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December 29, 2004

**VIA FACSIMILE (202) 879-4775**

Honorable Neal E. Kravitz  
Judge, Superior Court for the District  
District of Columbia  
Chambers 3620  
500 Indiana Avenue, NW  
Washington, D.C. 20001

Re: National Association of State Farm Agents, Inc. v. State Farm  
Mutual Automobile Insurance Company, et al.; CA-02ca014089;  
Calendar 7, Judge Neal E. Kravitz

Dear Judge Kravitz:

As a post-briefing supplement to Plaintiff's summary judgment pleadings, I enclose the December 7, 2004 Jury Instructions and Verdict Form from Alex Charts and Charts Insurance Association, Inc. v. Nationwide Mutual Insurance Co., Inc., et al.; Civil Action No. 3:97 CV 1621 (CFD), in the United States District Court for the District of Connecticut. (Although marked "proposed," these are the Jury Instructions given by Judge Droney, as can be seen.)

The Jury Instructions are of significance to NASFA v. State Farm because, in them, the Court set forth the factual basis which, if found by the jury, would render State Farm's competitor Nationwide Insurance a franchisor. The jury did precisely that finding that Nationwide was indeed a franchisor, as the enclosed Verdict Form (#2) recites. The pertinent jury instructions are at pages 16-19.

To be sure, the Connecticut Franchise Act differs from many of the other franchise acts in that it does not require that a party pay a "franchise fee" to be characterized as a franchisee. Like various statutes at issue here, however, it does require that a party offer, sell, or distribute the product in question under the company trademark, and that this be done pursuant to a marketing plan or system substantially prescribed by the company. State Farm agents fulfill these two requirements for franchisee status, as the briefing shows. The parties in NASFA v. State Farm also have devoted

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substantial space in their briefs to the "franchise fee" issue, and NASFA submits that the undisputed evidence demonstrates existence of such a fee, thus establishing the necessary third prong under most of the statutes. (The Connecticut statute itself is not at issue in NASFA v. State Farm.)

Because the same facts related to the two prongs relevant to the Connecticut verdict are in evidence in the summary judgment pleadings in this case, and because NASFA also has proven the existence of a franchise fee, we submit that the Nationwide case is strong support for a conclusion that State Farm, like Nationwide, is a franchisor, and that State Farm agents, like Nationwide agents, are franchisees.

Respectfully yours,



Allan P. Hillman

APH/fy  
Enclosures

cc: Paul S. Reichler, Esquire and Lawrence H. Martin, Esquire  
Counsel for State Farm (w/enclosures; via Fed-X)  
W. Michael Garner, Esquire (via Fed-X)  
Robert E. O'Connor, Jr., Esquire (via Fed-X)  
Clerk, Superior Court for the District of Columbia (w/enclosures; via Fed-X)

Hon. Christopher F. Droney  
United States District Judge

**PROPOSED JURY INSTRUCTIONS**

CASE: Alex Charts and Charts Insurance Associates, Inc. v. Nationwide Mutual Insurance Co., Inc., et al. - Civil Action No. 3:97 C/V 1621 (CFD)

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FARCIA & MILAS P.C.

**SECTION I****GENERAL INSTRUCTIONS****Juror Attentiveness**

Ladies and gentlemen, before you begin your deliberations, I now am going to instruct you on the law. You must pay close attention and I will try to be as clear as possible.

It has been obvious to me that until now you have faithfully discharged your duty to listen carefully and observe each witness who testified. Your interest never flagged, and you have followed the testimony with close attention.

I ask you to give me that same careful attention as I instruct you on the law.

**Role of the Court**

You have now heard all of the evidence in the case as well as the final arguments of the lawyers for the parties.

My duty at this point is to instruct you as to the law. It is your duty to accept these instructions of law and apply them to the facts as you determine them, just as it has been my duty to preside over the trial and decide what testimony and evidence is relevant under the law for your consideration.

On these legal matters, you must take the law as I give it to you. If any attorney has stated a legal principle different from any that I state to you in my instructions, it is my instructions that you must follow.

You should not single out any instruction as alone stating the law, but you should consider my instructions as a whole when you retire to deliberate in the jury room.

You should not, any of you, be concerned about the wisdom of any rule that I state. Regardless of any opinion that you may have as to what the law may be -- or ought to be -- it

would violate your sworn duty to base a verdict upon any other view of the law than that which I give you.

**Role of the Jury**

As members of the jury, you are the sole and exclusive judges of the facts. You pass upon the evidence. You determine the credibility of the witnesses. You resolve such conflicts as there may be in the testimony. You draw whatever reasonable inferences you decide to draw from the facts as you have determined them, and you determine the weight of the evidence.

In determining these issues, no one may invade your province or functions as jurors. In order for you to determine the facts, you must rely upon your own recollection of the evidence. What the lawyers have said in their opening statements, closing arguments, in the objections, or in their questions is not evidence. Nor is what I may have said -- or what I may say in these instructions -- about the facts of this case. In this connection, you should bear in mind that a question put to a witness is never evidence, it is only the answer which is evidence. But you may not consider any answer that I directed you to disregard or that I directed struck from the record. Do not consider such answers.

Since you are the sole and exclusive judges of the facts, I do not mean to indicate any opinion as to the facts or what your verdict should be. The rulings I have made during the trial are not any indication of my views of what your decision should be as to whether or not the plaintiffs have proven their case.

I also ask you to draw no inference from the fact that upon occasion I asked questions of certain witnesses. The questions were only intended for clarification or to expedite matters and certainly were not intended to suggest any opinions on my part as to the verdict you should

render, or whether any of the witnesses may have been more credible than any other witnesses. You are expressly to understand that the court has no opinion as to the verdict you should render in this case.

As to the facts, ladies and gentlemen, you are the exclusive judges. You are to perform the duty of finding the facts without bias or prejudice to any party.

#### Conduct of Counsel

It is the duty of the attorney on each side of a case to object when the other side offers testimony or other evidence which the attorney believes is not properly admissible. Counsel also have the right and duty to ask the court to make rulings of law and to request conferences at the side bar out of the hearing of the jury. All those questions of law must be decided by me, the court. You should not show any prejudice against an attorney or his client because the attorney objected to the admissibility of evidence, or asked for a conference out of the hearing of the jury or asked the court for a ruling on the law.

As I already indicated, my rulings on the admissibility of evidence do not, unless expressly stated by me, indicate any opinion as to the weight or effect of such evidence. You are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

#### Sympathy

Under your oath as jurors you are not to be swayed by sympathy. You should be guided solely by the evidence presented during the trial, without regard to the consequences of your decision.

You have been chosen to try the issues of fact and reach a verdict on the basis of the evidence or lack of evidence. If you let sympathy interfere with your clear thinking there is a risk

that you will not arrive at a just verdict. All parties to a civil lawsuit are entitled to a fair trial. You must make a fair and impartial decision so that you will arrive at a just verdict.

#### **Burden of Proof - General**

This is a civil case and as such the plaintiffs have the burden of proving the material allegations of their complaint by a fair preponderance of the evidence.

If after considering all of the testimony you are satisfied that the plaintiffs have carried their burden on each essential point as to which they have the burden of proof, then you must find for the plaintiffs on their claims. If after such consideration you find the testimony of both parties to be in balance or equally probable, then the plaintiffs have failed to sustain their burden and you must find for the defendants.

If upon a consideration of all the facts on the material allegations of the complaint, you find that the plaintiffs have failed to sustain the burden cast upon them, then you proceed no further and your verdict must be for the defendants. If, however, you find that the plaintiffs have sustained the burden, then you proceed to consider the issue of damages.

As to the plaintiffs' claim under the Connecticut Franchise Act, if you find that the plaintiffs have met their burden that they operated pursuant to a franchise agreement with the defendants, then it is the defendants that have the burden to prove that they had good cause to terminate the franchise agreement. This burden of the defendants is called an affirmative defense.

The defendants also have raised an affirmative defense as to damages, concerning the mitigation of damages. Therefore, if you find that the plaintiffs have established that they suffered damages, then you proceed to consider this affirmative defense raised by the defendants in regard to the amount of damages. In this regard, the burden is upon the defendants to establish

this affirmative defense by a preponderance of the evidence. I will instruct you further on these affirmative defenses in a moment.

**Burden of Proof -- Preponderance of the Evidence**

Some of you may have heard of proof beyond a reasonable doubt, which is the proper standard of proof in a criminal trial. That requirement does not apply to a civil case such as this and you should put it out of your mind. In a civil case, the party with the burden of proof on any given issue has the burden of proving every disputed element of the claim to you by a preponderance of the evidence. If you conclude that the party bearing the burden of proof has failed to establish the claim by a preponderance of the evidence, you must decide against that party on the issue you are considering.

What does a "preponderance of evidence" mean? To establish a fact by a preponderance of the evidence means to prove that the fact is more likely true than not true. A preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. In determining whether a claim has been proved by a preponderance of the evidence, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence, regardless of who may have produced them.

If you find that the credible evidence on a given issue is evenly divided between the parties -- that it is equally probable that one side is right as it is that the other side is right -- then you must decide that issue against the party having this burden of proof. That is because the party bearing this burden must prove more than simple equality of evidence -- the party must prove the element at issue by a preponderance of the evidence. On the other hand, the party with

this burden of proof need prove no more than a preponderance. So long as you find that the scales tip, however slightly, in favor of the party with this burden of proof -- that what the party claims is more likely true than not true -- then that element will have been proved by a preponderance of evidence.

#### Evidence In The Case

The evidence in this case consists of the sworn testimony of the witnesses, regardless of who may have called them; and all exhibits received in evidence, regardless of who may have produced them; and any facts which are stipulated.

Depositions may also be received in evidence. Depositions contain sworn testimony, with counsel for each party being entitled to ask questions. Testimony produced in a deposition may be read to you in open court. Deposition testimony may be accepted by you, subject to the same instructions which apply to witnesses testifying in open court.

To constitute evidence, exhibits must have been received or admitted into evidence. Exhibits which have been marked for identification or which were used to refresh a witness' recollection are not evidence unless they were admitted into evidence. During your deliberations, you will have the exhibits that were admitted into evidence with you in the jury room.

The questions posed by the lawyers are not evidence. It is the witnesses' answers that are evidence.

Any evidence as to which an objection was sustained by the court, and any evidence ordered stricken by the court, must be entirely disregarded.

Statements, objections and arguments of counsel are not evidence in this case, because the lawyers are not witnesses. What the lawyers have said in their opening and closing

statements is intended to help you understand the evidence to reach your verdict. However, if your recollection of the facts differs from the lawyers' statements, it is your recollection which controls.

Anything you may have seen or heard outside the courtroom is not evidence, and must be entirely disregarded.

If certain evidence was received for a limited purpose, you must consider that evidence for that limited purpose only.

It is for you alone to decide the weight, if any, to be given to the testimony you have heard and the exhibits you have seen.

#### Direct and Circumstantial Evidence

There are two types of evidence which you may properly use in reaching your verdict. One type of evidence is direct evidence. Direct evidence is when a witness testifies about something he or she knows by virtue of his or her own senses -- something he or she has seen, felt, touched, or heard. Direct evidence may also be in the form of an exhibit.

Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts.

To remind you of the example I gave you at the beginning of the case, assume that when you came into the courthouse this morning, the sun was shining and it was a nice day. Assume you could not look outside. As you were sitting here, someone walked in with an umbrella which was dripping wet. Then a few minutes later another person also entered with a wet umbrella. Now, you cannot look outside of the courtroom and you cannot see whether or not it is raining. So you have no direct evidence of that fact. But on the combination of facts which I

have asked you to assume, it would be reasonable and logical for you to conclude that it had been raining.

An inference may be drawn only if it is reasonable and logical, not if it is speculative.

You are allowed to draw logical inferences from facts that you find to have been provided; but you may not go outside of the evidence to find the facts, nor to resort to guesswork or conjecture. While you may draw conclusions from proven facts, you may not draw inferences from their inferences. To aid you in better understanding this, in the rain example I used earlier, while you could infer from the wet umbrellas that it was raining, you could not infer that there was a thunderstorm as well without more evidence. In other words, you should be careful to avoid resorting to speculation, conjecture or guesswork to determine critical facts in this case.

That is all there is to circumstantial evidence. You infer on the basis of reason and experience and common sense from one established fact the existence or non-existence of some other fact.

Circumstantial evidence is of no less value than direct evidence; for, it is a general rule that the law makes no distinction between direct evidence and circumstantial evidence but simply requires that your verdict must be based on a preponderance of all the evidence presented.

#### Stipulation of Facts

A stipulation of facts is an agreement among the parties that a certain fact is true. You must regard such agreed facts as true.

The parties have stipulated to the following facts in this case:

1. At all times relevant hereto Alex Charts was an insurance agent licensed to do business in the State of Connecticut.

2. Alex Charts was the President of Charts Insurance Associates, Inc. ("CIAI"), which was a Connecticut corporation engaged in the business of selling and servicing Nationwide insurance policies and other related products within the State of Connecticut. CIAI's principal place of business was in Fairfield, Connecticut.
3. At all times relevant hereto, the defendants were insurance corporations organized and existing under the laws of the State of Ohio and California, respectively, with their principal place of business located in Columbus, Ohio and Anaheim, California.
4. At all time relevant hereto, the defendants were engaged in the business of insurance in the State of Connecticut with a regional office located in Wallingford, Connecticut.
5. At all times relevant hereto, Mark Kapatoes, Reuben Gainey, Robert Meier, Joanne McGoldrick and Richard Crabtree were employees, agents, and/or contractors of Nationwide.
6. Mr. Charts became a Nationwide independent contract agent in February, 1979.
7. On May 10, 1993, Alex Charts, CIAI and Nationwide entered into a "Corporate Agency Agreement".
8. For the duration of Charts' relationship with Nationwide, Nationwide controlled the pricing and availability of its insurance products subject to applicable law and regulation.
9. Nationwide was at all times able to audit and/or examine the records maintained by Charts on Nationwide's computer system.
10. Charts was required to comply with advertising rules and regulations prescribed by Nationwide.
11. Nationwide maintained supervisory responsibility over Charts' performance and business operations under the Agreement.
12. During the spring of 1994, the Earl Richards Agency ("ERA"), another Nationwide agency located in Connecticut, closed when Mr. Richards retired.
13. As part of the wind up of the ERA, policies that had been serviced by the ERA were recorded as reassigned to Charts and CIAI, which was reflected in Nationwide's policy record keeping system.

14. Nationwide maintained an internal, centralized computer system to track policies and agents. Each Nationwide agent had a terminal for access to the system.
15. The computer system contained information to allow Nationwide to identify the agency responsible for the policy and to allocate the premiums payable on account for the policy. Nationwide used this information to calculate commissions and other compensation for each Nationwide agent and agency.
16. On January 11, 1996, Charts received a letter from Nationwide notifying him that his agreements would terminate April 10, 1996.

#### Witness Credibility

You have had the opportunity to observe all the witnesses. It is now your job to decide how believable each witness was in his or her testimony. You are the sole judges of the credibility of each witness and of the importance of his or her testimony.

It must be clear to you now that you are being called upon to resolve various factual issues raised by the parties in the face of very different pictures painted by both sides. In making these judgments, you should carefully scrutinize all of the testimony of each witness, the circumstances under which each witness testified, and any other matter in evidence which may help you decide the truth and the importance of each witness' testimony.

How do you determine where the truth lies? You watched each witness testify. Everything a witness said or did on the witness stand counts in your determination. How did the witness impress you? Did the witness appear to be frank, forthright and candid, or evasive and edgy as if hiding something? How did the witness appear; what was the witness' demeanor -- that is, carriage, behavior, bearing, manner and appearance while testifying? Often it is not what a person said but how he or she says it that moves us.

You should use all the tests for truthfulness that you would use in determining matters of

importance to you in your everyday life. You should consider any bias or hostility the witness may have shown for or against any party as well as any interest the witness has in the outcome of the case. You should consider the opportunity the witnesses had to see, hear, and know the things about which they testified, the accuracy of their memory, their candor or lack of candor, their intelligence, the reasonableness and probability of their testimony and its consistency or lack of consistency and its corroboration or lack of corroboration with other credible testimony.

In other words, what you must try to do in deciding credibility is to size a witness up in light of his or her demeanor, the explanations given and all of the other evidence in the case. Always remember that you should use your common sense, your good judgment, and your own life experience.

#### Expert Testimony

You heard expert testimony in this case from John Allen Kosowsky ("Kosowsky"). An expert is allowed to express his or her opinion on those matters about which he or she has special knowledge and training. Expert testimony is presented to you on the theory that someone who is experienced in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing the expert's testimony, you may consider the expert's qualifications, opinions, the reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe witnesses' testimony. You may give the expert testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept a witness' testimony merely because he or she is an expert. Nor should you substitute it for your own reason, judgment, and common sense. The determination

of the facts in this case rests solely with you.

**Number of Witnesses Called is Not Controlling**

Your decision on the facts of this case should not be determined by the number of witnesses testifying for or against a party. You should consider all the facts and circumstances in evidence to determine which of the witnesses you choose to believe or not believe. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

**Corporation as a Party**

This case must be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, stand equal before the law, and are to be dealt with as equals in this Court.

**Bankruptcy**

There has been evidence in this case that Alex and Helena Charts, as well as the Alex Charts Agency, Inc., filed for bankruptcy protection in 1992. I instruct you that this event has no effect on the ability of Alex Charts and Charts Insurance Associates, Inc., to bring this lawsuit against Nationwide. However, you may consider the bankruptcy documents as evidence on the issues in this case.

## SECTION II. ISSUES IN THIS CASE

Now, I will turn to the specific claims made by the plaintiffs, Alex Charts and Charts Insurance Associates, Inc., whom I will refer to collectively as "Charts." The defendants in this case will be referred to collectively as "Nationwide." When deciding liability and damages, if any, in this action, you should consider all of the plaintiffs as a singular party, and all of the defendants as a singular party.

### The Plaintiffs' Complaint

Charts has filed what the law calls a "complaint," which sets forth all of the issues that Charts intended to raise at trial. Charts' complaint consists of three counts or claims:

1. Count One alleges that Nationwide violated the covenant of good faith and fair dealing implied into the Agents Agreement (Plaintiffs' Exhibit 1) and the Corporate Agency Agreement (Plaintiffs' Exhibit 3), referred to collectively as "the Agreements";
2. Count Two alleges that Nationwide terminated the Agreements without good cause, in violation of the Connecticut Franchise Act ("the Franchise Act"), Conn. Gen. Stat. § 42-133e *et seq.*; and
3. Count Three alleges that Nationwide engaged in unfair trade practices, in violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. § 42-110a *et seq.*

I will explain more about these claims in a moment.

### Defenses of Nationwide

In response to Charts' complaint, Nationwide has raised the following affirmative defenses:

1. As to Count Two, that, if Charts was a franchise of Nationwide, Nationwide had good cause to terminate the business relationship between the parties; and
2. That Charts failed to mitigate its damages.

**A. Breach of the Covenant of Good Faith and Fair Dealing**

The common law of Connecticut implies into every contract a covenant of good faith and fair dealing. In Connecticut, good faith and fair dealing means an attitude or state of mind denoting honesty of purpose, freedom from intention to defraud and, generally speaking, means faithful to one's duty or obligation, and an honest intention not to take an unconscientious advantage of another. Essentially, it is a rule of construction designed to fulfill the reasonable expectations of the contracting parties as they presumably intended.

In order to find that Nationwide breached the implied covenant of good faith and fair dealing, you must find the following elements:

(1) That Charts and Nationwide were parties to a contract or contracts under which Charts reasonably expected to receive certain benefits;

(2) That Nationwide engaged in conduct that injured Charts' right to receive some or all of those benefits; and

(3) That, when committing the acts by which it injured Charts' right to receive the benefits it reasonably expected to receive under the contract, Nationwide was acting in bad faith. Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. Bad faith means more than mere negligence; it involves a dishonest purpose.

If you find that Charts has not met its burden of proof on any element, you must find in favor of Nationwide on the breach of the implied covenant of good faith and fair dealing claim. However, if you find that Charts has met its burden of proof on each of these three elements, you

must find Nationwide liable for breach of the implied covenant of good faith and fair dealing. Finally, if you do find that Nationwide breached the implied covenant of good faith and fair dealing, Charts must establish that it has been damaged by Nationwide's actions and it must prove the claimed damages to a reasonable degree of accuracy.

#### B. Connecticut Franchise Act

As I mentioned, Charts' complaint also asserts a claim against Nationwide for violation of the Connecticut Franchise Act. Charts claims that the relationship of its agency to Nationwide under the Agreements was that of a "franchise" as defined by the Franchise Act, that Nationwide did not have "good cause" to terminate the Agreements, and that Nationwide, therefore, violated the Franchise Act. Nationwide denies Charts was a "franchise" of Nationwide, and maintains that, in any event, it had good cause to terminate the parties' business relationship.

##### 1. Definition of a Franchise

The Franchise Act defines a "franchise" as:

[A]n oral or written agreement or arrangement in which (1) a franchisee is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor . . . and (2) the operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchisor's trademark, service mark, tradename, logotype, advertising or other commercial symbol designating the franchisor or its affiliate . . . .

Therefore, under the Franchise Act, a "franchise" relationship exists only where both of two requirements are met:

(1) There must be an oral or written agreement or arrangement in which a franchisee is granted the right to engage in the business of offering, selling, or distributing services under a marketing plan or system prescribed in substantial part by a franchisor; and

(2) The operation of the franchisee's business pursuant to this marketing plan or system must be substantially associated with the franchisor's trademark, service mark, tradename, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate.

The first element has a two step inquiry. First, Charts must prove by a preponderance of the evidence that there was an oral or written agreement or arrangement in which it was granted the right to engage in the business of offering, selling, or distributing insurance policies offered by Nationwide. The question of whether Charts was engaged in the business of offering, selling or distributing Nationwide policies can best be analyzed by measuring how far Charts is from the situation of a pure employee, who merely takes money and hands it over to his employer. In order to make such a determination, you should consider such things as whether Charts bore the burden of marketplace risk that is indicative of an independent business owner; whether Charts had any entrepreneurial responsibility for the sale of the policies; and whether Charts made a substantial investment in the components of an entrepreneurial business. If you find that Charts was not in the business of offering, selling, or distributing policies offered by Nationwide, then you must find for Nationwide on Charts' Franchise Act claim.

However, if you find that Charts was in the business of offering, selling or distributing policies offered by Nationwide, you move on to the second step of the inquiry, which addresses whether the marketing plan or system under which Charts offered, sold or distributed Nationwide policies was prescribed in substantial part by Nationwide. This requirement focuses on the amount of control exercised in the conduct of Charts' business as a significant factor in determining whether a franchise was created. You should consider several factors to determine

whether the control, if any, exercised by Nationwide over Charts rose to the level of a prescribed marketing plan or system. You should consider whether it was Nationwide or Charts that had the power to set the retail prices charged to Charts' customers. Price is perhaps the most fundamental aspect of a marketing plan, and the ability to set prices is quite indicative of a franchisor's control. However, fixing prices alone may not be determinative of a franchisor's control. You also should consider, for example, whether Nationwide had the power to control other aspects of operation of Charts' insurance agency, including its hours of operation, its days of operation, its advertising, its lighting, its sales quotas and its hiring. In addition, you should consider whether Nationwide provided Charts with such things as financial support and management training.

Although I have noted the importance of the power to control retail pricing in determining whether an alleged franchisor substantially prescribed a marketing plan or system, there is no precise formula as to how many of these factors must be present to find the level of control indicative of a franchise, or as to the weight each factor should be given in each case. Instead, you should consider these factors and give each the weight you believe it deserves, considering the significance of each factor to the business relationship between Nationwide and Charts. You should then determine whether it was Nationwide that substantially prescribed the marketing plan or system under which Charts operated, or whether Charts substantially prescribed its own marketing plan or system. If you determine that Nationwide did not substantially prescribe the marketing plan or system under which Charts operated, you should find in favor of Nationwide on Charts' Franchise Act claim.

If you determine that Charts has satisfied the first element of this test, however, you then

need to determine whether the operation of Charts business was substantially associated with Nationwide's trademark. Although the "substantially associated" element does not require that Charts sell Nationwide policies exclusively, most if not all of Charts' business must have been associated with Nationwide. Thus, in determining whether a substantial association exists, you may look at the likely result of termination of the parties' relationship to determine how dependant, or associated, Charts was on Nationwide. You should consider how many other insurance products or lines of products Charts marketed and sold along with the Nationwide lines, what portion of Charts' revenues were attributable to the sale of Nationwide's policies, Charts' financial ability to replace the Nationwide line, and Charts' financial performance after Nationwide terminated the Agreements. If, after considering all of those factors, you determine that most if not all of Charts' business was associated with Nationwide, and you find that Nationwide substantially prescribed a marketing plan or system for Charts, you should find that the parties relationship was a franchise. If you do not find that Charts was substantially associated with Nationwide, you should find that no franchise relationship existed and, therefore, find in favor of Nationwide on Charts's Franchise Act claim.

## 2. "Good Cause"

If you determine that the business relationship between Nationwide and Charts was a franchise, you must consider whether Nationwide had "good cause" to terminate the parties' business relationship. Nationwide contends that, even if its relationship with Charts constituted a franchise, it had legitimate business reasons to terminate the parties' relationship and, therefore, that it satisfies the good cause requirement. Charts claims that Nationwide did not have good cause for terminating the parties' relationship. As mentioned previously, Charts bears the

burden of proving that its relationship with Nationwide was a franchise as defined by the Franchise Act. If you determine that Charts has met its burden of proving the elements of a franchise, Nationwide then bears the burden of proving that it had good cause to terminate the parties' business relationship.

Under the Franchise Act, a franchisor may not terminate or cancel a franchise agreement unless it has good cause for doing so. In order to prove "good cause," a franchisor would have to show that the franchisee either failed to or refused to comply substantially with a material and reasonable term of the franchise agreement, or that the franchisor had an equivalent business reason of a similar nature. To prove good cause, it is not necessary for Nationwide to show that Charts breached the parties' Agreements or that it failed in any way. Rather, the good cause requirement is satisfied if Nationwide shows that, at the time it made the decision to terminate its relationship with Charts, it had a legitimate business reason for doing so. To prove that it had a legitimate business reason, it is not necessary for Nationwide to show that it was unprofitable for it to have Charts as a Nationwide agent. A franchisor is free to identify untapped opportunities in the market or unutilized potential, and to adjust its distribution and sales network accordingly. If Nationwide shows that its business decision was legitimate at the time it was made—even if shown by hindsight to have been made in error—it satisfies the good cause requirement set forth in the Franchise Act.

If you determine that Nationwide had a legitimate business reason for terminating Charts' agency, you must find that Nationwide has satisfied the good cause requirement, and you must therefore find for Nationwide on Charts' Franchise Act claim. If you determine that the parties' relationship was a franchise, and that Nationwide has not satisfied the good cause requirement,

you must determine whether Charts suffered any damages as a result of Nationwide's actions. I will instruct you on damages in a moment.

**C. Connecticut Unfair Trade Practices Act**

Charts' complaint also asserts a claim that Nationwide engaged in unfair and deceptive trade practices, in violation of the Connecticut Unfair Trade Practices Act ("CUTPA"). In determining whether Charts has met its burden of proving that Nationwide engaged in unfair or deceptive trade practices, you must find the following elements:

- (1) That the practices proved by Charts, without necessarily having been previously considered unlawful, offend public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness;
- (2) That the practices proved by Charts are immoral, unethical, or unscrupulous; and
- (3) That the practices proved by Charts cause unjustified, substantial injury to consumers, competitors, or other businessmen.

Moreover, a practice can be unfair under CUTPA because of the degree to which it meets one of the criteria or because, to a lesser degree, it meets all three.

In regard to the first prong of the CUTPA test, Charts must prove that Nationwide's termination of the business relationship between the parties amounted to a violation of an identifiable public policy in Connecticut. In other words, did the termination by Nationwide fall within some established concept of unfairness. Unless you so find, Nationwide cannot be found to have violated the public policy prong of CUTPA.

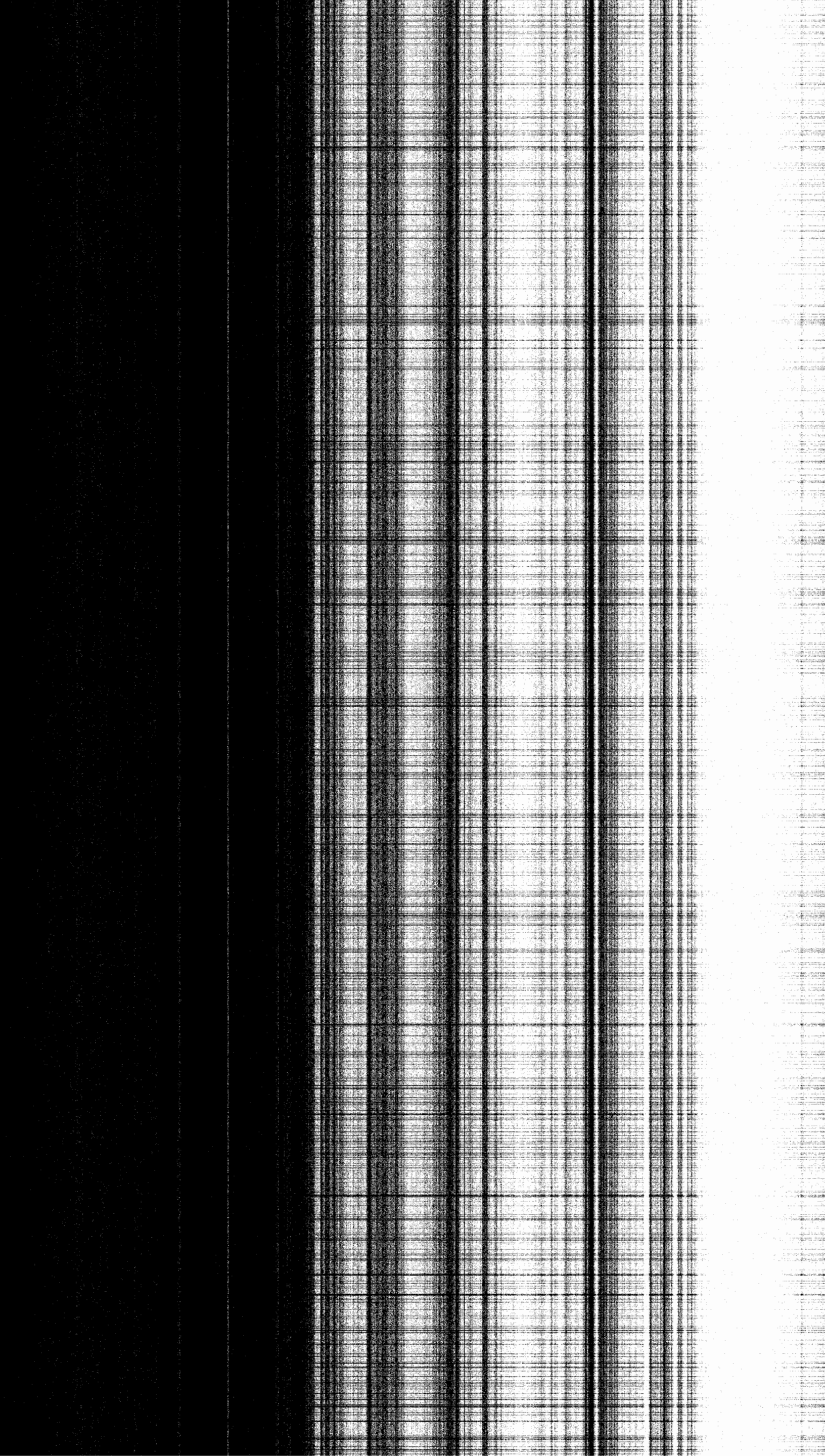
In regard to the second factor, you must next consider whether Nationwide engaged in

behavior that was immoral, unethical, oppressive, or unscrupulous by terminating its business relationship with Charts. In making this determination, you should consider whether Nationwide's actions were authorized by a valid contractual provision in its agreement with Charts; that is, whether the parties' agreed that Nationwide could take the actions that it took.

In regard to the third factor, you must consider whether the actions of Nationwide caused unjustified, substantial injury to consumers, competitors, or other businessmen. You should keep in mind that the mere fact that a person suffers injury does not make the injury legally "unfair." In order to meet its burden of proof on this element, Charts must establish the following: (1) the injury must be substantial; (2) it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and (3) it must be an injury that the consumer, competitor, or other business person could not reasonably have avoided.

In making your determination as to these three factors, it is important to note that CUTPA has a statute of limitations allowing only three years for a party to complain. Since the complaint in this case brought in August of 1997, I instruct you not to consider any actions taken by Nationwide or its employees or agents prior to August 11, 1994 on Charts' CUTPA claim.

Having evaluated these three factors, you must now determine whether Charts has met its burden of proving that Nationwide violated CUTPA by engaging in unfair acts or practices. If you find that Charts has failed to meet its burden on this issue, you must enter a verdict in favor of Nationwide on Charts' CUTPA claim. If you find that Charts has proven that Nationwide engaged in unfair or deceptive acts or practices in the course of its trade or commerce, however, then you must determine whether Charts has proven that it suffered a measurable injury as a result of the prohibited conduct. In this context, it is important to note that injury differs from



### SECTION III. DAMAGES

#### Compensatory Damages (All Claims)

Just because I am instructing you on how to award damages does not mean that I have any opinion on whether or not damages should be awarded in this case. In addition, since Nationwide must address the issue of damages during the trial or completely lose its opportunity to do so, none of the evidence or discussion relating to damages presented on Nationwide's behalf should be taken or construed by you as an admission by Nationwide that it is liable or that Charts is entitled to a damages award.

However, if you find that Nationwide is liable to Charts on any of the grounds advanced in this lawsuit, then you should consider the question of damages. There are essentially two kinds of damages which can be awarded in a lawsuit – compensatory damages and punitive damages. Compensatory damages are designed to fairly and justly compensate a plaintiff for any injuries suffered. Thus, in fixing compensatory damages, it is for you, in the exercise of your best judgment, to determine the amount of money which will, in your judgment, reasonably and fairly compensate Charts for any harm of any kind which was proximately caused by the wrongful conduct of Nationwide. Therefore, should you find that Charts is entitled to damages, you should attempt to put Charts in as good a position as it would have been in had the contract been performed, that is, had there been no breach. The interest protected in this way is called the "expectation interest." Another way of expressing this measure of general damages is that the damages should be the amount of the gain that Charts would have realized on the agreements with Nationwide if both parties had fully performed.

In order to recover damages, Charts must present sufficiently accurate and complete

evidence for you to be able to estimate the alleged damages with reasonable certainty. Reasonable certainty of proof is all that is required, and the amount of any damages may be determined approximately upon reasonable inferences and estimates. Damages, if any, must be fair, just and reasonable and nothing more, and must reflect the actual damages suffered by Charts net of any amounts received by Charts as a result of its efforts to mitigate its damages. I will speak about mitigation of damages in a moment. In addition, you must not speculate or guess as to damages, and under no circumstances should you let your sympathy affect your consideration of the law and the evidence. Likewise, it is not part of your function as jurors to punish Nationwide or to be generous. Merely because you have been shown evidence setting forth Charts' damage calculations does not mean that you have to accept them. It is Charts' burden to prove each element and item of damage its claims, including its damages resulting from alleged violations of the Franchise Act, unfair trade practices and the implied covenant of good faith and fair dealing: it is not Nationwide's burden to disprove them. Since it is Charts' burden to prove its damages, Nationwide also has no obligation to present evidence to disprove or refute Charts' claim of damages. Thus, unless you find that Charts has proven each element and item of damage by a fair preponderance of the evidence, you must find for Nationwide on that item of damage.

Additionally, in your determination of the damages to be awarded to Charts, if any, you must first determine that there is a causal connection between Nationwide's conduct and the actual loss claimed and proved by Charts. In other words, Nationwide's conduct must have brought about the loss to Charts. Therefore, if you find that anything else caused the Charts' loss or caused some portion of loss, then you must conclude that Charts has failed to satisfy its burden

of proof.

#### **Discounted Present Value**

It is also important for you to consider in your determination of the damages to be awarded to Charts, if any, that any award you make for compensation for future damages is substantially a present payment which Charts would receive today, whereas it is in compensation for something which would occur only from time to time throughout the years. For that reason, you must reduce the amount of your aggregate award, as best you can, to its present or discounted value on the rate of interest that you deem applicable. This is because the amount of your award, if any, represents a sum which may be immediately put at interest, whereas any future element of damage would not have occurred now but from time to time in the future.

#### **Damages for the Mere Fact of Violation (All Claims)**

If you return a verdict for Charts, but find that Charts has failed to prove by a preponderance of the evidence that it suffered any actual damages, then you must return an award of damages in the nominal or token amount of one dollar.

Nominal damages must be awarded when a defendant has violated state law but has suffered no actual damage as a natural consequence of that deprivation. The mere fact that a violation of state law occurred is an injury to the person entitled to enjoy that right, even when no actual damages flow from the deprivation. Therefore, if you find that Charts has suffered no injury as a result of Nationwide's conduct other than the violation of state law, you must award nominal damages of one dollar.

#### **Causation and Damages (All Claims)**

I have said that you may award damages only for those injuries which you find Charts has

proven by a preponderance of evidence to have been the direct result of conduct by Nationwide. You must distinguish between, on the one hand, the existence of a violation of Charts' rights and, on the other hand, the existence of injuries naturally resulting from that violation. Thus, even if you find that Nationwide wrongfully terminated or breached the agreements between the parties, or committed an unfair trade practice, you must ask whether Charts has proven by a preponderance of evidence that Nationwide's actions caused the damage that Charts claims to have suffered.

If you find that the damage suffered by Charts was partly the result of conduct by Nationwide that was legal and partly the result of conduct that was illegal, you must apportion the damages between the legal and illegal conduct—that is, you must assess the relative importance of the legal and the illegal conduct and allocate the damages accordingly.

#### Proximate Cause

It is also important to remember that when an injury or loss follows a party's act or omission, and that injury or damage may be attributable in a causal connection to that act or omission, then that act or omission is said to be the proximate cause of that injury or loss. Expressed another way, if an act or omission of a party is found to have been a substantial factor in bringing about an injury or loss, then that act or omission is a proximate cause of that injury or loss. However, if the act or omission is not a substantial factor in bringing about that injury or loss, then it is not the proximate cause of that injury or loss. When that happens, it means that the doer of the act or omission is not liable under the law for the damage or loss.

#### Double Recovery and Compensatory Damages (All Claims)

I have said that, if you return a verdict for Charts, you must award such sum of money as

you believe will fairly and justly compensate Charts for any injury you believe was actually sustained as a direct result of the conduct of Nationwide. In this case, Charts claims that Nationwide violated the Franchise Act, CUTPA, and the implied covenant of good faith and fair dealing contained in the agreements between the parties. If you find that Nationwide did in fact commit all of those alleged violations, you must remember, in calculating the damages, that Charts is entitled to be compensated only for injuries it actually suffered. In other words, Charts may not recover twice for the same injury. For example, if Nationwide violated both the Franchise Act and CUTPA, but the resulting injury was no greater than it would have been had Nationwide only violated either the Franchise Act or CUTPA, you should award an amount of compensatory damages no greater than you would award if Nationwide had committed only one of the alleged violations.

#### Mitigation of Damages

In considering damages to award to Charts, if any, you must determine whether Charts could have done something to lessen the harm suffered. The burden is on Nationwide to prove, by a preponderance of the evidence, that Charts could have lessened its damages, yet failed to do so. In addition, Nationwide has the burden to prove, by a preponderance of the evidence, the amount by which damages could have been mitigated. If Nationwide convinces you that Charts could have lessened its damages, but failed to do so, Charts is entitled only to damages sufficient to compensate for the injury that it would have suffered if appropriate action to reduce the harm caused by Nationwide would have been taken.

### Punitive Damages

If you find Nationwide liable to Charts' under any of the claims set forth in the complaint, then you may also make a separate and additional award of punitive damages. You may make such an award even if you find that, although Nationwide violated the implied covenant of good faith and fair dealing, the Franchise Act, or CUTPA, Charts did not prove by a preponderance of the evidence the amount of loss attributable to such violations.

In order to recover these types of damages, Charts must prove that Nationwide acted with reckless indifference to the rights of others or an intentional and wanton violation of those rights. Put another way, Charts must show that the wrongs done arose from hatred or ill will towards Charts, or from malice, that is, from some improper or unjustifiable motive or intent; or that Nationwide acted wantonly, that is, was aware or should have been aware, from its knowledge of the circumstances, that its conduct would naturally or probably harm Charts. If you find that Charts is entitled to punitive damages, you should indicate this on the verdict form, but should not list a particular amount to which Charts is entitled. I will determine that amount.

**SECTION IV. INSTRUCTIONS FOR DELIBERATIONS****Right To See Exhibits and Hear Testimony  
Communications With Court**

You are about to go into the jury room and begin your deliberations. The exhibits will be with you in the jury room. If you want any of the testimony read, you may also request that. Please remember that it is not always easy to locate what you might want, so be as specific as you possibly can in requesting portions of the testimony. I will also give you one copy of these instructions.

Your requests for testimony -- in fact any communication with the court -- should be made to me in writing, signed by your foreperson, and given to one of the marshals. In any event, do not tell me or anyone else how the jury stands on any issue until after a unanimous verdict is reached. I caution you, also, not to communicate to me any numerical division of how you stand during your deliberations.

**Duty To Deliberate/Unanimous Verdict**

You will now return to decide the case.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement. Each of you must decide the case for yourself, but you should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. Your verdict must be unanimous, but you are not bound to surrender your honest convictions concerning the effect or weight of the evidence for the mere purpose of returning a verdict or solely because of the opinion of other jurors. Discuss and weigh your respective opinions dispassionately, without regard to sympathy, without regard

to prejudice or favor for either party, and adopt that conclusion which in your good conscience appears to be in accordance with the truth.

Again, each of you must make your own decision about the proper outcome of this case based on your consideration of the evidence and your discussions with your fellow jurors. No juror should surrender his or her conscientious beliefs solely for the purpose of returning a unanimous verdict.

#### Selection of Foreperson

When you retire, you should elect one member of the jury as your foreperson. That person will preside over the deliberations and speak for you here in open court.

#### Return of Verdict

After you have reached a verdict, your foreperson will fill in the form that has been given to you, sign and date it and advise the marshal outside your door that you are ready to return to the courtroom.

I will stress that each of you should be in agreement with the verdict which is announced in court. Once your verdict is announced by your foreperson in open court and officially recorded, it cannot ordinarily be revoked.

#### General Verdict Form

I have prepared a general verdict form for you to use in recording your decision. On the form, there are spaces to indicate your verdict on each of the plaintiff's claims against Nationwide. Remember, each verdict must be unanimous and must reflect the conscientious judgment of each juror. You should return a verdict on each claim.

**Final Instruction**

Now the time has come for you to retire to the jury room. When you go to the jury room, do not begin to deliberate until you receive from the Deputy Clerk all the exhibits you are to consider and until she formally directs you to begin your deliberations.

I remind you that at the completion of your deliberations, the foreperson should communicate to the court through a signed note indicating that a verdict has been reached.

**Please do not send me the verdict form. Please remember that, in your note to me, you should not indicate what your verdict is, but merely state that a verdict has been reached. Then, have the foreperson bring the executed verdict form with him or her into court.**

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT



ALEX CHARTS and CHARTS  
INSURANCE ASSOCIATES, INC.

Plaintiff,

FILED  
DEC -9 P 5:12  
U.S. DISTRICT COURT  
HARTFORD, CT.

v.

Civil Action No. 3:97CV1621(CFD)

NATIONWIDE MUTUAL INSURANCE  
CO., et al.

Defendants

VERDICT FORM

**I. SECTION ONE (Breach of the Implied Covenant of Good Faith and Fair Dealing)**

1. Do you find that the plaintiffs, Alex Charts and Charts Insurance Associates Inc. (referred to collectively as "Charts" herein), have proven by a preponderance of the evidence that the defendants (referred to collectively as "Nationwide" herein) violated the implied covenant of good faith and fair dealing?

YES  NO

Proceed to Question 2.

**II. SECTION TWO - Connecticut Franchise Act**

2. Do you find that Charts has proven by a preponderance of the evidence that it operated pursuant to a franchise agreement with Nationwide?

YES  NO

If you answered "Yes" to Question 2, proceed to Question 3.

If you answered "No" to Question 2, proceed to Question 4.

3. Do you find that Nationwide has proven by a preponderance of the evidence that it had good cause to terminate the parties' agreement?

YES  NO

Proceed to Question 4.

III. SECTION THREE (Connecticut Unfair Trade Practices Act)

4. Do you find that Charts has proven by a preponderance of the evidence that Nationwide committed a violation of the Connecticut Unfair Trade Practices Act?

YES  NO

Proceed to Question 5.

IV. SECTION FOUR (Damages)

5. If you answered "Yes" to Questions 1 or 4, or "No" to Question 3, then indicate the amount of damages that Charts has proven by a preponderance of the evidence.

\$ 2,300,000.00

Proceed to Question 6.

V. SECTION FIVE (Punitive Damages)

6. If you answered "Yes" to Questions 1 or 4, or "No" to Question 3, do you find that Charts has proven by a preponderance of the evidence that it should recover punitive damages from Nationwide?

YES  NO

VI. SECTION SIX

You have completed your deliberations. Please sign and date this form.

Debra Grotzer  
Foreperson

12.9.04  
Date

I hereby certify that the foregoing is a true copy of the original document on this date: 12/13/04

EVAN P. BROWN  
Clerk  
[Signature]  
Clerk

**IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA  
CIVIL DIVISION**

NATIONAL ASSOCIATION OF )  
STATE FARM AGENTS, INC., )

Plaintiff, )

v. )

STATE FARM MUTUAL )  
AUTOMOBILE INSURANCE )  
COMPANY, *et al.* )

Defendants. )

C.A. No. 02ca004089

Calendar 7

Judge Neal E. Kravitz

Next Court Event:

Pre-Trial Conference: ADR + 60 days

**DEFENDANTS' RESPONSE TO PLAINTIFF'S  
NOTICE OF FILING OF SUPPLEMENTAL AUTHORITY**

Paul S. Reichler, D.C. Bar #185116  
Lawrence H. Martin, D.C. Bar #476639  
Jonas M. Monast, DC Bar No. 479873  
Sarah A. Altschuller, DC Bar No. 489202  
FOLEY HOAG LLP  
1875 K Street, N.W., Suite 800  
Washington, DC 20006  
(202) 223-1200

January 5, 2005

On December 29, 2004, Plaintiff National Association of State Farm Agents filed a "Notice of Filing of Supplemental Authority Decided After the Conclusion of Briefing on Summary Judgment" with the Court. The Notice was occasioned by a recent Connecticut jury verdict finding that a terminated Nationwide Insurance agent is a franchisee under that state's law, and awarding him \$2.3 million. *Charts et al. v. Nationwide Mut. Ins. Co.*, Civil Action No. 3:97CV1621 (D. Conn. 2004). Included with Plaintiff's Notice was a letter brief from counsel arguing the relevance of the *Charts* verdict to this case. Although Defendant State Farm is reluctant to burden the Court with still more paper, Plaintiff's submission demands a response.

The *Charts* case has no value as precedent concerning the franchise issues raised in this Court for at least three reasons: (1) unlike virtually all the franchisee statutes at issue here, the Connecticut franchise law does *not* require purported franchisees to pay a franchise fee to the franchisor; (2) whereas the Judge in *Charts* determined that the franchise issue was not ripe for summary judgment on the record before him, all Parties in this case agree that summary judgment is appropriate without further proceedings; and (3) the jury instructions in *Charts* gave the jury inadequate guidance on the meaning of the phrase "offer, sell or distribute" as interpreted by the Connecticut Supreme Court.

**I. The Connecticut Franchise Statute Does Not Require Franchisees to Pay a Franchise Fee.**

Unlike Connecticut, the franchise statutes of 13 of 15 of the states whose laws are at issue in this case require putative franchisees to pay a franchise fee to the alleged franchisor.<sup>1</sup> Thus, even if one were otherwise to accept the *Charts* case uncritically, it would do nothing to diminish

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<sup>1</sup> The two exceptions are Arkansas and New Jersey, the courts of both of which have already held that insurance agents are not franchisees. *Stockton v. Sentry Ins.*, 989 S.W.2d 914 (Ark. 1999); *Mazziotti v. State Farm Indemnity et al.*, No. C 333-98 (N.J. Super Ch. Div 2002).

the propriety of summarily denying Plaintiff's franchise law claims on the independent grounds that State Farm Agents pay no fee to the Company.

As the Court is well aware, the question of whether State Farm Agents pay a franchise fee to the Company was the subject of extensive briefing in the Parties' pending cross-motions for summary judgment. As hard as Plaintiff tried to come up with a coherent argument that Agents pay a fee -- in fact, it repeatedly shifted its theories throughout the case -- none of the purported "fees" it identified support its case. As State Farm decisively demonstrated in both its initial brief in support of its Motion for Summary Judgment, and again in its Reply Brief, the undisputed material facts prove beyond the slightest doubt that Agents are not required to pay any fees to State Farm, much less a franchise fee. For this wholly independent reason, summary judgment for State Farm is mandated.

**II. Unlike *Charts*, The Parties Here Agree  
That the Case Is Ripe for Summary Judgment.**

Although the Connecticut franchise issue was evidently briefed on defendant Nationwide's motion for summary judgment, Judge Droney decided that the issue was not ripe for summary judgment on the record before him. Without analysis, he denied Nationwide's motion with only a single sentence: "The Court finds that there are genuine issues of material fact, including whether the relationship between the parties constituted a franchise, that preclude summary judgment on the plaintiffs' claims." Ruling on Def.'s Mot. for Summ. J. at 11 (Sept. 30, 2003) (attached hereto at Tab 1).

Here, in contrast, all Parties have agreed that there are no genuine issues of material fact left for bench trial before the Court, and that the matter is ripe for judgment as a matter of law. The record is complete. All potential fact witnesses on both sides have been deposed. The evidentiary record is substantial. On the record before the Court, there is no dispute about the

following facts: all insurance policies are contracts between State Farm and the policyholder only; State Farm has complete control over the decision of whether to accept or reject new risks; Agents may not vary the terms and conditions of coverage; State Farm bears the risk of loss in the event of an insurable claim; the premiums are set by the Company; an Agent's contingent permission to issue temporary binders in conformity with strict guidelines established by State Farm is subject at all times to the Company's right to suspend or revoke that permission; *etc.* See Def.'s Reply Br. in Support of Summ J. at 31 (July 22, 2004). In other words, State Farm Agents do none of the things courts look for in deciding whether alleged franchisees offer, sell or distribute an alleged franchisor's goods or services. A ruling that Agents do not offer, sell or distribute insurance as a matter of law is thus called for without further proceedings.

### III. The Judge's Jury Instructions in *Charts* Were Inadequate.

In addition to the letter brief from counsel, Plaintiff's Notice also included the jury instructions Judge Droney delivered to guide the jury's deliberations in *Charts*. Even a cursory examination of the instructions reveals them to be conspicuously imprecise, even more so when held up to the light of case law from the Connecticut Supreme Court. In *Getty Petroleum Marketing, Inc. v. Ahmad*, 253 Conn. 806, 757 A.2d 494 (Conn. 2000), the Connecticut Supreme Court elaborated on the meaning of the phrase "offer, sell or distribute" as used in the Connecticut franchise act. Consistent with State Farm's prior briefing on the subject, it gave the terms a technical construction. It held that where an alleged franchisee is merely acting as a commission agent facilitating the exchange between the would-be franchisor and the end customer, and where the franchisor owns the items being sold, delivered them to the alleged franchisee and set the prices, the putative franchisee did *not* have the right to "offer, sell or distribute" within the meaning of the Connecticut law. 757 A.2d at 498-501; *see also Automatic*

*Comfort Corp. v. D&R Serv., Inc.*, 627 F. Supp. 783, 787 (D. Conn. 1986)). This is precisely what State Farm argued in its summary judgment papers, and it is the reason other courts have uniformly held that State Farm Agents are not franchisees. See cases cited at pp. 52-55 of Def.'s Memo. in Support of Mot. for Summ. J. (May 6, 2004).

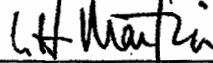
In the face of this clear authority the only guidance Judge Droney gave the jury on the question of what it means to "offer, sell or distribute" a franchisor's goods or service consisted of a single paragraph (and really, a single sentence) in which he stated: "The question of whether Charts was engaged in the business of offering, selling or distributing Nationwide policies can best be analyzed by measuring how far Charts is from the situation of a pure employee, who merely takes money and hands it over to his employer." Jury Instructions at 17. In light of the obvious disjunction between the jury instructions and *Getty Petroleum* and *Automatic Comfort Corp.*, it is unlikely that the jury's verdict in the *Charts* case will survive appeal to the United States Court of Appeals for the Second Circuit. In any event, whatever the outcome in Connecticut, the jury instructions in *Charts* do not accurately reflect the law in any of the 15 states whose franchise statutes were invoked by Plaintiff in this case.

Indeed, *Charts* stands by itself in lonely opposition to the mountain of judicial opinions that come to exactly the opposite conclusion and find that insurance agents are not and cannot be franchisees. *Charts* is simply inadequate to overcome their weight, especially given the added fact that three of those prior cases directly addressed the State Farm-Agent relationship, and two of those were rendered in jurisdictions Plaintiff in this case is suing about. *Hartman v. State Farm Mut. Auto. Ins. Co.*, Case No. 93-8084 (S.D. Fla. 1993), *aff'd*, 77 F.3d 496 (11th Cir. 1996); *Mazziotti v. State Farm Indemnity et al.*, No. C 333-98 (N.J. Super Ch. Div 2002); *Vitkauskas v. State Farm Mut. Auto. Ins. Co.*, 509 N.E.2d 1385 (Ill. App. Ct. 1987).

For all these reasons, *Charts* cannot stem the tide against Plaintiff. Summary judgment in State Farm's favor is still warranted.

Respectfully submitted,

By its attorneys,



Paul S. Reichler, DC Bar No. 185116  
Lawrence H. Martin, DC Bar No. 476639  
Jonas M. Monast, DC Bar No. 479873  
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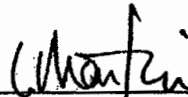
Dated: January 5, 2005

#### CERTIFICATE OF SERVICE

I hereby certify that on this the 5<sup>th</sup> day of January, 2005 a true and correct copy of "DEFENDANTS' RESPONSE TO PLAINTIFF'S NOTICE OF FILING OF SUPPLEMENTAL AUTHORITY" was served upon the following attorneys of record for Plaintiff herein, by facsimile and by U.S. mail, postage paid:

✓ Allan P. Hillman, Esq.  
NEUBERGER, QUINN, GIELEN,  
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One South Street, 27th Floor  
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80 South Eighth Street  
Minneapolis, MN 55402-2204



Lawrence H. Martin

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UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

HIL  
JSR  
DSF  
Grethe  
JA

RECEIVE

OCT - 2 2003

BINGHAM MCCUTCHEN

ALEX CHARTS, et al.  
Plaintiff,

v.

Civil Action No. 3:97CV1621(CFD)

NATIONWIDE MUTUAL INSURANCE  
CO., et al.  
Defendants.

**RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Pursuant to Fed.R.Civ.P. 56, the defendants, Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company, Nationwide Life Insurance Company, Nationwide Property and Casualty Insurance Company, Nationwide Variable Life Insurance Company, and Colonial Insurance Company of California (collectively "Nationwide") filed a Motion for Summary Judgment and/or For Order Limiting the Issues to be Tried [Doc. # 127]. For the following reasons the defendants' motion is DENIED.

**I. Background<sup>1</sup>**

Plaintiff Alex Charts first entered into an insurance agent's agreement with Nationwide on February 1, 1979. Charts operated his insurance agency as a corporation named "Alex Charts Agency, Inc." In late 1992 or early 1993, around the time that Charts and his wife filed for

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<sup>1</sup>The facts are taken from the parties Local Rule 9(c) statements and motion papers. (The Local Rules have been renumbered since the parties filed their papers. The new Local Rule number is 56). Disputed facts are indicated.

personal bankruptcy, Charts formed "the Charts Insurance Agency, Inc." ("CIAI").<sup>2</sup> CIAI, which is also a plaintiff in this action, entered into a Corporate Agency Agreement with Nationwide on May 10, 1993. That agreement identified Charts as the principal of CIAI. The agreement also provided that it could be terminated by either party upon written notice, without cause.

On December 14, 1992, Alex Charts and his wife Helena filed their voluntary petition under Chapter 7 of the Bankruptcy Code with the United States Bankruptcy Court for the District of Connecticut. On February 13, 1996, the Bankruptcy Court issued an Order of Discharge of Debtor, and the bankruptcy case was closed on March 1, 1996. The plaintiffs concede that the bankruptcy petition did not include any references to CIAI and that its existence was never raised in the bankruptcy proceedings, but they maintain that because CIAI was formed after the petition was filed, it need not have been disclosed. Charts did disclose his ownership of the shares of Alex Charts Agency, Inc. in his bankruptcy schedules.

By letter dated January 11, 1996, Nationwide cancelled the Corporate Agency Agreement with CIAI. After Charts requested an internal review of that decision, Nationwide's review board endorsed the termination. Charts and CIAI filed this action on August 11, 1997. The amended complaint [Doc. # 62] asserts three counts.<sup>3</sup> Count one alleges that in terminating the Corporate Agency Agreement with CIAI, Nationwide breached its implied covenant of good faith and fair dealing. Count two asserts that the termination of the agreement was in violation of the

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<sup>2</sup> The parties dispute the precise date on which this entity was formed, but agree that the Certificate of Organization and the First Biennial Report were filed with the Connecticut Secretary of State's Office on January 20, 1993.

<sup>3</sup>This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1332, as there is complete diversity of citizenship between the opposing parties.

Connecticut Franchise Act. Count three asserts that the termination resulted in a violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. §§ 42-110b, et seq. Nationwide's summary judgment motion addresses all three counts.

Before reaching the merits of the summary judgment motion filed by Nationwide, the Court will recount more of the procedural history of this case, particularly its intersection with the Charts' bankruptcy petition and discharge.

## **II. Additional Procedural History of this Case**

On December 6, 1999, Nationwide filed its first motion for summary judgment [Doc. #85] claiming that because Charts did not disclose the existence of CIAI in his bankruptcy proceedings, he did not have standing to pursue this lawsuit and should be judicially estopped from pursuing any undisclosed claim. On August 8, 2000, Magistrate Judge William I. Garfinkel issued a recommended ruling [Doc. # 97] granting the summary judgment motion and concluding that Charts' claims against Nationwide were part of the Charts' bankruptcy estate and as such could not be asserted here by Charts. On September 29, 2000, this Court approved, in part, the recommended ruling [Doc. #102], over the plaintiffs' objection, and judgment entered for Nationwide [Doc. # 103].<sup>4</sup>

The plaintiffs appealed the ruling and judgment and on July 11, 2001, the Second Circuit issued a Summary Order remanding the case to this Court [Doc. # 110]. While not commenting on the merits of this Court's conclusion that the plaintiffs' claims were property of the bankruptcy

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<sup>4</sup>The Court did not approve that part of the decision which concluded that Charts was also precluded by the doctrine of judicial estoppel.

estate, the Second Circuit held that the bankruptcy trustee was a necessary party in making such a determination. The mandate directed this Court "to vacate the judgment" and "reopen[] the proceeding and join[] the [bankruptcy] estate as a party." It further stated that "withdrawal of the reference would seem to be the most practical and expeditious way of handling the matter."

In accordance with the mandate, on July 12, 2002, this Court entered an Order [Doc. # 126] vacating its ruling on the motion for summary judgment. The Order also directed the Clerk of the Bankruptcy Court for the District of Connecticut to withdraw the reference in the Charts Bankruptcy case. Further, it directed the Clerk of this Court to add the bankruptcy estate as a plaintiff in this case, and directed the trustee of the estate to file an appearance.

On July 26, 2002, the defendants filed this motion for summary judgment [Doc. #127], which closely mirrors their original motion. A hearing on the defendants' motion was held following the formal consolidation of this action with the bankruptcy action.

### **III. Summary Judgment Motion**

In its new Motion for Summary Judgment [Doc. # 127], Nationwide asserts the same standing and judicial estoppel arguments that were the basis of the recommended ruling on the first motion for summary judgment—that is, that Charts does not have standing to assert these claims, or that he is judicially estopped from asserting them, because he had not disclosed the existence of CIAI during the bankruptcy proceedings.

Nationwide also claims that, even if Charts has standing and is not judicially estopped from asserting these claims, it is entitled to summary judgment on the merits of the first, second, and third counts of the amended complaint. Regarding count one, Nationwide argues that its

termination of CIAI cannot violate the implied covenant of good faith and fair dealing because the Corporate Agency Agreement expressly provides that it was terminable at will by Nationwide. Regarding the Connecticut Franchise Act claims in count two, Nationwide asserts that, based on the undisputed facts, the Corporate Agency Agreement did not create a "franchise" and therefore that the plaintiffs do not fall within the Act. Finally, Nationwide asserts two independent bases for summary judgment on the plaintiffs' CUTPA claims in count three: 1) to the extent that it incorporates the earlier counts, it must fail "as they do" and 2) that the additional CUTPA violation alleged—involving a "computer crime"—is time-barred.

#### **IV. Standard**

In a summary judgment motion, the burden is on the moving party to establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). A court must grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Miner v. City of Glens Falls, 999 F.2d 655, 661 (2d Cir. 1993) (citation omitted). A dispute regarding a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 523 (2d Cir. 1992) (quoting Anderson, 477 U.S. at 248). After discovery, if the nonmoving party "has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof," then summary judgment is appropriate. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

The Court resolves “all ambiguities and draw[s] all inferences in favor of the nonmoving party in order to determine how a reasonable jury would decide.” Aldrich, 963 F.2d at 253. Thus, “[o]nly when reasonable minds could not differ as to the import of the evidence is summary judgment proper.” Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir. 1991); see also Suburban Propane v. Proctor Gas. Inc., 953 F.2d 780, 788 (2d Cir. 1992).

## V. Discussion

### A. Property of the Estate

As noted above, the recommended ruling on the defendants’ original motion for summary judgment, approved by this Court, found that the claims asserted by the plaintiffs here belonged to the bankruptcy estate of Alex Charts and his wife. Therefore, the Court held, the Charts’ failure to disclose CIAI’s existence and to list their claims on the schedule of assets in the bankruptcy proceeding deprived them of standing to pursue these claims here. The Second Circuit’s Summary Order [Doc. #110] remanding this case did not address the merits of this Court’s determination that the claims were property of the bankruptcy estate, but held that “the district court erred in adjudicating the property rights and claims at issue without joining the debtor’s estate as a party.” Summary Order, at 2.<sup>5</sup> After considering the parties’ arguments and the

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<sup>5</sup>At the hearing held after the estate was joined as a party, the estate’s trustee, Attorney Richard Belford, indicated that he believed the claims raised by the Charts relating to CIAI were *not* properly part of the bankruptcy estate. Moreover, Belford indicated that if the Court were to again hold that these claims were part of the estate, he would seek to abandon them. If the claims had been abandoned by the estate, this issue would have been moot, because debtors are free to pursue claims that have been abandoned by the estate. See Hutchins v. Internal Revenue Serv., 67 F.3d 40, 45 (3d Cir. 1995) (holding that debtor had standing to assert potential tax refund claim after the court granted the trustee’s motion to abandon the claim). However, the estate did not abandon the claims, but instead sold any interest it had in the claims to Nationwide. Thus, if

comments of the trustee, the Court will again consider the question of whether the claims asserted by the plaintiff were part of the bankruptcy estate.

1. Waiver of Standing Claim

The plaintiffs argue that by failing to raise issues of lack of standing, bankruptcy, and judicial estoppel in their first responsive pleading, Nationwide has waived those affirmative defenses, pursuant to Fed.R.CivP. 8(c). However, standing is an essential element of jurisdiction. See The Bennett Funding Group, Inc. v. Breeden, No. 01-5062, 01-5064, 01-5066, 01-5068, 2003 WL 21653878, \*6 (July 15, 2003, 2d Cir.) (“[S]tanding is an aspect of subject matter jurisdiction”); Abortion Rights Mobilization, Inc. v. Baker, 885 F.2d 1020, 1023 (2d Cir. 1898) (“[W]hen a plaintiff lacks standing to bring suit, a court has no subject matter jurisdiction over the case.”). Furthermore, it is well-settled that issues going to this court’s subject matter jurisdiction can never be waived. See The Herrick Co. v. SCS Communications, Inc., 251 F.3d 315, 333 (2d Cir. 2001) (“Under these circumstances, the fundamental principle that the limits on federal subject matter jurisdiction cannot be waived, and may be challenged at any time, governs.”). Therefore, the Court holds that Nationwide has not waived its objection based on standing by failing to raise it in its first responsive pleading. With regard to whether the defense of bankruptcy has been waived, the Court finds that the Charts’ bankruptcy proceedings are not asserted as an affirmative defense. Rather, those proceedings are merely the factual predicate to Nationwide’s standing argument, which, as has just been noted, cannot be waived.

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the Court were to hold that these claims were property of the estate, the Charts would not have standing to assert them because any claim owned by the estate is now held by Nationwide.

## 2. Plaintiffs' Standing<sup>6</sup>

"When a debtor files for bankruptcy protection, a bankruptcy estate is created." Polvay v. B.O. Acquisitions, Inc., No. 96 Civ. 3576(PKL), 1997 WL 188127, at \*2 (April 17, 1997, S.D.N.Y.). The scope of the estate is defined at 11 U.S.C. § 541(a), which lists the property interests of the debtor that comprise the estate, and § 541(b), which provides for certain exclusions. It is undisputed that the Corporate Agency Agreement with CIAI was entered into in May of 1993—after the Charts' bankruptcy petition was filed—and that the alleged breach of that agreement by Nationwide occurred in January 1996—before the bankruptcy case was closed in March of 1996. Thus, the question for this Court is whether Chart's and CIAI's claims, which accrued after the petition was filed, but before the case was closed and the Charts were discharged, constitute property of the estate under § 541. Section 541(a) provides, in relevant part, that

Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case. . . .

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<sup>6</sup>Although the parties have not raised the issue, the Court notes that it has already decided, by adopting Judge Garfinkel's recommended ruling, that the plaintiffs' claims were property of the Charts' bankruptcy estate. While the Second Circuit's Summary Order [Doc. # 110] did not expressly overrule that determination, the Court retains the power to reconsider that decision, and will do so now. See May Dep't Stores Co. v. International Leasing Corp., No. 88Civ.4300(CSH), 1995 WL 656986, at \*2 (Nov. 8, 1995 S.D.N.Y.) (Under law of the case rules, "district courts retain discretion to reconsider, on remand, any issues that the Circuit Court did not 'expressly or implicitly decide.'" (quoting United States v. Stanley, 54 F.3d 103, 107 (2d Cir. 1995). See also Westerbeke Corp. v. Daihatsu Motor Corp., 304 F.3d 200, 219 (2d Cir. 2002) (law of the case a discretionary doctrine); United States v. Uccio, 940 F.2d 753 (2d Cir. 1991) (under law of the case doctrine courts should adhere to prior decisions in same case, but while the rule "informs the court's discretion it does not limit the tribunal's power" to reconsider prior ruling). Moreover, the Second Circuit's mandate seems to contemplate a de novo review of the standing issue by this Court after hearing from the bankruptcy trustee.

(7) Any interest in property that the estate acquires after the commencement of the case.

11 U.S.C. § 541(a).

In the recommended ruling on the original motion for summary judgment, the Court relied on Correll v. Equifax Check Servs., Inc., 234 B.R. 8 (D. Conn. 1997), in which the Court held that, pursuant to § 541(a)(7), a Fair Debt Collection Act cause of action arising out of dunning letters received by the debtor after the bankruptcy petition was filed constituted property of the estate. See Correll, 234 B.R. at 10. Other courts have reached similar conclusions based on § 541(a)(7). See Polvay, 1997 WL 188127, at \*2 (“Causes of action arising after the debtor files for bankruptcy generally become part of the estate.”); Stanley v. Sherwin-Williams Co., 156 B.R. 25 (W.D. Va. 1993) (debtor did not have standing to maintain cause of action for interference of contractual relations which arose prior to the discharge of his estate); In re Griseuk, 165 B.R. 956, 957-59 (Bankr. M. D. Fl. 1994) (holding that personal injury action arising during the pendency of the bankruptcy proceedings was property of the estate); DeLarco v. DeWitt, 136 A.D.2d 406, 408 (N.Y. App. Div. 1988) (“Upon the filing of a voluntary bankruptcy petition, all property which a debtor owns or subsequently acquires, including a cause of action, vests in the bankruptcy estate.”). However, other courts have held that post-petition, pre-discharge causes of action under similar circumstances are property of the debtor. See In re Durrett, 187 B.R. 413, 417-19 (Bankr. D. N.H. 1995) (personal injury action arising post-petition did not become part of the bankruptcy estate); In re Domeling, 127 B.R. 954, 955-56 (W.D. Pa. 1991) (tort claim arising out of post-petition automobile accident was property of the debtor, rather than the estate).

Taken together, these cases indicate that there may be no bright-line test for whether a

cause of action that accrues post-petition will be included as part of the bankruptcy estate.

Rather, in making such a determination, the Court should consider whether the cause of action "is sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupt's ability to make an unencumbered fresh start." Domeling, 127 B.R. at 957 (citing Segal v. Rochelle, 382 U.S. 375 (1966) and noting that it is still controlling, despite the revision of the bankruptcy code in 1978) (internal quotations omitted)).

For example, in In re O'Dowd, 233 F.3d 197 (3<sup>rd</sup> Cir. 2000), the Third Circuit considered the relation of a post-petition legal malpractice claim to the debtor's pre-bankruptcy past:

[Debtor's] primary contention is that, since the [malpractice] Action is a post-petition tort claim, it can belong only to the debtor. She relies on caselaw in which courts have found that a debtor's post-petition cause of action did not constitute property of the estate [string cite omitted]. However, none of these cases involved claims that could be traced directly to pre-petition conduct in the way [this claim] can be . . . While we acknowledge that the conduct giving rise to the malpractice claim occurred post-petition, we find it conceptually impossible to sever [that action] from . . . [debtor's] pre-bankruptcy dealings with [her attorney].

Id. at 203-04.

Here, in contrast to O'Dowd, the post-petition claims at issue did not involve matters that could be traced to the plaintiffs' pre-petition conduct. The gravamen for all the counts in the amended complaint is the alleged breach of the Corporate Agency Agreement on January 11, 1996.<sup>7</sup> The agreement was entered into on May 10, 1993 after the formation of the new

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<sup>7</sup>Although the First Amended Complaint refers also to the "Agency Agreement" of 1979 and an "Agent Corporation Agreement" of 1991, it appears that the plaintiffs are relying only on breaches of the Corporate Agency Agreement of 1993. To the extent that the plaintiffs are making any claims that predate the formation of CIAI or that do not relate to the 1993 agreement, those claims may very well be barred by the Charts' bankruptcy. That distinction is best left to the time of trial, however, in light of the plaintiffs' apparent reliance on post-petition causes of action.

insurance agency, and is not "rooted in the debtor's pre-bankruptcy past" (which ended with the filing of the petition in December 1992).<sup>8</sup> Even though there is a provision in the Corporate Agency Agreement purporting to make the agreement retroactive to 1980, it is not the performance of the contract that is the subject of the plaintiffs' claims, but the *breach* of that agreement—an event that the parties do not dispute occurred, if at all, post-petition.

Therefore, the Court holds that the claims asserted by the plaintiffs are not property of the bankruptcy estate and the plaintiffs have standing to assert these claims.

#### **B. Merits of the Summary Judgment Claim**

The Court finds that there are genuine issues of material fact, including whether the relationship between the parties constituted a franchise, that preclude summary judgment on the plaintiffs' claims.

#### **VI. Conclusion**

For the preceding reasons, the defendants' Motion for Summary Judgment and/or For Order Limiting the Issues to be Tried [Doc. # 127] is DENIED.

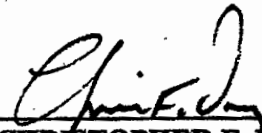
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<sup>8</sup>Moreover, Charts was free to enter into contracts in his individual capacity after the filing of the petition. Section 541(a)(7) explicitly refers to property acquired by the estate, as distinct from the debtor. As the court noted in Doemling:

Obviously, after the commencement of the case, the estate has an existence that is completely separate from that of the debtor. Section 541(a)(7) covers only property that the estate itself acquires after the commencement of the proceeding. Hence, there is absolutely no support for the . . . claim that all the debtor's property, whether obtained pre- or post-petition, is property of the estate unless specifically excluded.

Doemling, 127 B.R. at 956.

SO ORDERED this 30<sup>th</sup> day of September 2003, at Hartford, Connecticut.

  
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**CHRISTOPHER F. DRONEY**  
**UNITED STATES DISTRICT JUDGE**