrimental to distribution; and (3) the fact that a franchisee refused to purchase or accept delivery of any motor vehicle. NEB. REV. STAT. § 60-1429.

160. Goldwell of N.J., Inc. v. KPSS, Inc., 622 F. Supp. 2d 168, 187-90 (D.N.J. 2009).

media platforms. It seems likely that the franchisee could substantially comply by listing its franchise on Twitter, Facebook and LinkedIn despite failing to develop Snapchat and TikTok accounts. Likewise, if that distributor were required to increase year-over-year sales by 5%, a 4.8% sales increase may be enough to be considered substantial compliance.

The existence of good cause is a fact-intensive inquiry, ill-suited for summary judgment. This is especially true in informal relationships where the parties must first establish what the franchise's specific requirements are, and then assess the franchisee's success in meeting those obligations. A written contract with specific obligations alleviates some of the ambiguity, but even so a franchisee's obligations may (and often do) extend beyond those written in the agreement, not to mention the lingering concerns of reasonableness, materiality, and substantial compliance with such requirements.

C. Notice Requirements

A franchisor may only terminate, cancel, or fail to renew a franchise after having given "written notice setting forth all the reasons for such termination, cancellation, or intent not to renew to the franchisee at least sixty days in advance of such termination, cancellation, or failure to renew."[161] Absent any exception, the discontinuation notice must be (1) written; (2) identify the action taken; (3) set forth "all the reasons for the action"; and (4) be at least sixty days in advance.[162]

Critically, regardless of the existence of good cause, a franchisee is not terminated until it is issued a statutorily compliant notice. Across the country, grantors commonly fail to issue a proper notice in several different manners. It is common for a grantor to "see red" and issue a notice that is more focused on assailing the franchisee than complying with the statutory requirements. Some grantors will try to draft the notice as curt as possible. These "short and sweet" notices may fail to properly set forth "all the reasons for the action." Other times, the grantor will vaguely foreshadow what is to come without ever identifying what action it plans on taking, only to then attempt to terminate the agreement at the expiration of the notice period. Being able to recognize these situations as falling short of the notice requirements is crucial.

As mentioned earlier, the NFPA lists seven exceptions to the notice requirement. In the event of abandonment by the franchisee, the

161. Neb. Rev. Stat. § 87-404(1).
162. Neb. Rev. Stat. § 87-404(1).

franchisor may discontinue on 15 days' written notice. In the event of any other exception, the franchisor may discontinue effective immediately upon written notice.[163] If a franchisor attempts to terminate pursuant to any of these reasons, that does not preclude the franchisee from challenging the legitimacy of the action. A franchisee should not blanketly accept a franchisor's determination that 15 days' notice or no notice whatsoever is required.

IV. PRACTICAL POINTERS

Considering the sheer breadth of protectable relationships, it is important for attorneys advising Nebraskan businesses to thoroughly understand the NFPA and how it may apply throughout their client's relationship with another business.

A. At the Outset

Whether the NFPA may apply to a business dealing is a critical question that attorneys must ask themselves before the establishment of most business relationships, particularly if their client will be distributing the product of another party. Attorneys should reject the myopic perspective that the NFPA only applies to package or business format franchises operating within the state. A protected franchise may exist in a variety of different industries, and it is mission critical for parties to assess whether NFPA-protection attaches to their business. Recognizing the applicability of the NFPA, or lack thereof, may inform certain business decisions later. In some instances, the price of protection is simply vigilance.

B. Contract Drafting

A written contract is an integral part of claiming protection under the NFPA and the language of the contract can either bolster or weaken the protection. Consequently, franchises must be aware of the benefits and potential detriments of formalizing their relationship with a franchisor. The following is a far from exhaustive list of provisions that franchisees should understand before signing on the dotted line.

1. Inclusion of Definitional and Location and Sales Requirements

When it comes to formalizing the relationship, franchisees should be eager to work some of the definitional elements into the contract. Various points for franchisees to make in arguing for protection under

163. Neb. Rev. Stat. § 87-404(1).

the NFPA have been set forth above, but working some of the definitional elements into the contract would undoubtedly bolster the claim and may alleviate some uncertainty. Defining the relationship in a written contract would eliminate much of the guesswork around the existence of a franchise.

It is also prudent for the franchisee to attempt to include the additional requirements within the agreement. As discussed, the location and sale requirements do not need to be included in the agreement, but such an inclusion could eliminate uncertainty. For instance, if the franchisee and franchisor included a provision that the franchisee intended to derive twenty percent of its business from the franchisor, the franchisee would be in a better position demonstrating that intention than it otherwise would be. Likewise, including specifics regarding the maintenance of a place of business in Nebraska would prevent any attempt by the franchisor to argue that the franchise is not situated within the state.

2. Forum Selection Clauses and Choice of Law Provisions

Despite the NFPA explicitly providing that a party cannot contract out of protection, franchisees should understand that franchisors may attempt to skirt this statutory protection by incorporating forum selection and choice of law clauses into the agreement.[164] In the vast majority of instances, a court will enforce a forum selection clause and transfer the case to the agreed venue,[165] and Nebraska is once again no exception.[166] Once transferred, there is no guarantee that a court will value the public policy backing the NFPA over the forum state's interest in allowing parties to contract as they please.[167]

In 1989, the United States Court of Appeals for the Eighth Circuit found that the anti-waiver provision of the Minnesota Franchise Act ("MFA") did not outweigh Minnesota's interest in enforcing choice of

164. For a thorough discussion of franchisors attempting to contract around anti-waiver provisions, *see* Johnathan Klick, Bruce Kobayashi, & Larry Ribstein, *Federalism, Variation, and State Regulation of Franchisee Termination*, 3 ENTREPRENEURIAL BUS. L. J. 356, 366-73 (2009).

165. *Id*. at 368; *see also* Atl. Marine Constr. Co., Inc. v. U.S. Dist. Ct. for the W. Dist. of Tex., 571 U.S. 49 (2013).

166. Polk Cty. Recreational Ass'n v. Susquehanna Patriot Commercial Leasing Co., Inc., 734 N.W.2d 750, 759 (Neb. 2007) ("Nebraska courts are generally directed to enforce forum selection clauses unless certain statutory exceptions apply."); *see also* Patrick J. Borchers, *Annual Survey of Issues Affecting Nebraska Law: Nebraska Choice of Law: A Synthesis*, 39 CREIGHTON L. REV. 1, 14 (2005) ("Nebraska courts have routinely cited and applied section 187, only rarely invalidating choice-of-law clauses.").

167. Klick, Kobayashi, & Ribstein, *supra* note 164, at 372-73 (tabling a panoply of results in the enforcement of choice of law provisions).

law provisions.[168] There, a distributor brought an action alleging a violation of the MFA even though the parties previously agreed that the distributorship agreement would be governed by the laws of Nebraska.[169] The circuit court first determined that the contacts between the parties and the two forum states were equal, and then found that the bargaining position between the parties was equal given that the matter involved "multi-million-dollar dealings between two computer companies with nationwide clienteles."[170] And, finally, the circuit court found that the freedom to contract for a particular law outweighed the public policy backing the MFA.[171] In response to this decision, the Minnesota Legislature amended the MFA to explicitly provide that the Act could not be waived through a choice of law provision.[172]

Recently, pursuant to a forum selection clause, the Western District of Wisconsin transferred a dealership claim arising under the Wisconsin Fair Dealership Law to the Western District of Washington.[173] Upon receipt of the case, the court determined that Washington law applied and granted judgment on the pleadings in favor of the grantor.[174] The court found that the parties' contract included a provision stating that Washington law applied, and that Washington's choice of law rules directed the court to apply Washington law.[175]

In Washington, when parties dispute the choice of law, the court determines whether there is a "real conflict"—changing the result of the dispute—between the laws of the two states and whether the choice of law provision is effective.[176] The court determined that there was an actual conflict between the states' laws because the WFDL requires grantors to show good cause and provide notice—two features absent from Washington's franchise law.[177] The court then deter-

168. Modern Comput. Sys., Inc. v. Modern Banking Sys., Inc., 871 F.2d 734, 738 (8th Cir. 1989).

169. *Modern Comput. Sys.*, 871 F.2d at 739.

170. *Id*. at 739.

171. *Id*. at 740.

172. MINN. STAT. § 80C.21 ("Any condition, stipulation or provision, including any choice of law provision, purporting to bind any person who, at the time of acquiring a franchise is a resident of this state, or, in the case of a partnership or corporation, organized or incorporated under the laws of this state, or purporting to bind a person acquiring any franchise to be operated in this state to waive compliance or which has the effect of waiving compliance with any provision of sections 80C.01 to 80C.22 or any rule or order thereunder is void.").

173. ACD Distribution, LLC v. Wizards of the Coast, LLC, No. 18-cv-658-jdp, 2018 WL 4941787 (W.D. Wis., Oct. 12, 2018)

174. ACD Distribution, LLC v. Wizards of the Coast, LLC, No. C18-1517JLR, 2020 WL 3266196, at *6 (W.D. Wash. June 17, 2020).

175. *ACD Distribution, LLC*, 2020 WL 3266196, at *3.

176. *Id.*, at *4.

177. *Id.*, at *5.

mined that the dealer was unable to demonstrate Wisconsin had a materially greater interest.[178] On appeal, the United States Court of Appeals for the Ninth Circuit upheld the decision.[179]

3. Non-Renewal Provisions and "Certain Reasonable Conditions"

Franchisees should anticipate franchisors attempting to include a provision providing that the franchise is non-renewable. Section 87-404 provides that a franchisor is permitted to include in a contract that the franchise is not perpetually renewable.[180] This ability is a significant fallback of having a clear written agreement, and significantly limits the availability of NFPA protection following the contract term limit. Franchisors are also able to condition non-renewability on the ability of the franchisee to meet "certain reasonable conditions." It seems likely that the ability to meet certain reasonable conditions is little different than the good cause analysis fleshed out above.

4. Covenants to Not Compete

Franchisees should be cognizant of the treatment of covenants not to compete within a franchise agreement. Normally, Nebraska law does not approve of blue-penciling or revising non-compete agreements to make them valid and enforceable.[181] This rule is reaffirmed in *H&R Block Tax Services*,[182] where the Nebraska Supreme Court found that because a portion of the covenant was invalid, the remainder was unenforceable.[183] The court also held that a covenant to not compete within a franchise agreement was more analogous to the same prohibition subsequent to a sale of a business than employment agreements containing such prohibitions.[184]

Ten years later, in *Unlimited Opportunity*,[185] the Nebraska Supreme Court rejected a franchisee's argument that the NFPA endorses a blue-penciling rule.[186] There, the court held that the NFPA only defines the relationship and responsibilities between the franchisor

178. *Id.*
179. ACD Distribution LLC v. Wizards of the Coast LLC, Nos. 20-35828, 20-35986, 2021 WL 4027805, at *1 (9th Cir. Sept. 3, 2021) (unpublished). This logic was subsequently followed by the Central District for California in Crazy Lenny's E.Bikes, LLC v. Alta Cycling Grp., LLC, CV 22-214 DSF (JEMx), 2022 WL 1537029 (C.D. Cal. May 12, 2022). There, the Court found that California law required the enforcement of a choice of law provision in the Dealer Agreement and dismissed plaintiff's claim under the WFDL. *Id.* at *3.
180. NEB. REV. STAT. § 87-404(1).
181. *See* CAE Vanguard, Inc. v. Newman, 518 N.W.2d 652, 655 (Neb. 1994).
182. 269 Neb. 411 (2005).
183. H & R Block Tax Servs., Inc. v. Circle A Enters., Inc., 269 Neb. 411, 417 (2005).
184. *H & R Block Tax Servs.*, 269 Neb. 411, 418-20 (2005).
185. 861 N.W.2d 437 (2015).
186. Unlimited Opportunity, Inc. v. Waadah, 861 N.W.2d 437, 441 (Neb. 2015).

and franchisees and "does not reference noncompete covenants in franchise agreements."[187] Thus, the court concluded that the Act does not dictate public policy for the severability of franchise agreements.[188]

After the *Unlimited Opportunity* decision, the Nebraska Legislature added section 87-404(2)[189] which provides:

> If restrictions in a noncompete agreement are found by an arbitrator or a court to be unreasonable in restraining competition, the arbitrator or court shall reform the terms of the noncompete agreement to the extent necessary to cause the restrictions contained therein to be reasonable and enforceable. The arbitrator or court shall then enforce the noncompete agreement against the franchisee, the guarantor, or any person with a direct or indirect beneficial interest in the franchise in accordance with the reformed terms of the noncompete agreement. The arbitrator or court may reform and enforce the restrictions in a noncompete agreement as part of an order for preliminary or temporary relief. Notwithstanding section 87-403, this subsection also applies to any noncompete agreement entered into by a franchisor headquartered in the State of Nebraska, unless otherwise agreed to by the franchisor and franchisee. This subsection applies to any noncompete agreement entered into before, on, or after April 8, 2016.

Breaking this section down, all noncompete agreements entered into between a franchisor and franchisee are subject to blue-penciling as necessary to "cause the restrictions . . . to be reasonable and enforceable."[190] This amendment lessens the pressure on the franchisor to properly draft a non-compete agreement and constricts the ability of a franchisee to compete following the termination of the franchise relationship. Franchisees should remain cognizant that, given the holding in *H&R Block Tax Services*, any blue-pencilling would likely be less forgiving than it would be in employment agreements.[191]

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187. *Unlimited Opportunity,* 861 N.W.2d at 441-43 (Neb. 2015).

188. *Id.*

189. Neb. Unicameral, LB742,, 105th Leg., 2nd Sess. (2018); *see also* Neb. Unicameral, LB942, 104th Leg., 2nd Sess. (2016).

190. NEB. REV. STAT. § 87-404(2).

191. *H & R Block Tax Servs.*, 693 N.W.2d at 554 ("Nebraska courts are generally more willing to uphold promises to refrain from competition made in the context of the sale of goodwill as a business asset than those made in connection with contracts of employment. . . . The rationale behind the differential treatment is that in a sale of a business, 'it is almost intolerable that a person should be permitted to obtain money from another upon solemn agreement not to compete for a reasonable period within a restricted area, and then use the funds thus obtained to do the very thing the contract prohibits.'") (citations omitted).

5. Alternative Dispute Resolution

Mediation and arbitration are increasingly popular forms of dispute resolution, particularly among feuding businesses,[192] and disputes between franchises are no exception.[193] In fact, under various state franchise statutes, mediation or arbitration are necessary prerequisites to filing an action.[194] The NFPA does not directly discuss arbitration or mediation, and the only mention of either is in section 87-404(2), which touches on the role of an arbitrator in the context of reforming non-compete agreements. Yet, alternative dispute resolution provisions regularly appear in franchise contracts, or the parties decide to pursue mediation or arbitration by themselves. An arbitration agreement would almost certainly be upheld, even though it may facially contract around the NFPA.[195] That said, whether the NFPA would apply to the proceeding is likely a question that would be resolved following a choice-of-law determination by the arbitrator.

C. TERMINATION

A discontinuation notice can stun franchisees, significantly affecting both their professional and personal lives. Other times, discontinuation is hardly a surprise and merely the climax of several months of feuding. Regardless of the circumstance, the harm posed by termination requires immediate redress, and paralysis could cause irreversible harm to the business. For these reasons, securing a temporary injunctive relief pending further injunctive relief is the most effective route for potentially terminated franchisees to take, especially consid-

192. *See generally* Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?* 25 OHIO ST. J. DISP. RESOL. 433 (2010); Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. Rev. 1119 (2019).

193. Peter Klarfeld, Michael Lewis, & Peter Silverman, *Mediating Franchise Disputes*, A.B.A. 1, 38 (2009), https://www.americanbar.org/content/dam/aba/events/franchising/2009/w12.pdf (identifying success rate, informed risk management and relatively low costs as advantages of mediating franchise disputes); Arthur L. Pressman & Justin Klein, *The Strategy of Arbitration*, A.B.A. 1, 31 (2012), https://www.americanbar.org/content/dam/aba/publications/franchising_past_meeting_materials/2012/w10.pdf (discussing the use and benefits of arbitration clauses in franchise agreements).

194. *See* Lydia Nussbaum, *Mediation as Regulation: Expanding State Governance over Private Disputes*, 2016 UTAH L. REV. 361, 381-82 ("One common area in which states deploy these statutory mediation mandates involves disputes between private commercial contracting parties, often relating to manufacturing and distribution contracts."); Senator Russell D. Feingold, *Mandatory Arbitration: What Process is Due?*, 39 HARV. J. ON LEGIS. 281, 294 (2002) ("Most states have created their own alternative dispute resolution mechanisms and forums with access to auto industry expertise that provide inexpensive, efficient, and non-judicial resolution of disputes.").

195. To this end, the Supreme Court has repeatedly upheld the enforceability of arbitration agreements. *See e.g.*, Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 247-48 (2013); Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 681-84, (2010).

ering the effective one-year commencement window. In limited notice circumstances, immediate injunctive relief is even more necessary.

If the action arises in Nebraska state court, the franchisee should consider immediately moving for *ex parte* relief under Neb. Rev. Stat. § 25-1064 along with further other injunctive relief under the NFPA[196] and section 25-1063. Pursuant to section 25-1064, a judge may grant a temporary restraining order without notice where (1) "it clearly appears from specific facts shown by affidavit that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party . . . can be heard in opposition" and (2) "the applicant . . . certifies to the court in writing the efforts, if any, which have been made to give such notice and the reasons supporting the applicant's claim that such notice shall not be required."[197] If the court determines that the franchisee has met its burden for a temporary restraining order without notice, then the court is required to revisit the issues at a temporary injunction hearing.[198]

Injunctive relief under section 25-1063 is available where "the commission or continuance of some act . . . would produce great or irreparable harm to the plaintiff" where the franchisor "is doing, or threatens, or is about to do . . . some act in violation of the plaintiff's rights . . .," or in "any case specially authorized by statute."[199] A court may enjoin "a threatened injury whenever its nature is such that it cannot be adequately compensated in damages and its continuation would occasion a constantly recurring grievance,"[200] and the NFPA explicitly provides that a franchisee may pursue injunctive relief.[201]

For claims arising in federal court, the Eighth Circuit's test for a temporary restraining order or preliminary injunctive relief requires the court to consider: (1) the threat of irreparable harm to the movant; (2) the balance of that harm and the injury that granting relief will inflict on other parties; (3) the movant's likelihood of success on the

196. NEB. REV. STAT. § 87-409 ("Any franchisee may bring an action against its franchisor for violation of sections 87-401 to 87-410 to recover damages sustained by reason of any violation of sections 87-401 to 87-410 and, when appropriate, shall be entitled to injunctive relief."). Unlike other states, violations of the NFPA do not create a presumption of irreparable harm. *See e.g.*, WIS. STAT. § 135.065 ("In any action brought by a dealer against a grantor under this chapter, any violation of this chapter by the grantor is deemed an irreparable injury to the dealer for determining if a temporary injunction should be issued.").

197. NEB. REV. STAT. § 25-1064(3).

198. *Id.* ("When the motion for a temporary injunction comes up for hearing, the party who obtained the temporary restraining order shall proceed with the application for a temporary injunction, and if he or she does not do so, the district court shall dissolve the temporary restraining order.").

199. NEB. REV. STAT. § 25-1063.

200. Daugherty v. Ashton Feed and Grain Co., Inc., 303 N.W.2d 64, 69 (Neb. 1981).

201. NEB. REV. STAT. § 87-409.

merits; and (4) the public interest.[202] No single factor is determinative,[203] and franchisees should also be aware that they will need to post security "proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained."[204]

Recent case law demonstrates that franchisees should not take the existence of a franchise for granted and must be prepared to demonstrate the existence of such relationship or otherwise face an uphill battle to demonstrate that they are worthy of "extraordinary relief."[205] Likewise, absent a presumption of irreparable harm, the burden is on the franchisee to demonstrate that the harm posed to its business cannot be mollified by monetary damages or is otherwise easily calculable.[206] The franchisee must be prepared to demonstrate that the harm posed by discontinuation is integral to its operation.

From a strategic perspective, securing temporary injunctive relief pending further injunctive relief is greatly beneficial to the franchisee. In issuing such relief, the Court would provide the franchisee with the security contemplated by the NFPA and rebalance the bargaining scales. This would substantially aid the franchisee in its negotiations with the franchisor to fairly resolve the conflict without further judicial process.

D. Related Claims

When a franchise is unlawfully discontinued, the franchisee should be aware of other claims available to remedy the harm. Commonly, a franchisor will replace the discontinued franchisee with a new franchisee. These replacement decisions rarely come from thin

202. Johnson v. Minneapolis Park & Recreation Bd., 729 F.3d 1094, 1098 (8th Cir. 2013) (citing Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981) (en banc)).

203. Adam-Mellang v. Apartment Search, Inc., 96 F.3d 297, 299 (8th Cir. 1996).

204. Fed. R. Civ. P. 65(c).

205. Roudachevski v. All-Am. Care Ctrs., Inc., 648 F.3d 701, 705 (8th Cir. 2011). In *Omaha Interlock, Inc. v. Alcohol Detection Sys. Tech., LLC*, the purported franchisee failed to demonstrate that it would suffer damages that could not be remedied by money damages. 8:21CV8, 2021 WL 4307522, at *5 (D. Neb. Sept. 21, 2021). Similar to *Western Convenience*, the purported franchisee failed to demonstrate that there was a meeting of the minds between it and the alleged franchisor regarding an exclusive dealer agreement subsequent to the purported franchisee's purchase of a predecessor franchisee's assets. *Id.* at *15; *see also* Colo. Sec. Consultants, Ltd. Liab. Co. v. Signal 88 Franchise Grp., 8:16-CV-439, 2017 WL 1047260 at *1 (D. Neb. Mar. 17, 2017) (finding that a franchisor failed to demonstrate irreparable harm where a franchisee began to compete under a different entity, despite the potential violation of a non-compete agreement).

206. *See e.g.*, Med. Shoppe Int'l, Inc. v. S.B.S. Pill Dr., Inc., 336 F.3d 801, 805 (8th Cir. 2003) (internal citation omitted) ("'Loss of intangible assets such as reputation and goodwill can constitute irreparable injury.' Harm to reputation and goodwill is difficult, if not impossible, to quantify in terms of dollars.").

air and are often the product of month-long courtships. When the replacement franchisee begins soliciting the franchisor for business, it may be interfering with the franchisor's contractual relationship with the to-be-discontinued franchisee. Franchisors may also supplant a franchisee as part of a nationwide distribution consolidation effort. These efforts may give rise to claims under various state and federal anti-trust laws, especially if the franchisor offers favorable promotional spending and price discounts to the replacement franchisee.[207] Consequently, a discontinued franchisee should look at the availability of bringing anti-trust, conspiracy, and tortious interference claims as well as others against both the franchisor and the franchisee.[208]

Franchisees should try to steer away from arguing for a common law right to good cause and notice. In *McDonald's Corp. v. Markim, Inc.*,[209] the Nebraska Supreme Court rejected a purported franchisee's argument that in common law, it was entitled to good cause protection.[210] The court declined to reconstruct Nebraska law or retroactively apply the underlying policy of the NFPA.[211] The court determined that all the purported franchisee was entitled to under common law was good faith conduct by the franchisor, which could not be equated with good cause.[212]

Moreover, a franchisee should also consider the protections offered under other Nebraska specific industry statutes and other state franchise statutes. As discussed, a franchisee may be protected under both the NFPA and a specific industry statute, depending on the nature of the business and product range offered.

A Nebraskan-based multi-state dealer may also be protected under other state franchise statutes when it has sufficient contact within the state.[213] For instance, a franchisee may be based in Ne-

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207. For a guidance on the interplay between antitrust and franchise laws, *see generally* Kay Lynn Brumbaugh & Allan P. Hillman, *Fundamentals 201: Antitrust Essentials for Franchise Lawyers*, A.B.A. (2012), https://www.americanbar.org/content/dam/aba/publications/franchising_past_meeting_materials/2012/w8.pdf. Nebraska has enacted anti-trust laws targeting: horizontal restraints (NEB. REV. STAT. § 59-801); monopolization (NEB. REV. STAT. §§ 59-802, 1604); vertical restraints (NEB. REV. STAT. §§ 59-1605, 1506); mergers (NEB. REV. STAT. §§ 59-1606(1)); and predatory pricing (NEB. REV. STAT. §§ 59-501, 502, 503, 504). A private right of action exists for violations of sections 59-801 to 59-831. NEB. REV. STAT. § 59-828(2).

208. More often than not, these disputes will be litigated in federal court. As such, franchisees should be keenly aware of the Eighth Circuit's interpretation of the causes of the action.

209. 306 N.W.2d 158 (Neb. 1981).

210. McDonald's Corp. v Markim Inc., 306 N.W.2d 158, 163 (Neb. 1981).

211. *McDonald's Corp*., 306 N.W.2d at 162 (Neb. 1981).

212. *Id.* at 167 (citing Melson v. Turner, 251 N.W. 172 (Neb.1933))

213. For example, in *Hales Mach. Tool, Inc. v. Doosan Infracore Am. Corp.*, plaintiffs brought causes of action under the franchise laws (most industry-specific) of Iowa, Minnesota, Nebraska, South Dakota and Wisconsin. No. CV 15-3625 (MJD/JSM), 2016 WL

braska, but do considerable business in Wisconsin. In this circumstance, the franchisee could avail itself of the protections of the Wisconsin Fair Dealership Law, which as alluded to, features a dealer-friendly standing test. Thus, if that franchisee were terminated, it could bring claims under both the NFPA and the WFDL, although relief under the statutes may be limited to the franchisee's presence in the respective states.[214] Multi-state dealers should be aware of how their protection may be similarly limited in other states as well.

V. CONCLUSION

The Nebraska Franchise Practices Act is hardly a peculiar, hypertechnical law applying to only a narrow subset of commercial relationships. Instead, the law offers protection to qualifying businesses across a range of industries. In times of economic hardship, this protection may be invaluable for the state's businesses, and it is incumbent on attorneys advising Nebraskan businesses to recognize its potential—husked or otherwise.

11518312 at *1 (D. Minn. May 24, 2016); *see also* Keen Edge Co., Inc. v. Wright Mfg., Inc., No. 19-CV-1673-JPS, 2020 WL 4926664 at *2 (E.D. Wis. Aug. 21, 2020) (dealer brought claims under Illinois, Indiana, Kansas, Minnesota, Missouri, North Dakota, and Wisconsin).

214. Brian Butler & Jeffrey A. Mandell, *The Wisconsin Fair Dealership Law*, §§ 2.6, 3.3 (5th ed. 2022).