IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

BROWN DOG, INC. And ERIC BROWN,

Plaintiffs,

v.

THE QUIZNO'S FRANCHISE COMPANY LLC,

Defendant.

OPINION AND ORDER

04-C-18-X

THE QUIZNO'S FRANCHISE COMPANY, LLC,

Third-Party Plaintiff,

v.

STUART BROWN,

Third-Party Defendant.

This is a civil diversity action arising out of the termination of a marketing agreement between plaintiff Brown Dog, Inc. ("Brown Dog") and defendant/third party plaintiff The Quizno's Franchise Company, LLC ("Quizno's"). Following a grant of partial summary judgment, the parties tried their remaining claims to the court in June 2005 and submitted post-trial briefs through August. Brown Dog claims that Quizno's violated Wisconsin's Fair Dealership Law (WFDL) when it terminated the parties' written agreement. Quizno's has filed a counterclaim and a third party claim that plaintiffs and Brown Dog's CEO are liable to it for costs incurred due to Brown Dog's failure to perform under the contract.

For the reasons stated below, I am granting judgment against Brown Dog on its remaining claim against Quizno's under the WFDL, and for Quizno's on its third-party claim for damages but awarding only nominal damages.

FACTS

Having presided over the bench trial, having heard and seen the witnesses testify, having made credibility determinations and having considered the exhibits, I find the following facts:

Quizno's is a Colorado limited liability company with its principal place of business in Denver, Colorado. Steven Shaffer is president of Quizno's. Brown Dog is a Wisconsin corporation with its principal place of business in Eau Claire, Wisconsin, which is home to its CEO, third party defendant Stuart Brown, and his adult son, plaintiff Eric Brown.

Quizno's is a national company that sells toasted submarine sandwiches and related food products. Quizno's views itself in direct competition with Subway, McDonald's, Taco Bell, Wendy's, and Arby's. (In Wisconsin, there also are regional competitors such as Cousin's Subs and Jimmy John's). Quizno's is a recent arrival on the national fast food scene: in 1992, Quizno's only had about 40 restaurants open; at the time of trial, Quizno's had about 4000 restaurants open worldwide, 3600 of which were in the United States, with 2400 other franchisees "in the pipeline," waiting only for selection and preparation of a suitable restaurant site.[1] In 2004, Quizno's had about $1.2 billion in sales, a fraction of the $135 billion fast food market that year.

[1] By way of comparison, at t he time of trial, Subway had about 21,000 franchises, McDonald's had 14,000, Wendy's had 8,000; Taco Bell had 6,000, and Arby's had 3600. Some of these companies rely exclusively on franchisees to run their restaurants, others have at least some corporate-run restaurants.

Quizno's sells franchises to operate its restaurants at a fee of $25,000 per restaurant, plus monthly royalties and assessments thereafter. Although some franchisees buy and operate more than one restaurant, the typical Quizno's franchisee is a 38 year old man with a net worth of $140,000. His franchise becomes his life and allows him, according to Quizno's, to "live the [entrepreneurial] dream." The restaurants usually are open seven days a week, and franchisees often commit eighty hours a week to their stores.

Quizno's uses intermediary managers called Area Directors ("AD"s) to recruit franchisees, get the new restaurants open and keep them profitable. Many people who become ADs already own Quizno's franchises and decide to move up the hierarchy. A person becomes an AD by purchasing from Quizno's the right to develop the franchises in a defined geographic territory. When buying a territory from Quizno's, an AD agrees to open and maintain an ever-increasing number of stores in his territory pursuant to a quarterly quota spelled out in the written contract. As Quizno's field representative, the AD is responsible for recruiting franchisees, guiding them swiftly and successfully through the myriad steps necessary to open a sandwich shop, then providing continuous support after opening. In exchange, the AD receives 50% of the franchise fee paid by each new store owner (that is $12,500 per new restaurant, paid up front) plus perpetual monthly royalties equal to 2.8% of the net sales from each store operating in his territory (compared to 4.2% in monthly royalties to Quizno's). With a nationwide average of about $400,000 per store in sales, the per-store royalties for an AD usually are between $10,000-$12,000 per year.

Since ADs, over time, usually aim to open and maintain at least a dozen restaurants, an AD who meets or exceeds his development quota will be comfortably remunerated.

Quizno's views constant growth in the number of its restaurants as critical to its viability as a corporation. A fast food company must grow constantly to survive and remain profitable in the crowded and competitive marketplace. As an object lesson, Quizno's points to Blimpie's, a sandwich chain that stopped opening new restaurants and spiraled downward as a company so that it no longer is a national force. National growth also is important at the local level: Quizno's average sales per store is increasing over time: as the nationwide network of restaurants has grown, average unit volumes have grown as well, thus increasing the profits to each franchisee.

Quizno's constant mantra is to increase its market share by building its brand and its market by opening evermore restaurants in the best locations. To build its brand, Quizno's pays for national advertising by imposing a 4% fee on its franchisee's net sales (compared to 5% for Subway and McDonald's); in '04 Quizno's committed an additional $30 million in corporate money to national advertising.

In building its market, Quizno's deems its ADs critical to achieving the growth necessary to remain a major–and a profitable–player in the fast food market. ADs account for 50% of Quizno's growth. Quizno's expects its ADs to "drive leads," that is, to identify and woo potential franchisees on a monthly basis by networking, placing advertisements in

various media, and holding open houses and seminars using a canned presentation from Quizno's, with rigorous followup.

When an AD obtains a signature on a "UFOC" (Uniform Franchise Offering Contract), the new franchisee is designated in Quizno's acronymic jargon as a SNOWS (Sold, Not Opened, Without a Site); the AD must help the SNOWS promptly move to "SNO" status ("Sold, Not Opened," *i.e.*, has a site which is being prepared). Quizno's in Denver keeps track of all its SNOWSes and SNOs nationwide in a weekly "Pipeline" report (also called the FMR or "franchise management report). Every SNOWS and SNO in the pipeline has a projected opening date, with intermediate progress in critical areas reported to headquarters on a weekly basis. Using the FMR, Quizno's knows every week how many new restaurants will open in 30 days, 60 days, and 90 days, and can plan accordingly. Although Quizno's does not use the FMR to judge the performance of its ADs, it can cross-reference the numbers to determine how many SNOWSes and SNOs an AD has in the pipeline and how long before they are projected to open a restaurant.

It can take anywhere from 3 months to a full year simply to find a suitable restaurant site, after which negotiations with the landlord commence, which can take from 3 weeks to 3 months. The competition for a prime location is intense. If a good spot becomes available, then Quizno's must be ready to jump on it instantly; if it does not, then Subway or another competitor will snatch the site.[2] Therefore, it is critical for ADs to have

[2] In fact, Subway will pay a landlord a $1000 bounty to drop a Quizno's franchise as a tenant and replace it with a Subway franchise.

SNOWSes in the pipeline so that when a suitable spot becomes available, the AD and the franchisee can swoop in and grab it right away. Both the AD and Quizno's help SNOWSes find sites and negotiate favorable leases. But the AD, who probably recruited the franchisee and who is in the field with him, is the franchisee's primary guardian, hectoring prospective landlords, getting the lease signed, aiding with obtaining an SBA loan; once the site is rented, the AD helps his new SNO prepare and implement schematics and floor plans, implement local marketing, order his food from Quizno's, hire and train his crew, then open the doors and start selling sandwiches. The AD must inspect each store monthly and counsel his franchisees on how to make more money. The AD is, and remains, each of his franchisee's "lifeline" to Quizno's headquarters in Denver.

Quizno's requires new ADs to attend (and pay for) a training seminar in Denver. Quizno's also has a procedural manual for ADs that details the hows, whens and whys of the position, including restaurant development. Quizno's hosts six two-day meetings for ADs every year, dubbed "BAM"s ("Big-Ass Meetings"). Shaffer and several top aides meet quarterly to review all ADs to ensure that they are meeting their quarterly quotas for opening new restaurants, have an adequate number of SNOWSes and SNOs in the pipeline, and are complying with the requirements of Quizno's manual for ADs.

In Shaffer's view, running a successful restaurant is difficult, but being a successful AD is easy now that Quizno's has become a "magical brand" that is experiencing explosive growth across America. Even so, from the early '90s through the time of trial, Quizno's

dropped 29 of its 70 ADs, 28 of them for failing to meet their contractual development quotas. Shaffer personally is responsible for relieving most of the underperforming ADs, starting when he became Quizno's Chief Development Officer in 2002 and continuing after he became president in 2004.[3] Prior to this, from 1994 to 2002, Quizno's made no concerted effort to ride herd on its ADs. In the '90s, when Quizno's was struggling to survive, it could not afford to fire any of its ADs, so it didn't. Although Quizno's always had imposed quotas on its ADs as part of their contracts, no one used to comply with them.

But when Shaffer assumed the position of CDO, he alerted the ADs that things were changing: on his watch, Quizno's would enforce the development quotas to which the ADs had agreed. Shaffer made this decision for several reasons. As previously noted, Quizno's needed to continue to grow in order to compete in the market; AD development quotas were the only way to ensure constant growth. Second, the Quizno's brand was hot, so the quotas were realistic and achievable. (Worth noting, each AD writes his own development quota after researching his market and submitting his proposed development plan to Quizno's as part of his application to become an AD). Third, the franchisees were demanding that Quizno's open more restaurants so that they could get to work selling sandwiches.

Even so, rather than immediately terminate Quizno's clutch of chronically under-performing ADs, Shaffer decided that fairness militated toward giving them an opportunity

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[3] Shaffer started with Quizno's in 1992 as a franchisee in St. Louis, rising to AD in 1995, adding the position of Executive Vice President of Operations, Central Region in 1998. Shaffer remained an AD until 2002 when he became Chief Development Officer.

to catch up and get with the program. But Quizno's commitment to expansion never flagged: at every BAM, Shaffer personally told the assembled ADs during development breakouts that Quizno's expected all of its ADs to open the new restaurants required by their contracts, called Area Director Marketing Agreements (ADMAs). Shaffer would meet one-on-one with lagging ADs to exhort them to work harder and to close the gap on their quotas. But if an AD remained consistently behind quota, then Quizno's would terminate the ADMA. Shaffer personally would review each underperforming AD with his key advisors, then decide whether to terminate the ADMA. Although there was some variation on how long Shaffer tolerated chronic quota deficiencies by ADs, once he took charge, the mode was 6 to 8 straight quarters of missed quotas before termination.

By way of example, Michael Baird, an AD in the Amarillo/Oklahoma City area since 1999, had a quota that required 1 open restaurant (as opposed to sold franchises, for which there was a separate quota) in the 4th quarter of 2000, and increased incrementally to 15 open restaurants in the 4th quarter of 2003. Baird stayed current until the end of 2001, then fell behind; he never got more than 7 restaurants open, so he spent 7 straight quarters under quota (all in 2002-'03[4]) and was 6 restaurants behind when Quizno's terminated his ADMA during the 4th quarter of 2003.[5]

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[4] That is, after Shaffer assumed the reins as Quizno's Chief Development Officer.

[5] In each of these examples, I am not counting the quarter in which Quizno's terminated the ADMA because I surmise that, as with Brown Dog, each AD's quarter was measured on its last day.

Classic Subs, Inc., an AD in Fargo since 1995, was to increase from 3 restaurants in the 3rd quarter of 1998 to 12 restaurants in the 3rd quarter of 2004. Classic Subs was at or above its quota for 17 quarters but fell 2 restaurants behind in the 4th quarter of 2002, then wavered between -1 and -3 for seven quarters (all in 2002-'03) before Quizno's terminated the ADMA during the 3rd quarter of 2004.

Daniel A. Schwalbe, Inc., became an AD in Spokane starting in 1995. Schwalbe's quota started at 2 open restaurants in the 4th quarter of 1998 and rose to 12 restaurants by the 1st quarter of 2003. Schwalbe was at or above quota for 11 quarters, then wavered between -1 and -3 for ten quarters (eight of them in 2002-'03) before Quizno's terminated the ADMA in January, 2004.

Feit Food Concepts, Inc., became an AD in Sioux Falls starting in 1999. Feit's quota started at 1 open restaurant in the 2nd quarter of 2000 and rose to 14 restaurants by the 3rd quarter of 2004. Feit was at or above quota for 10 quarters, then descended from -1 to -5 over the course of 8 quarters (all of them in 2002-'04) before Quizno's terminated the ADMA in September, 2004.

Great Valley Development, LLC became an AD in Mississippi starting in 1998. Great Valley's quota started at 5 open restaurants in the 3rd quarter of 2001 and rose to 11 restaurants by the 2nd quarter of 2004. Great Valley was at or above quota for 3 quarters, then wavered between -1 and -4 for 8 quarters (all of them in 2002-'04) before Quizno's terminated the ADMA in April, 2004.

Roger Grieco became an AD in Tennessee starting in 1996. Grieco's quota started at 6 open restaurants in the 3rd quarter of 1999 and rose to 21restaurants by the 1st quarter of 2003. Grieco was at or above quota for only the last two quarters of 1999, then descended from -1 to -9 over the next 12 quarters (4 of them in 2002) before Quizno's terminated the ADMA in January, 2003.

MJ Development became an AD in Texas starting in 1996. MJD's quota started at 3 open restaurants in the 1st quarter of 1999 and rose to 18 restaurants by the 1st quarter of 2004. MJD was at or above quota for only the 4 quarters of 1999, then wavered between -1 and -9 for 16 quarters (8 of them in 2002-'03) before Quizno's terminated the ADMA in January, 2004, by which time MJD had opened only 11 of 18 required restaurants.

R&B Management, LLC, became an AD in Alabama and Georgia starting in 1998. R&B's quota started at 1 open restaurant in the 4th quarter of 1999 and rose to 31 restaurants by the 2nd quarter of 2004. R&B never met its quota, starting out at -1 and spiraling down to -18 over the course of 17 quarters (8 of them in 2002-'03) before Quizno's terminated the ADMA in January, 2004.[6]

The Neuhart Group, Inc. became an AD in Sacramento starting in 1996. Neuhart's quota started at 1 open restaurant in the 4th quarter of 1998 and rose to 27 restaurants by the 1st quarter of 2004. Counting the 3rd quarter of 1998 when Neuhart opened one

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[6] The exhibits suggest that R&B might have remained an AD for one more full quarter, in 2004, with only 10 of 31 required restaurants open.

restaurant before any were due, Neuhart was at or above quota for 3 quarters, then wavered between -1 and -3 for 7 quarters, caught up for the 1st quarter of 2001, fell to -1 in the next quarter, then plummeted from -2 in the 1st quarter of 2002 to -10 in the 2nd quarter of 2003, before leveling off at -9 for two quarters until Quizno's terminated the ADMA in January, 2004.

Falcon Ventures became an AD in Georgia starting in 1998. Falcon's quota started at 4 open restaurants in the 3rd quarter of 1998 and rose to 48 restaurants by the 3rd quarter of 2004. Falcon met its quota for one quarter and after that was constantly behind until terminated in August, 2004. In the 1st quarter of 2002, Falcon was 9 restaurants behind (12 of 21) and plunged to 35 behind (13 of 48) at the time of termination in the 3rd quarter of 2004.

Quizno's also had some ADs whose development quotas were subject only to yearly review. Quizno's culled yearly underperformers like the quarterlies, although sometimes it took longer. For instance, Impetus Profit, LLC, was an AD in Montana and the Dakotas starting 1994; at every single anniversary, Impetus was under its quota for open restaurants, starting at 0 for 2 in 1995 and falling to 9 out of 20 (-11) in 2000 before clawing back up to 15 out of 20 (-5)in 2002 and 16 out of 20 (-4) in 2003; Quizno's terminated Impetus's ADMA in January 2004.

Lenlar, LLC was AD of a region stretching from Peoria to Louisville, starting in 1998; although Lenlar opened lots of restaurants, it promptly fell behind quota and stayed there.

Lenlar finished fiscal 2002 (March '02) with 24 open of 35 required (-11), 2003 with 35 open of 45 required (-10), 2004 with 49 open of 57 required (-8) and was terminated September 2004 with 58 restaurants open against 68 required by the end of fiscal '05.

Restaurant Development, Inc., became AD of Springfield, Missouri in 1997. RDI was -2 against its quota at the end of fiscal 1998 (0 of 2), caught up in fiscal 2000 (7 of 7), but plunged to -16 (7 of 23) by the end of fiscal 2003; Quizno's terminated RDI's ADMA on December 23, 2003.

Finally, Subs Unlimited became the AD of Huntsville-Decatur-Florence in 1995. It finished 1996 with no open restaurants (-2 against its quota), and fell to -9 (5 of 14) by the end of 2001; in 2002, Subs Unlimited almost caught up, finishing with 13 open restaurants against a quota of 14. Quizno's nonetheless terminated Subs Unlimited's ADMA in November, 2003.

Upon becoming Quizno's decision-maker in 2002, Shaffer used consistent standards to review his ADs, although he would make exceptions based on the particular circumstances of a situation. For instance, Shaffer tolerated Falcon Ventures' abysmal performance in Louisiana because Falcon also was AD for Dallas, one of Quizno's top ten markets. Quizno's initially told Falcon to focus on Dallas, which it did with explosive success, while Louisiana languished. Once the Dallas market was established, Quizno's told Falcon to refocus on Louisiana; Falcon did not, so Quizno's terminated Falcon's ADMA for that territory.

With R&B in Georgia and Alabama, the owner lived in Atlanta and tried to develop his Alabama territory from there. Quizno's was willing to try this, but it didn't work, so Quizno's told the owner to move to Birmingham and focus on Alabama. He didn't, so Quizno's terminated his ADMA.

The Neuhart Group in Sacramento greatly exceeded its quota for selling franchises: by the 2nd quarter of 2001, it had sold 27 franchises against a quota of 14. But Neuhart couldn't get restaurants *open*: that same quarter, it had 11 restaurants open against a quota of 13. Quizno's tolerated this imbalance for a while, then finally terminated Neuhart's ADMA. At the time of termination, Neuhart's quota required 27 sold franchises and 27 open restaurants; it had sold 38 franchises but only had opened 18 restaurants.

Against this backdrop, Brown Dog enters the picture. In 2000, Brown Dog was a franchisee that owned and operated two Quizno's restaurants in Wisconsin. That year, Brown Dog paid $75,000 in nonrefundable fees to obtain the right to become Quizno's AD in 22 counties in Central and West-Central Wisconsin. Brown Dog's ADMA became effective on May 1, 2000. Brown Dog's status as a Quizno's AD falls under the aegis of the Wisconsin Fair Dealership Law, Wis. Stat. § 135 *et. seq.*, a statutory scheme enacted by the state in order to equalize bargaining power between the parties to a dealership contract and to promote fair dealing.[7]

[7] I made this determination when deciding the summary judgment motions and it is the law of the case which I will not disturb. *See Creek v. Village of Westhaven*, 144 F.3d 441, 445 (7th Cir. 1998). The trial testimony and exhibits fleshing out the relationship between Quizno's and its ADs cuts in both directions on whether the WFDL actually should apply to Brown Dog.

Under its ADMA, Brown Dog was to solicit franchisees for Quizno's restaurants, perform site acquisition and development services and render other support to Quizno's restaurants in its territory. As evidenced by Exhibit II to the ADMA, Stuart Brown and Eric Brown also signed personal and unconditional guaranties with Quizno's in which they agreed to be bound by and personally liable for any breach of the ADMA.

Exhibit I to the ADMA set forth the development quota that Brown Dog was required to meet by the last day of each sales quarter. This development quota was a reasonable and essential requirement of Brown Dog's ADMA with Quizno's. The development quota called for a gradually increasing number of open restaurants, requiring not less than 12 by the end of the third quarter of 2004. Brown Dog actually had suggested a more aggressive quota leading to 15 restaurants, but the parties agreed to lower this to 12. This quota represented the minimum number of restaurants that Quizno's expected Brown Dog to open; under the ADMA's "best efforts" clause, Quizno's hoped that Brown Dog would exceed the quota.

Section 4.1 of Brown Dog's ADMA reads:

> Development Quota. AD agrees to comply with the development quota set forth in Exhibit I to this Agreement (**"Development Quota"**) with respect to each Sales Quarter. The determination as to whether AD has met its development obligations under this Agreement shall be made based on the number of Restaurants open and operating at the end of a Sales Quarter. For purposes of these development obligations, a Restaurant must be open and operating in compliance with the applicable Franchise Agreement in order to be counted toward the satisfaction of the Development Quota. AD agrees that during the term of this Agreement, it will at all times faithfully, honestly and diligently perform its obligations hereunder and will continuously exert its best efforts

> to promote and enhance the development and operation of QUIZNO'S Restaurants within the Territory.

Section 17.2 of the agreement provided that failure to meet the Development Quota could be grounds for termination of the agreement. That provision reads:

> Franchisor shall have the right to terminate this Agreement, effective upon delivery of written notice of termination to AD, . . . if AD . . .
>
> (d) Fails to meet the Development Quota set forth in Exhibit I and does not correct such failure within ninety (90) days after written notice of such failure to comply is delivered to AD.

On July 18, 2000, Brown Dog sought and obtained an addendum to the ADMA, purchasing the development rights to seven more Wisconsin counties proximate to Minneapolis-St. Paul. On June 15, 2001, Brown Dog again bought development rights to 14 more counties near the Green Bay-Appleton market (plus one county in Michigan). Brown Dog paid $73,738 in nonrefundable fees to become AD in this territory. Although these new territories roughly doubled the population of Brown Dog's development territory from the original ADMA (from about 750,000 to about 1.6 million), they resulted in insignificant changes to Brown Dog's development quota for the years 2002-'04.[8] Compared to other ADs, Brown Dog had a favorable initial ratio of restaurants to population through 2004, although thereafter the ratio gradually dropped closer to the mode for ADs.[9]

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[8] The parties did extend the length of the AD agreement and the ultimate number of restaurants, with a quota of 32 open restaurants by the 2nd quarter of 2007.

[9] Brown Dog's ratio began above 100,000 people per restaurant; most other ADs had ratios in the mid-five figures, many around 40,000, some lower.

Brown Dog stayed at or above its quota of 1 to 4 restaurants for over two years. However, at the end of the 2nd quarter of 2002, Brown Dog still had only 4 restaurants open instead of the required 5. By the end of the 3rd quarter of 2002, Brown Dog had 5 restaurants open instead of the required 6.

On November 13, 2002, Quizno's sent a notice of default to Brown Dog based upon its failure to meet the development quota. The letter read in part:

> Re: Notice of Default; Area Director Agreement dated June 1, 2000 ("Agreement") Between Brown Dog, Inc. ("You") and The Quizno's Corporation ("Quizno's")
>
> Dear Eric:
>
> You are hereby notified that you are in default of Section 4.1 of the Agreement for failure to meet the Development Quota set forth in Exhibit I.
>
> Your failure to cure the above defaults within ninety (90) days from the date of your receipt of this letter may result in termination of the Agreement in accordance with Section 17.2(d).

Although Brown Dog had been behind quota for only 2 quarters, Shaffer wanted to send a clear message to Brown Dog that Quizno's took the quota seriously and expected Brown Dog to catch up to it and maintain it. Indeed, at one of the subsequent BAMS in Denver, Shaffer personally discussed Brown Dog's quota problem with Eric Brown, exhorting him to work hard.

But Brown Dog did not cure its default within 90 days. The ADMA required Brown Dog to have 7 restaurants open by the end of the 4th quarter of 2002. Brown Dog only had

5 restaurants open. Brown Dog's quota remained at 7 open restaurants through the end of the 1st quarter of 2003. On February 14, 2003, the end of the 90-day cure period, Brown Dog still had only 5 restaurants open and operating, although it opened number 6 later that same quarter.

Quizno's considered Brown Dog's continued failure to meet its quota a serious breach, but it did not terminate the agreement at the end of the 90-day cure period in mid-February 2003. Instead, Quizno's allowed Brown Dog more time to attempt to catch up to and then maintain its quota. Shaffer was "waiting for the explosion to happen." But from the time Brown Dog received the November 2002 default notice until September 23, 2003, it remained at least one restaurant behind its quota at the end of each quarter.

On September 15, 2003, Brown Dog unofficially "opened" store #5820 in Wausau, which would have brought it into compliance with its development quota for the 2nd quarter of 2003 (which of course already had passed as of June 30, 2003). However, Quizno's did not count that restaurant towards Brown Dog's development quota in September 2003 because it opened its doors before Quizno's had approved the site or reviewed the lease, explicit contractual prerequisites to the full execution of a franchise agreement. Quizno's approved store #5820 in the 4th quarter of 2003.

On September 23, 2003, Quizno's attorneys sent a "Termination Notice" to Brown Dog stating:

> On November 13, 2002, Quizno's served upon you a Notice of Default notifying you that you were in default of Section 4.1 of

> the ADMA for failure to meet the Development Quota set forth in Exhibit I of the ADMA. You were provided ninety (90) days to cure your developmental defaults. Given that you have failed and refused to cure said defaults, you are hereby notified that the ADMA is terminated in accordance with Section 17.2(d) of the ADMA. The termination of the ADMA will become effective ninety (90) days from the date you receive this termination notice should you fail to cure your defaults within sixty (60) days of receipt of this notice.

Brown Dog received this letter on September 24, 2003. Eric Brown responded with an e-mail to Quizno's claiming to have 6 stores under construction; this was not true, although there is no evidence that Quizno's knew that it was untrue at the time.

For completeness of the narrative, I note that on October 9, 2003, Quizno's sent Brown Dog an unrelated termination notice announcing that Brown Dog was in default of section 4.4 of the ADMA because it had opened restaurant #5820 prior to Quizno's fully executing a franchise agreement with the applicant. Also, testimony at trial established that Eric Brown intentionally mishandled the opening of restaurant #5630 during the 4th quarter of 2003 in an unsuccessful attempt to meet his 60-day cure deadline. Ultimately, however, Quizno's did not use either of these incidents as a basis to terminate Brown Dog's ADMA.[10]

By the end of the 3rd quarter of 2003, Brown Dog was required to have 9 open restaurants; it had 7. As of November 24, 2003, Brown Dog had 8 stores open, including store #5820. At that point, Shaffer decided to terminate Brown Dog's AD agreement. Shaffer made this decision to terminate without animus toward the Browns or their

[10] I note, however, that Eric Brown's unseemly conduct regarding restaurant #5630 and his dissembling trial testimony about it establish that he was neither a trustworthy AD nor a trustworthy witness.

company. It was a business decision based on the circumstances presented: Shaffer looked at Brown Dog's development schedule versus its actual performance. He also looked at its pipeline: Shaffer concluded that Brown Dog did not have enough SNOWSes and SNOs set to open in 6 months, or in 12 months, to allow Brown Dog to get back up to quota and remain there. According to Shaffer, being one restaurant behind quota was significant because "one is a big number when you only have eight restaurants."[11]

On December 3, 2003, Quizno's attorneys sent Brown Dog's attorney a letter informing him that because Brown Dog had failed to cure its developmental defaults within the 60-day cure period set forth in the September 23, 2003 notice, Quizno's was terminating Brown Dog's AD agreement effective December 24, 2003. Two days later, on December 5, 2003, Brown Dog opened a 9th restaurant. The agreement terminated on December 24, 2003. Had Brown Dog survived as AD to the end of the 4th quarter, its quota would have required 10 open restaurants by December 31.

The chart on the next page illustrates Brown Dog's quota situation during its tenure as Quizno's AD.

[11] By comparison, Subway had about 137 restaurants operating in Brown Dog's territory.

Quarter	Brown Dog's Quota	Actually Open	Difference
2000, 1st	1	1	0
2000, 2nd	1	2	+1
2000, 3rd	1	2	+1
2000 ,4th	2	2	0
2001, 1st	2	3	+1
2001, 2nd	3	3	0
2001, 3rd	3	3	0
2001, 4th	4	4	0
2002, 1st	4	4	0
2002, 2nd	5	4	-1
2002, 3rd	6	5	-1
2002, 4th	7	5	-2
2003, 1st	7	6	-1
2003, 2nd	8	7	-1
2003, 3rd	9	7	-2
2003, 4th	10	*terminated before end of quarter*	*terminated before end of quarter*

OPINION

I. Brown Dog's Claim under the WFDL

By virtue of the court having granted partial summary judgment before trial, Brown Dog's claim that Quizno's breached the ADMA has been narrowed to two related questions under Wisconsin's Fair Dealership Law: (1) Prior to termination by Quizno's, had Brown Dog substantially complied with its obligations under the ADMA? (2) If not, did Quizno's nonetheless discriminate against Brown Dog by terminating the ADMA? Under the WFDL, it is Quizno's burden to establish that the answer to both of these questions is "No."

Having heard and seen the witnesses testify, having made credibility determinations, having considered the exhibits, and having considered the parties' arguments, I conclude that Quizno's has met its burden on both points: Brown Dog did not substantially comply with the ADMA, and the manner in which Quizno's terminated the contract did not discriminate against Brown Dog.

In anticipation of Brown Dog's sedulous exegesis of this order, I note that I do not intend herein to address every point made by each party in its post-trial briefs because there is no need. I further note that my credibility determinations take into account that no witness got everything right, just as no witness got everything wrong. I have considered and accounted for actual and perceived discrepancies, gaps, contradictions, biases, *etc.*, in finding the facts set forth in the previous section.

In its post-trial brief on liability, Brown Dog has presented arcane calculations and sometimes fussy arguments in its attempt to establish that it is entitled to relief under the WFDL. But in this case, Occam's Razor applies and the simplest explanation happens to be the most accurate: Brown Dog was a chronic underperformer as an AD and Quizno's handled Brown Dog's underperformance in the fashion it routinely employed in these situations. Brown Dog's failure to meet its quota for six quarters did not constitute substantial compliance with the terms of the ADMA, and Quizno's did not discriminate against Brown Dog by terminating Brown Dog in the seventh quarter after warning that this could happen.

Section 135.03 of the Wisconsin Fair Dealership Law provides:

> Cancellation and alteration of dealerships. No grantor, directly or through any officer, agent or employe, may terminate, cancel, fail to renew or substantially change the competitive circumstances of a dealership agreement without good cause. The burden of proving good cause is on the grantor.

Absent bad faith by the dealer, good cause to terminate exists if that dealer

> [fails] to comply substantially with essential and reasonable requirements imposed upon him by the grantor, or sought to be imposed by the grantor, which requirements are not discriminatory as compared with requirements imposed on other similarly situated dealers either by their terms or in the manner of their enforcement.

Wis. Stat. § 135.02(4).

Wisconsin Pattern Civil Jury Instruction 2770, provides that in a WFDL lawsuit,

> You may determine that a dealer has substantially complied with the terms of the agreement even though every detail has

> not been performed in strict conformity with the agreement. Relatively minor and unimportant deviation by the dealer does not constitute cause for termination. Good cause exists if the noncompliance of the dealer is of such an extent and nature that there has been no practical fulfillment of the terms of the agreement.

There has never been any dispute that Brown Dog's development quota for opening restaurants was essential and reasonable. There is no dispute that Brown Dog failed to comply with this quota for six quarters in a row, from the 2nd quarter of 2002 through the 3rd quarter of 2003. What Brown Dog claims is that it nevertheless substantially complied with this quota because it was only 1 or 2 restaurants behind, and often during the next quarter it "caught up" to the preceding quarter's quota, which should be equated with full performance. Indeed, posits Brown Dog, if we look at "the open store days the Agreement required," then Brown Dog scores 97.8%. *See* Brown Dog's Post-Trial Brief Regarding Liability, dkt. 125, at 23.

This is a clever gloss of the parties' contract, but it is a non sequitur: Brown Dog's ADMA did not "require" "open store days"; it doesn't even use the term. The ADMA explicitly required a specified number of open restaurants as measured on specified dates. It is not Brown Dog's prerogative to redefine what was required by the contract's pellucid terms in an attempt to prove that it was "close enough" to be deemed in substantial

compliance.[12] There were myriad measures of performance to which Quizno's and Brown Dog could have agreed in order to determine whether Brown Dog was developing its territory adequately. They could have agreed to "open store days." They could have chosen gross sales, or net profits, either for each open store or for the entire area. They could have measured for geographic diversity and adequate coverage of the vast territory. They could have measured performance each week, each month, quarter or year. They could have calculated averages, based on number of stores open, profits, gross sales, or number of customers. They could have measured only franchises sold as opposed to restaurants opened. They could have agreed that a bad week could expiate by a good month, a bad month by a good year. They could have used a grouping of these measures in a weighted formula.

But they didn't. They agreed that a quarterly measure of open restaurants, taken on the last day of each quarter, was an essential and reasonable method to gauge whether Brown Dog was fulfilling its obligation to expand Quizno's market in Central Wisconsin. That is the yardstick by which compliance must be measured. It is much too late for Brown Dog to complain that "Quizno's way of reckoning compliance is flawed and unreliable," *see* dkt. 125

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[12] When the Packers played the Vikings on November 3, 2005, they led or were tied for 57½ minutes of the 60 minute game, trailing for less than 3 minutes, and "losing" on the last play of the game. But why should the Packers accept this as a loss? Measured by "point-minutes," the Packers won. In addition, they were ahead at the end of three quarters out of four. Had the game continued beyond the 60 minute cutoff, the Packers might well have scored enough points to catch up or even surpass the Vikings. Therefore, even if the Packers didn't actually "win" by the rules to which the teams had agreed prior to the game, Green Bay could be deemed substantially to have won by virtue of its interstitial performance and the possibility that if it had been given more time, it could have performed even better.

at 4, particularly after having conceded that the quota was a reasonable and essential term of the ADMA. It is disingenuous for Brown Dog to argue that "Nothing in the Agreement requires that a single day be treated as a proxy for an entire quarter" (*id.* at 5) when § 4.1 of the ADMA provides:

> The determination as to whether AD has met its development obligations under this Agreement shall be made based on the number of Restaurants open and operating at the end of a Sales Quarter.

Therefore, the only open question is whether six straight quarters of missing the quota by a low number constitutes a failure to comply substantially with it. I conclude that it does. A dealer's deficient sales can constitute good cause for termination under the WFDL. *Al Bishop Agency, Inc. v. Lithonia*, 474 F. Supp. 828, 833-34 (E.D. Wis. 1979).

Brown Dog correctly observes that perfection cannot be the standard, but Brown Dog's compliance with its quota was not perfect. Even so, argues Brown Dog, being only one or two restaurants behind quota is "close enough" to be viewed as substantial compliance. Before trial, Brown Dog's argument had enough traction for this court to deny Quizno's motion for summary judgment on this point; now that Quizno's has presented the big picture in more detail, Brown Dog's argument has skidded into a ditch.

Quizno's has established that constant, predictable and reliable growth is critical to its viability in the dog-eat-dog arena of fast food franchising and is critical to the success of its individual franchisees. Quizno's has established that it reasonably viewed the quota agreed to by each AD in its ADMA as the lowest acceptable number of open restaurants, and

that Quizno's hoped each AD would use its contractually-mandated best efforts to exceed that number. Quizno's has established that because its product has been explosively popular, its view of AD quotas as a minimum performance standard is fair and realistic. Quizno's has established that when measuring quota compliance, "one" is a big number when an AD only has eight restaurants in its territory.[13]

But this cannot be the end of the analysis because it implies that being one restaurant behind for one quarter is a failure to comply substantially, which is a back-handed way of saying that perfection is required. Perforce, we must add a time axis to the equation.

Brown Dog agreed in §17.2(d) of its ADMA that a 90 day failure to cure *any* quota deficiency was a ground for termination. In other words, Brown Dog knew and agreed that two consecutive quarters of being one restaurant below quota would allow Quizno's to pull the plug. Therefore, the ADMA itself provided that being one restaurant down for one quarter was not a failure substantially to comply with its terms. This is reasonable, since anyone could have a bad quarter, and you cannot draw a line with only one point. The ADMA gives an AD a second quarter within which to redouble its "best efforts" and cure the default. But that's all: the ADMA makes clear that two consecutive quarters below quota

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[13] Although it is not our case, it would be reasonable to infer that one is *not* so big a number for an AD with a huge quota. Perhaps if Falcon Ventures had opened 36 of its required 37 restaurants in the 3rd quarter of 2003 and opened 3 more in the next quarter to have 39 open of 40 required, a court–and Quizno's, for that matter–might view this as substantial compliance. But if Falcon remained 1 restaurant behind for five or six quarters, then the answer might well change. As noted elsewhere in this opinion, the antidiscrimination requirement of the WFDL does not require identical treatment of all grantors with no consideration of their individual circumstances.

will trigger klaxon horns in Denver and ought to trigger equal alarm in the offending AD: now there are two points between which a line may be drawn, and the line is red, representing ongoing noncompliance.

Is there any valid reason *not* to conclude that two consecutive quarters of missing the development quota by one restaurant constitutes a failure substantially to comply with the quota, which is an essential and reasonable term of Brown Dog's ADMA? Relevant to this determination is §135.04 of the WFDL, which further required Quizno's to provide Brown Dog with 90 day's prior written notice of termination and *further* required Quizno's to provide 60 days after such notice for Brown Dog to cure the specified deficiencies. Therefore, the earliest date on which Quizno's could terminate an AD in Wisconsin would be after five straight months of being below quota. Brown Dog's brief doesn't address this particular question because it hinges on the "restaurant-days" analysis rather than the actual terms of the ADMA and the WFDL.

Wisconsin's pattern jury instruction indicates that noncompliance is substantial if it is "of such an extent and nature that there has been no practical fulfillment of the terms of the agreement." This definition fairly and adequately captures the notion of material breach to which Brown Dog has cited in its brief, *see* dkt. 125 at 2-3. Taking into account the hyper-competitiveness of the fast food market and adding the criticality to Quizno's of constant, predictable growth, I conclude that five months of being under quota by even one

restaurant is a failure of such an extent and nature that it cannot be viewed as a practical fulfillment of the terms of the ADMA.

But this conclusion can only be dicta in Brown Dog's case because Quizno's did not terminate Brown Dog's ADMA after only five months. It tolerated Brown Dog's failures from June 30, 2002 through November 24, 2003 before finally deciding to terminate the contract. During that 17 month span, Quizno's roweled Brown Dog to no avail. After two quarters of missed quotas, on November 13, 2002 Quizno's sent Brown Dog a letter warning it that it was in noncompliance and allowing it 90 days (until mid-February, 2003) to catch up. But even though Brown Dog remained behind quota throughout that 3-month span, Quizno's stayed its hand. This was pursuant to Shaffer's policy of giving all ADs, including the inveterate underperformers, 1½ to 2 years of breathing room to adjust to and get with the new program of steady growth and accountability. Indeed, Shaffer personally met with Eric Brown at least once at a BAM in Denver, urging him to improve Brown Dog's performance. To no avail: Brown Dog remained under quota. Indeed, after receiving the second termination letter in September '03, Eric Brown began a campaign of chicanery against Quizno's and a franchisee with regard to restaurant #5630 in a last-ditch effort to salvage his foundering fiefdom. Again, to no avail: that restaurant opened after the 60 day cure period had ended.[14]

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[14] Brown Dog takes exception to being accused of "mulcting" Quizno's of its bargain, *see* dkt. 125 at 10, n.5. True, the grounds on which Quizno's actually terminated Brown Dog's ADMA did not involve fraud or swindling, and I am not ruling against Brown Dog on that basis. There is no doubt, however, that Eric Brown cozened his franchisee and wilfully misled Quizno's about the opening date of this restaurant.

In sum, Brown Dog failed substantially to comply with a reasonable and essential term of its contract with Quizno's.

That, however, is not the end of the story. Brown Dog claims that Quizno's nonetheless discriminated against it in violation of the WFDL because Quizno's did not give Brown Dog as much time to cure its default as it gave other ADs who missed their quotas. With a keen sense of melodrama, Brown Dog proclaims that Shaffer made a "fatal admission" at trial that proves discrimination, or at least establishes that Quizno's has failed to meet its burden of proving lack of discrimination: when cross-examined about Lenlar, an underperforming AD who was measured on a yearly basis, Shaffer wondered whether a particular exhibit was useful to show the length of Lenlar's default because Lenlar might have caught up to its quota during the year, thus curing the default. According to Brown Dog, this "admission" guts the usefulness of the exhibits showing the length of time other ADs were in default before being terminated, and shows that "you cannot fairly measure compliance by treating a single day as a proxy for an entire quarter." Dkt. 125 at 12-13.

Brown Dog's arguments are unpersuasive. Riffing on Zeno's Paradox, Brown Dog asks this court to disregard the *gestalt* of Quizno's relationship with its lagging ADs, urging the court instead to divide and re-divide the evidence until arriving at a morsel that Brown Dog likes, then apply this as an overarching and dispositive principle without regard to the other circumstances relevant to the analysis. I decline to proceed in this fashion.

For instance, Shaffer's "fatal admission" was his off-the-cuff speculation as to what might have informed his decision to give Lenlar more time to cure its default. It is much too small a nugget to outweigh the ore-carts of testimony in which Shaffer explained that when he became Quizno's chief development officer, he announced and implemented a new policy of quota accountability that gave all the slacking ADs close to the same amount of time to cure their defaults. The evidence establishes that this was a fair policy and that Shaffer enforced it uniformly and even-handedly. Because Shaffer provided each AD with individual consideration within the template of this policy, Quizno's did not treat *every* AD *exactly* the same. When considering individual cases, Shaffer used his judgment as CDO, then as president, to achieve a fair result under the circumstances presented. Quizno's gave some ADs more time to cure than others. Quizno's tolerated larger default numbers for some ADs. But Quizno's used the same framework in the same manner for all underperforming ADs, including Brown Dog. This is the antithesis of unfair discrimination.

Brown Dog shrilly disagrees: under its interpretation of the WFDL, prohibited discrimination occurs every time a grantor treats any dealer differently from any other dealer in any fashion to any degree. Flipping its argument that "perfection was not required" of Brown Dog when performing its contract, Brown Dog insists that perfect symmetry *is* required of Quizno's when evaluating and sanctioning non-performing ADs. Brown Dog argues that a scintilla of differentiation mandates judgment in Brown Dog's favor, and toward this end it trumpets each AD that received even a quarter's more time as proof

positive that unlawful discrimination occurred. Indeed, Brown Dog argues that it is fair and useful for the court to consider the length of time some ADs were in default before Shaffer assumed control and announced his new policy.

As for the last point, the WFDL does not prevent a grantor from changing a business practice in a fashion that helps one dealer and hurts another. *Remus v. Amoco Oil Co.*, 794 F.2d 1238, 1241 (7th Cir. 1986); as the lower court put it in *Remus*, the WFDL does not so circumscribe a grantor's business judgment that the grantor risks liability even when it makes a non-discriminatory change in policy based on factors unrelated to the dealer. *Remus v. Amoco Oil Co.,* 611 F.Supp. 885, 888 (E.D. Wis. 1985). That is what happened here. In fact, all Quizno's did was make an across-the-board decision to enforce more diligently the terms of contracts that its ADs already had signed. It is not Brown Dog's concern whether Quizno's let some of its other dealers slide prior to the policy change announced in December 2001. *Cf. Deutschland Ent., Ltd. v. Burger King Corp.*, 957 F.2nd 449, 453 (7th Cir. 1992)(one reason dealer not similar to others is that grantor's litigation with the others occurred long before complaining dealer became a franchisee). Had Brown Dog been a nonperforming AD prior to Shaffer's ascendancy, doubtless it would have received the same indulgent treatment from Quizno's. It is risible for Brown Dog to imply that after jettisoning its tolerance for mediocrity, Quizno's nonetheless was required ever after to provide each underperforming AD with as much cure time as its worst-ever AD had received prior to the policy change. *See, e.g., Ziegler Co., Inc. v. Rexnord, Inc.*, 147 Wis.2d 308, 314

(1988)(WFDL does not impose an eternal and unqualified duty of self-sacrifice upon a grantor).

The operative question in this lawsuit is whether Quizno's applied Shaffer's new policy to Brown Dog in a discriminatory manner. The answer is No. It is not unlawful discrimination for a grantor to consider each dealer's situation and to decide to keep or terminate a dealer based on whether it has met the newly-imposed goals or has failed to do so. *Al Bishop*, 474 F.Supp. At 834; *see also L-O Distributors, Inc. v. Speed Queen Co.*, 611 F.Supp. 1569, 1581 (D. Minn. 1985)(termination of dealership due to poor sales performance not discriminatory under WFDL where grantor terminated six other dealers for poor sales performance during same 17 month period). Dealers have no statutory right to insist on identical treatment. It is enough if a grantor has a clear policy and applies it in an essentially similar manner to all of its dealers. *See, e.g., L-O Distributors,*, 611 F.Supp. at 1573.

The WFDL is intended to promote fair business relations between grantors and dealers and the continuation of dealerships on a fair basis. Wis. Stat. § 135.025(2)(a). Fairness is the talismanic word here. The WFDL performs the important function of protecting small local businessmen from possible exploitation by large corporations that have significantly more resources and bargaining power. It is not, however, a shield of invulnerability for bad managers. Quizno's treated Brown Dog fairly at all times. Brown Dog has no valid claim against Quizno's under the WFDL.

II. Quizno's Counterclaims and Third-Party Claim for Damages

Finally, the court must consider Quizno's claims for damages arising out of Brown Dog's breach of the ADMA. In the ADMA's Exhibit II, Eric and Stuart Brown personally guaranteed to make Quizno's whole in the event of a breach. Because Brown Dog breached the ADMA, these guarantees have vested.

Nonetheless, Quizno's has not proved that it actually suffered any damages. As I noted when denying summary judgment on these claims, Quizno's did not have to prove damages for lost profits with absolute certainty, but it had the burden of producing sufficient evidence on which to base a reasonable inference as to a damage amount. *See Lindevig v. Dairy Equipment Co.*, 150 Wis. 2d 731, 740 (Ct. App. 1989). Quizno's chose not to do this.

After thoroughly trashing the damages report prepared by Brown Dog's expert, Quizno's, with no apparent sense of irony, suggests that the report nonetheless is reliable enough to establish that Quizno's suffered $109,330.50 in damages during the six months following termination of Brown Dog's ADMA. *See* Quizno's Post-Trial Brief on Damages, dkt. 124, at 20.

But as Brown Dog argues in response (dkt. 126), Quizno's has not presented any evidence that it actually incurred any costs or expenses it otherwise would not have had to pay; indeed, Quizno's may well have come out ahead as a result of terminating Brown Dog's ADMA. Figures within haling distance of a trustworthy calculation are impossible because

Quizno's did not present evidence on these matters at trial. So, Quizno's has not proved that it actually suffered any damages from the breach.

Even so, failure to prove damages does not justify dismissal of a claim for breach of contract; the victim of a breach always is entitled to nominal damages if he proves a breach but no damages. *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.,* 908 F.2d 1363, 1372 (7th Cir. 1990). So, Quizno's is entitled to one dollar on its claims against the plaintiffs. I trust that Quizno's will be gracious enough not to require payment.

ORDER

It is ORDERED that:

(1) Judgment is entered in favor of defendant and against plaintiff on plaintiff's remaining claim under the Wisconsin Fair Dealership Law; and

(2) Judgment is entered in favor of defendant/third-party plaintiff and against plaintiffs and third-party defendant on all of defendant's claims for breach of contract, with a nominal award of one dollar in damages.

The Clerk of Court is directed to enter this judgment and close this case.

Entered this 27th day of December, 2005.

BY THE COURT:
/s/
STEPHEN L. CROCKER
Magistrate Judge