# THE BKCG BULLETIN

FALL 2021 EDITION

## Putting The Cart Before The Store

### BKCG Delivers Complete Knockout For Ralphs Against Landlord

After nearly 40 years of having Ralphs as the main tenant at its small shopping center in Venice Beach, California, landlord Lincoln Center, LLC decided to try to evict the popular supermarket. Why? Was Ralphs not paying rent? No. Was Ralphs somehow interfering with the only other tenant, Rite Aid? No. Lincoln Center's *purported* reason was that Ralphs was placing shopping carts in the front of the store for its customers and using its loading dock area for deliveries. You read that correctly. Lincoln Center tried to evict Ralphs for having shopping carts out in front of the store and a delivery truck in its loading dock. As BKCG successfully argued at trial, the *real* reason Lincoln Center sued was because Ralphs was in a long-term lease with favorable rent rates in the now gentrified area of Venice Beach.

The Ralphs store in Venice Beach was originally a Boys Market, then an Alpha Beta, and then a Ralphs–all of those subject to the original lease signed back in 1979 when the landlord was Earl Schafer and his wife Sallie Jac Schafer. The Schafers ultimately transferred the property to a limited liability company that has been managed by their daughter, Sheila Murrell, for decades.

Back in 1979, Venice Beach was a modest beach town and real property was not what it is today. With SnapChat and Google (among others) opening offices in Venice, both commercial and residential real estate values soared. Ralphs has invested heavily in this location, and in 2015, completely renovated the market in one of its most expensive remodels ever.

Unfortunately for Lincoln Center, however, landlords locked into long-term leases could not enjoy the real estate boom–unless such a landlord could concoct a reason to evict a paying tenant . . .

Lincoln Center wanted a piece of this growing pie, and, in the Fall of 2019, Lincoln Center sent Ralphs a default notice with a laundry list of claimed "defaults" demanding that Ralphs either comply with the landlord's conditions or be evicted. This list of grievances included several practices common to virtually all supermarkets in Southern California. (continued on page 4)

## BKCG Prevails In Auto Dealership Buy Sell Dispute

Alton Burkhalter and Ros Lockwood recently won a binding arbitration for the buyer of a Honda dealership in its dispute with the Seller over the transfer price of the new vehicle inventory.

BKCG's client purchased an existing Honda dealership. As is customary in such a transaction, the Buyer purchased all of Seller's new vehicle inventory. The custom and practice in the industry is that the Seller realizes virtually all of its profit from selling Buyer the dealership goodwill, also known as "Blue Sky", and assets such as new vehicle inventory are transferred from Seller to Buyer at the Seller's net cost. The language used the APA by the parties appeared to reflect this industry custom and practice. But, after the escrow closed, the Buyer realized that Seller had received, but had not passed on to Buyer, credits and payments for Holdback, Honda Transfer Balance, Dealer Marketing Allowance, Floor Plan Assistance and Fuel Tank Full.

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## Businesses Move Forward With Vaccination Requirements

Businesses are moving forward with re-opening and getting their employees back at work and customers using their services. They appear to be done waiting for those resistant to getting vaccinated to change their mind. In fact, many of the businesses pushing hardest for mandatory vaccinations are in industries such as higher education, airlines, hotels, restaurants, and entertainment. All such businesses have been heavily impacted by the pandemic and are taking action.

The reality is that companies understand they need to get people off the fence so business can get back to normal. This has forced many companies to enact vaccine policies. The policies enacted range from providing incentives to enacting a financial cost on those refusing to get vaccinated. But businesses have learned that simply waiting out the pandemic is not an option if it wants to survive.

In setting a vaccine policy, consideration must be given to the scope of the policy. Will the policy apply to all categories of workers or only certain workers? Will there be exemptions for medical or religious reasons? If an employee falls within an exemption, are they permitted in the office or must they work remotely? If a trade show does not require attendees to be vaccinated, does the company allow its employees to attend? Do you allow your employees to attend meetings in offices where vaccinations are not required?

Consideration must also be given to the approach to be used to get employees vaccinated. On this issue, companies are using several different approaches. At one end of the spectrum are financial incentives to employees. Some businesses like Amazon have paid cash to employees who get vaccinated. Other companies such as Starbucks provide paid time off to encourage its employees to get vaccinated. Still other businesses are trying to entice employees to get vaccinated with extra vacation days.

At the other end of the spectrum are companies that enact a financial cost on those who are not vaccinated. Delta Airlines announced a type of health insurance surcharge on any unvaccinated employee; that is, an employee has to pay an additional $200 per month toward their health insurance if they want to remain unvaccinated. United Airlines required all employees to be vaccinated by the end of September. United then upped the ante by telling those employees who seek an exemption from the vaccine requirement on religious or medical grounds that they will be placed on unpaid administrative leave.

Coming up with a vaccine policy may seem straightforward. However, there are a number of decisions that have to be made to ensure that your business has a coherent and well thought out plan to get employees back at work in a safe environment.

Please contact Keith Butler at kbutler@bkcglaw.com or (949) 975-7500 if you have any questions about this article, or any other related matter.

## Criminal Conduct: Paying Late Wages During COVID?

In our Spring 2021 Newsletter, we discussed the expanded powers of the new Department of Financial Protection and Innovation (the "DFPI"), including broad powers to investigate and punish COVID-19-related business misconduct. The naming of this new department, which the legislature vested with more power than its predecessor, signaled that California is taking finance and business violations very seriously during the ongoing pandemic. This focus on enforcing finance and business regulations has meant that, even during the pandemic, the state of California is still strictly enforcing employers' obligations through any and all methods available, not just through the new DFPI.

Employers operating in California know (or should know) that the California Labor Code imposes numerous obligations regarding employees' wages, breaks, and various other employment-related matters. Of particular concern for many employers while the pandemic drags on, however, are the consequences of paying employees their wages late—especially when the late payment is due entirely to circumstances outside the employers' control.

Many California businesses that center around in-person services, and particularly indoor services, have suffered immensely during the pandemic, and continue to struggle to recover as the pandemic persists. Countless businesses such as gyms, theaters, and restaurants have been forced to close entirely due to the devastating effects of the pandemic, while the ones that have managed to survive still face enormous obstacles in just trying to stay afloat. Understandably, many such businesses have made the calculated decision to keep staff on payroll in order to generate some revenue and avoid closing entirely, but this can result in shortfalls and late payments to employees as the pandemic lingers.

However, employers must be very careful not to pay late wages. Labor Code section 216, in addition to other potential penalties, makes it a misdemeanor crime to either: (1) willfully refuse to pay wages due and payable after a demand has been made while having the ability to pay; or (2) falsely deny the amount of wages due with the intent to benefit oneself or to harass another.

A business having been ravaged by the pandemic may seem like a very compelling reason for why an employer might pay its employees late due to inability to pay such wages. However, California is still holding employers to the same standards for timely payment of wages that applied before the pandemic: wages must be paid on time, every time. California has still been investigating and prosecuting complaints of late payments regardless of the pandemic. Thus, an employer may not even be able to assert the defense ostensibly provided for in Section 216 that the employer did not have the "ability to pay" until after the state has already initiated some investigation or enforcement action in response to a complaint.

Indeed, there have been very recent instances of the California Labor Commissioner's Office vigorously investigating late payment allegations as misdemeanor criminal matters, even when the employer alleged to have paid the late wages has been severely impacted by the pandemic. These investigations into even those businesses that have been profoundly affected by the pandemic should serve as a cautionary tale to all employers in California that late payment of wages will not be tolerated, and that even with a good excuse for late payments employers may still face a formal criminal investigation where they will be forced to prove their inability to pay to avoid criminal charges.

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## Be Careful When Drafting Executive Employment Agreements

A BKCG client's recent unfortunate experience made me think that it would be a good idea to discuss a few key issues that should be included in a properly-drafted executive employment agreement – as well as some items to be avoided, if at all possible. Obviously, even in a normal labor market (unlike the present climate), talented and highly sought-after executives may have a fair amount of negotiating clout. As a result, you may not be able to attract your candidate with a standard at-will employment offer, but providing an employment agreement doesn't mean that the employer has to give away the farm.

1. A properly drafted probationary period provision. Just because an executive candidate is well-qualified, has fantastic, relevant market experience and a successful track record, there is no guarantee that he or she will be a good fit for *your* company. Company cultures and working styles vary greatly between companies and, especially at higher corporate echelons, interpersonal relationships matter tremendously. Your new hire may have been a rock star in her last job, but your executive team may be incapable of working with her, due to her working habits, large ego or inability to be a team player. For this reason, your agreement should give you an out to terminate employment for any reason, or no reason at all. Your probationary period provision should clearly specify how long the probationary period lasts and what your company is (and is not) obligated to pay the executive if you terminate him before the expiration of the probationary period. For example, you probably want to make clear that the executive is either not entitled to the signing bonus that he or she would have received had employment continued beyond the probationary period, or will only receive a small portion of it.

2. Severance. Whether tied to termination of employment during the probationary period, or for "no cause" termination beyond the probationary period, your agreement should include a severance clause with an agreed amount of severance to be paid to the executive upon termination, in exchange for the executive signing a release of all employment claims against the employer that can be legally released (generally speaking, potential or actual workers' compensation claims, the right to bring FEHA/EEOC complaints and the right to be legally indemnified for third party claims against an employee arising from employment cannot be released). Severance is typically paid as salary continuation, and does *not* need to be paid as a lump sum. The amount of severance to be paid under the employment agreement is entirely a matter of negotiation between employer and the executive. Company circumstances can change rapidly and, absent a severance clause, an employer who has a long-term executive employment agreement can be liable for substantial, six-figure damages if it terminates the executive's employment, other than for "cause", before the term of the agreement expires.

3. Vacation Pay/PTO. Executives will frequently ask and negotiate for generous vacation pay or paid time off. 4 weeks, or even 5 or 6 weeks per year is not unusual. Make sure, however, that your employment agreement makes clear that the annual allotment of vacation pay or paid time off will accrue in equal periodic increments over the year. Beyond that, you may even want to specify that vacation pay or paid time off does not begin to accrue until after the executive's probationary period has been successfully completed. One of our clients recently had to pay a year's worth of vacation pay to the executive it terminated during her probationary period because there was no accrual clause in her employment agreement. As such, the executive technically qualified for 4 weeks of paid vacation on day 1 of her employment.

4. Bonuses. It is essential to unambiguously differentiate between discretionary and non-discretionary bonuses. The former bonus is, as the word "discretionary" implies, payable only if and when the employer chooses to pay it. The latter are generally payable if certain specified benchmarks or milestones are met, either by the employee personally, the employee's work group, or by the company as a whole, e.g., sales volume/revenue, client growth or retention, or company EBITDA. Whatever type of bonus is to be paid, it is essential that the qualifying criteria or circumstances giving rise to payment be clearly spelled out – as well as the circumstances in which a bonus will *not* be payable, such as the employee resigning employment before the qualifying bonus period is complete, or the employee being terminated for cause. An important thing to remember is that, if non-payment of a non-discretionary bonus is challenged by the employee, the employer can be compelled to produce documents (which may include highly sensitive internal financial documents) to substantiate the non-payment. For this reason, careful thought should be given in advance to how the bonus is structured; how objectively easy (or difficult) it will be for the company to demonstrate to the executive that the bonus was not earned; and what specific documentary evidence the company would have to provide to the executive's lawyer if the company was ever called upon to justify its refusal to pay an executive a contractually-agreed bonus payment.

Obviously, the foregoing are just a few of the issues that can arise when considering providing a much sought-after new executive with an employment agreement. As always, you should seek legal advice based on your particular situation before furnishing such an agreement and generally avoid using a form of agreement provided by your prospective new hire. One of the main problems when clients attempt to draft their own agreements is the omissions from the agreement. Moreover, the cost of those omissions generally dwarfs the cost of having legal counsel draft or review the executive employment agreement in the first place.

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# Putting The Cart Before The Store

## BKCG Delivers Complete Knockout For Ralphs Against Landlord (continued from page 1)

Lincoln Center demanded that Ralphs remove a water bottle filling machine, a Red Box DVD rental machine, and a firewood display, all in the front sidewalk area of the store. Although Ralphs believed these practices were well within their rights as a tenant, Ralphs voluntarily removed these items in an effort to keep the peace with the landlord. However, the landlord also insisted that Ralphs no longer provide shopping carts out front for its customers, nor use its exclusive loading docks for time consuming overnight deliveries of inventory. These are two practices that Ralphs could not compromise on, as no carts for customers and no fresh inventory would put the store out of business. Ralphs tried to reason with the landlord for months, to no avail. And, in late 2019 during the Christmas and New Year holidays, with no warning, Lincoln Center served an unlawful detainer lawsuit on Ralphs seeking to evict Ralphs from this newly renovated gem. That is when BKCG sprang into action.

Although unlawful detainer cases are typically litigated as smaller, expedited cases, Lincoln Center spared no expense in its zeal to evict Ralphs and get a new, richer lease. Extensive written discovery and multiple depositions were conducted, and Lincoln Center filed a Motion for Summary Judgment in an attempt to obtain a judgment before trial. The BKCG team of Managing Partner, Dan Kessler, and Senior Counsel, Michael Oberbeck, defeated the summary judgment, preserving the case for trial. Lincoln Center next designated multiple experts, attempting to obfuscate at trial what should be a simple contract case. Following delays due to the pandemic, trial was set to proceed in Los Angeles County Superior Court in June 2021.

And so, Dan Kessler and associate Michael McConnell headed up to Santa Monica to put the matter to Superior Court Judge Bobbi Tillmon. During opening statements, Kessler showed his hand, telling the trial judge that Ralphs was so confident that Lincoln Center's case was legally unsustainable, he would be seeking an order of judgment before even putting on Ralphs's case. Following three full days of trial (of just the landlord's case-in-chief), Kessler did just that. Arguing for over an hour after Lincoln Center rested its case, the BKCG team showed the court the undisputed evidence. Knowing this motion for judgment was coming, McConnell and Kessler compiled the evidence and testimony during trial for a real time presentation. BKCG used "old school" blow-ups to highlight the key lease provisions, and historical satellite photos to demonstrate that Ralphs had been operating with these common grocery store practices for decades. The evidence was uncontroverted that nobody (no co-tenants, government agencies, customers or vendors) ever complained about these practices. Kessler argued that the lease documents allowed Ralphs to operate this way, and it was not until Lincoln Center decided to try and make a play for a higher paying tenant that Lincoln Center decided to complain.

After taking the evening recess on day 3 of trial, the very next court day, the trial judge asked Lincoln Center if it had any additional evidence to provide. The landlord's counsel passed, confidently stating, "We've presented the evidence that we have to prove the case, Your Honor." The judge then immediately granted judgment in favor of Ralphs, and ordered that Ralphs recover from Lincoln Center its fees and costs incurred in this case.

Just recently, the court ruled that BKCG's fees were reasonable and awarded Ralphs over $350,000 to reimburse it for the litigation expenses (refusing Lincoln Center's request to slash the fee amount). Ralphs's senior attorney, John DeFrance, was intimately involved with the case and was pleased with the result stating, "Dan Kessler and his team at BKCG did a phenomenal job protecting Ralphs' legal and leasehold interests at this irreplaceable property. BKCG's thorough, yet efficient preparation for this case was top-notch. The favorable testimony BKCG elicited at trial was irrefutable and Dan's skills as an orator are superlative. The whole process was very collaborative between BKCG and our Legal, Real Estate and Operations Departments. We are absolutely thrilled with the results!"

Ralphs will continue to operate in Venice, although Lincoln Center is still trying to get that valuable tenancy back, but that's a story for another edition.

Please contact Daniel Kessler at dkessler@bkcglaw.com or (949) 975-7500 if you have any questions about this article, or any other related matter.

## BKCG Gets Win For Dealership In "Corporate Raiding" Case

BKCG recently landed a win for one of its vehicle dealership clients, Surf City Auto Group, Inc. dba Huntington Beach Chrysler Dodge Jeep RAM, by persuading the trial court that the evidence and law was so in Surf City's favor that the competing dealership suing it could not prevail on its claims at trial. A competitor of Surf City's, Moss Bros. Auto Group, filed the lawsuit when Moss Bros. employees left that dealership to work with Surf City's leadership team. Moss Bros. complained that Surf City, and some individual defendants, were liable for "corporate raiding" and that Surf City had tortiously interfered with the "at will" employment relationship between Moss Bros. and the employees it had recruited. However, the law in California strongly supports the free movement of employees to better employment opportunities and, absent some independently wrongful act (such as an employee taking trade secret information with it to the new employer) employees can be recruited by a competitor and are free to work for a competitor.

In fact, this issue was recently put to rest by California's Supreme Court in *Ixchel Pharma LLC v. Biogen, Inc.* (2020) 9 Cal.5th 1130. In *Ixchel*, the Court clarified the requirements for a plaintiff claiming a competitor interfered with an at-will employment relationship simply by hiring the plaintiff's employee. It noted that moving forward, an element of such a claim is a showing that the competitor intentionally engaged in an independently wrongful act when it recruited the employee. The Court noted that this requirement was necessary to avoid lawsuits that seek to improperly punish legitimate business competition. *Id.* at 1148. Since the *Ixchel* case, therefore, it is not enough for a plaintiff to demonstrate that an at-will relationship was disrupted when its employees were recruited by a competitor. Rather, a plaintiff needs to demonstrate that the competitor's solicitation and hiring of its employees involved an act that was "proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." See *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1159.

Relying upon the *Ixchel* case, and the fact that Moss Bros. could not show that Surf City or the recruited employees did anything wrongful when the employees joined Surf City's dealership, BKCG counsel filed and prevailed on a Motion for Summary Judgment, obtained judgment in Surf City's favor and Moss Bros.' case was dismissed giving Surf City a solid and justified victory.

In sum, California is fairly unique in its treatment of employee non-solicitation agreements and other potential restraints on employment. As a result, if you come across an employment agreement, whether as an employer or an employee, check with an attorney before assuming that clauses in that agreement that might impede an employee's right to work for a competitor are enforceable.

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## Keeping Your Trade Secrets Secret

One of the most common issues in commercial litigation is the allegation that a business, often through former employees, stole the valuable trade secrets of another business. What business owners often do not realize is that in order to protect their trade secrets and preserve their legal claims to them, they have an active duty to engage in reasonable efforts to protect them. This includes making efforts to ensure that separated employees return all of their confidential materials when they leave the company.

The State of California, in recognition of how common trade secret misappropriation claims are, passed the California Uniform Trade Secrets Act ("CUTSA") to 1) define "trade secrets" in such a way that courts and juries would know what was actually worth protecting, 2) to reduce the incidence of bad-faith trade secret misappropriation claims, and 3) to streamline such litigation so that where there is a claim of misappropriation of trade secrets, all other related claims would be "preempted" and dismissed.

CUTSA defines trade secret as follows:

"[T]rade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process that:

(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

Cal. Civ. Code § 3426.1

In our work, we often see business litigants allege that former employees misappropriated trade secrets, despite the fact that the litigant making this allegation did not clearly engage in efforts to protect these secrets. For a court to recognize an item as a trade secret, the law states that a person protecting the secret has a duty to undertake efforts "that are reasonable under the circumstances to maintain its secrecy."

In *FormFactor, Inc. v. Micro-Probe, Inc.* (2012) U.S. Dist. LEXIS 79359, a U.S. District Court dismissed a plaintiff's (FormFactor, Inc.) trade secret misappropriation claim under CUTSA made against a former employee (Browne) and his new employer (Micro-Probe, Inc.), which was a competitor. (continued on page 6)

## BKCG Prevails In Auto Dealership Buy Sell Dispute (continued from page 1)

In negotiating the APA, the parties never discussed these incentives in detail. Instead, they used broad language reflective of the custom and practice of the industry that Buyer would be acquiring Seller's new vehicle inventory at Seller's net cost, irrespective of how Honda lowered that net cost to Seller. The parties' agreement stated, in relevant part: "Any manufacturer incentives which are tied to vehicles sold under this agreement shall transfer to Buyer upon closing."

The Seller maintained that the credits withheld were neither "holdback" nor "factory incentives". But, following a full-blown arbitration hearing, the arbitrator agreed with BKCG and found in Buyer's favor. If you have any questions regarding terms and conditions to be included in your dealership's asset purchase agreement, please feel free to call or email Alton Burkhalter or Ros Lockwood.

Please contact Alton Burkhalter at aburkhalter@bkcglaw.com or (949) 975-7500 if you have any questions about this article, or any other related matter.

## Keeping Your Trade Secrets Secret (continued from page 5)

FormFactor alleged that Micro-Probe had been soliciting current and former FormFactor employees, including Browne, for the express purpose of having them disclose FormFactor's technical and marketing information. Id. at 2-3. The Court dismissed the case because, among other things, "there is no evidence that FormFactor made reasonable efforts to protect the secrecy of any particular trade secret. As for any trade secrets disclosed to Browne, the evidence shows that FormFactor did not enter into a written agreement with Browne to protect its trade secrets, that it allowed him to retain his contact information when he left FormFactor, that it allowed/authorized Browne and other employees to work from home (including using personal email to conduct FormFactor business, and to back up FormFactor data onto external hard drives), and that it did not request that Browne return any FormFactor data when he tendered his resignation and left the company." Id. at p. 20.

Today, especially given how frequently companies allow their employees to work remotely, it is especially important that employers take active measures to ensure that former employees return all confidential materials when they leave the company. If an employer does engage in such reasonable efforts, they will have the protection of CUTSA, even if they are unsuccessful in getting everything back. Do not simply assume that a departing employee will treat your confidential files, contact lists, processes, and other such sensitive materials with the confidentiality they deserve! Contact our offices for thoughts and strategies on how to protect your valuable business secrets.

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