The GPMemorandum

TO: **OUR FRANCHISE AND DISTRIBUTION CLIENTS AND FRIENDS**

FROM: **GRAY PLANT MOOTY'S FRANCHISE AND DISTRIBUTION PRACTICE GROUP**

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This issue of *The GPMemorandum* focuses on topics primarily of interest to companies that use distributors and dealers rather than manage a business format franchise system. The distribution-related topics this quarter include defamation, antitrust, arbitration, and state laws.

DEFAMATION

STATEMENTS TO RETAILER'S REPRESENTATIVES WERE "PUBLISHED" FOR PURPOSES OF SLANDER CLAIMS UNDER NEW YORK LAW

In a dispute between a mattress retailer and a bedding manufacturer, the United States Court of Appeals for the Second Circuit has ruled that statements made to representatives of the retailer may have constituted slander. *Sleepy's LLC v. Select Comfort Wholesale Corp.*, 2018 WL 6174650 (2d Cir. Nov. 27, 2018). Sleepy's, a mattress and bedding retailer, entered into a dealer agreement with Select Comfort pursuant to which Sleepy's acquired the right to sell Select Comfort's ''Personal Preference" line of "Sleep Number" beds in Sleepy's stores. Select Comfort retained exclusive rights to sell its ''Core" (rather than Personal Preference) line of Sleep Number beds. Sleepy's was disappointed with sales and came to suspect that Select Comfort salespeople were disparaging the Personal Preference line in order to elevate the Core line. Sleepy's then conducted undercover shopping visits that it believed revealed a regular pattern of disparagement. After confronting Select Comfort with the results of the secret-shopper investigation, Sleepy's brought suit and raised claims for slander, unfair competition, and Lanham Act violations, among other causes of action.

Following two bench trials (and an intervening appeal to the Second Circuit), the district court entered judgment in favor of Select Comfort on all of Sleepy's claims. With respect to the slander claims, the district court held that they failed because the allegedly slanderous statements were made only to Sleepy's representatives during the secret-shopper visits and, therefore, had not been "published." The district court reasoned that under New York law, the publication element of a cause of action for slander cannot be met where the statement is made to the defamed party's agent. Sleepy's appealed the decision to the Second Circuit, challenging both the district court's merits determination and its award of $2.6 million in attorneys' fees to Select Comfort.

On appeal, the Second Circuit affirmed the dismissal of all but the slander claims. Citing precedent from the New York Appellate Division, the Second Circuit concluded that communication to a plaintiff's agent constitutes publication for purposes of a slander claim because the agent is a different entity from the principal and, therefore, the communication is to a third person. Although the New York Court of Appeals had not addressed the issue, the Second Circuit found no reason to think that the Court of Appeals would reach a different conclusion. Accordingly, the Second Circuit vacated the district court's ruling and remanded for determination as to whether Sleepy's consented to the utterance of the statements at issue. The court also vacated and remanded the fee award to Select Comfort.

LIMITATION OF ACTIONS

SEVENTH CIRCUIT FINDS DISTRIBUTOR'S CLAIMS TIME-BARRED BY STATUTES OF LIMITATIONS

The United States Court of Appeals for the Seventh Circuit has affirmed a district court's determination that a distributor's claims were stale under the applicable statute of limitations. *Heiman v. Bimbo Foods Bakeries Distrib. Co.*, 902 F.3d 715 (7th Cir. Aug. 30, 2018). Heiman's company, JTE, distributed products for defendant Bimbo Foods under a distribution agreement that did not have a fixed duration and could be terminated in the event of a noncurable or untimely cured breach by one of the parties. The agreement also specified that New York law would govern all claims and disputes. The parties successfully operated under the agreement for a number of years until 2008, when Bimbo allegedly created a scheme to force JTE out of its distribution rights so that Bimbo could install a new distributor who was willing to accept a lower share of proceeds. JTE alleged that Bimbo began fabricating curable breaches, including filing false reports of poor customer service and creating staged photographs of empty store shelves. Ultimately, in 2011, when JTE refused to sell its distribution rights, Bimbo terminated JTE, citing the fabricated breaches as cause. JTE filed suit against Bimbo for breach of contract and tortious interference in May 2017. The district court determined that both claims were time-barred under the applicable statutes of limitations.

On appeal, JTE argued that the district court applied the wrong statute of limitations for its breach of contract claim, and failed to apply the discovery rule for its tortious interference claim. With regard to the breach of contract claim, although the parties' agreement indicated that New York law would govern, the court observed that the choice-of-law rules of the forum state (in this case, Illinois) determine which state's law applies. While Illinois honors express choice-of-law provisions for purposes of determining substantive legal rights, Illinois law considers statutes of limitations to be procedural issues governed by the law of the forum. Because the parties' agreement qualified as a contract for the sale of goods under Illinois law, it was governed by the UCC's four-year statute of limitations rather than the ten-year period applicable to other written contracts. As a result, JTE's breach of contract claim was untimely. With regard to its tortious interference claim, JTE argued that under the Illinois fraud-discovery rule, its claim did not accrue until it discovered the full extent of Bimbo's wrongdoing. The court disagreed, noting that JTE admitted to knowing that Bimbo was creating false complaints in 2011, and that JTE knew it was substantially performing its obligations at the time of the breaches. By the time Bimbo unilaterally terminated the parties' agreement, JTE knew that it had been subject to wrongful conduct. Accordingly, the court held that the discovery rule did not apply, and that the applicable limitations period had lapsed.

CHOICE OF LAW

IOWA FEDERAL COURT UPHOLDS CHOICE OF LAW PROVISION, DISMISSES CALIFORNIA UNFAIR COMPETITION CLAIM

A manufacturer represented by Gray Plant Mooty recently obtained an important victory when a federal court in Iowa enforced a choice of law provision to preclude application of California's unfair competition statute. *Quality Office Furnishings, Inc. v. Allsteel, Inc.*, No. 3:17-CV-00041-JEG (S.D. Iowa Sept. 11, 2018). This dispute arose after Allsteel, a nationwide manufacturer of office furniture headquartered in Iowa, declined to renew its agreement with a California-based dealer. Although the dealer agreement designated Iowa's courts as the exclusive forum and Iowa law to govern, the dealer initially brought suit in California state court, alleging, in part, violation of California's unfair competition law. After successfully transferring the case to Iowa pursuant to the forum selection provision in the parties' dealership agreement, Allsteel then moved to dismiss the unfair competition claim, arguing that the choice of law provision precluded any claim under California law.

The court granted Allsteel's motion to dismiss, holding that because Iowa law governed the parties' agreement, the dealer could not bring a claim under California's unfair competition statute. The dealer had argued that its unfair competition claim was not related to the agreement, but the court rejected this argument based on the dealer's own allegations. The complaint specifically alleged that Allsteel violated the statute by refusing to renew the parties' agreement, demonstrating that the unfair competition claim did arise under the agreement.

The dealer's argument that California law should apply because California had the most significant relationship to the parties also was rejected. Although the dealer was based in California, the court found that significant facts in the record supported enforcement of Iowa law. Most importantly, the court noted that for the last 20 years of the parties' relationship, and specifically when the dealer entered into the final agreement, Allsteel was headquartered in Iowa and had its manufacturing and distribution centers in Iowa. The court found that in its "basic function as an Allsteel dealer," Quality Office regularly reached into Iowa through its communications and other dealings with Allsteel's headquarters. The court also noted that as a nationwide seller with dealers in multiple states, Allsteel's selection of Iowa law for consistent application of its dealer agreements was practical and not unreasonable.

STATE LAWS

EQUIPMENT MANUFACTURER DEFEATS CLAIMS UNDER MINNESOTA AND WISCONSIN DEALER STATUTES

A federal court in Minnesota recently ruled that a manufacturer was not liable under Minnesota or Wisconsin dealer statutes when its five-year relationship with a dealer ended over disputes about the noncompete obligation in a new form of annual contract. In *Tri-State Bobcat Inc. v. FINN Corp.*, 2018 WL 4268898 (D. Minn. Sept. 6, 2018), Tri-State Bobcat brought suit against FINN Corp., a manufacturer of hydroseeders and other landscaping equipment, after the parties failed to agree on terms for a 2016 dealer agreement. While the parties were negotiating terms for the new contract, Tri-State expanded its relationship with a manufacturer of forestry equipment. The proposed 2016 FINN agreement had expressly prohibited sales of that manufacturer's products. Tri-State insisted that it did not view FINN and the other manufacturer as competitors, despite FINN's statements to the contrary, therefore Tri-State objected to the new FINN agreement. Because the parties did not agree on the 2016 dealer agreement, FINN ended the relationship, and Tri-State argued that this amounted to a violation under state dealer laws.

Representing FINN in the suit, Gray Plant Mooty argued on summary judgment that the statutes could not have been violated because FINN attempted to renew Tri-State on terms that were consistent with its other dealers. Unlike the other dealers, Tri-State refused to sign that agreement (despite leading FINN to believe it would) while simultaneously expanding its relationship with a manufacturer FINN had identified as a competitive threat. The court agreed, concluding that FINN had neither terminated the parties' previous agreement (which had expired at the end of 2015) nor failed to renew the agreement, as Tri-State simply refused to sign a 2016 contract based on noncompete terms that it did not like. The new noncompete terms were found to be reasonable and did not "substantially change the competitive circumstances" of the relationship, because FINN sales accounted for a mere 5 percent of Tri-State's overall revenue and the new terms did not significantly diminish the dealer's viability.

In addition to dismissing Tri-State's claims at summary judgment, the court also ruled in favor of FINN on its own counterclaims for unpaid accounts receivable and charge-back penalties for out-of-territory sales before the end of the dealership.

COURT FINDS DISTRIBUTOR IS NOT A DEALERSHIP UNDER WISCONSIN FAIR DEALERSHIP LAW

In another case involving the Wisconsin dealership statute, a federal court granted a manufacturer's motion for summary judgment after finding that a distributor was not a "dealership" under the Wisconsin Fair Dealership Law (WFDL). *PMT Machinery Sales, Inc. v. Yama Seiki USA, Inc.*, 2018 WL 5775919 (E.D. Wis. Nov. 2, 2018). In October 2015, PMT was incorporated to sell Yama Seiki machines and immediately contacted Yama Seiki seeking to become an exclusive distributor in eastern Wisconsin. The general manager of Yama Seiki sent PMT an "exclusive letter of dealership," but PMT rejected the offer for fear it could not meet sales requirements outlined in the letter. Instead, PMT continued to sell Yama Seiki machines in eastern Wisconsin under the belief, based on prior communications with Yama Seiki, that it had exclusive territorial rights. In October 2017, PMT learned that other parties were selling Yama Seiki machines in the same area. After discussions between the parties, PMT filed its complaint alleging that Yama Seiki violated the WFDL by substantially changing the allegedly exclusive dealership arrangement and by not giving the required 90-day notice prior to termination.

The court granted Yama Seiki's motion for summary judgment, holding that PMT did not meet the definition of a "dealership" under the WFDL. Courts apply a three-part test to determine whether a party meets the definition, analyzing whether: (1) there was a contract, (2) which granted the right to sell or distribute goods or services or to use a trademark, and (3) the parties have a requisite "community of interests." The court found that PMT did not satisfy the second element because it did not have the right to use Yama Seiki's trademark in a meaningful way, did not directly sell Yama Seiki machines to customers but rather negotiated orders that customers would place directly with Yama Seiki, did not have the right to sell Yama Seiki machines to customers, and did not have the right to bind Yama Seiki to any sales. The court concluded that PMT effectively served as a manufacturer's representative rather than as a "dealership" selling Yama Seiki's machines. The court declined to analyze whether PMT satisfied the other two elements of the definition. PMT has now appealed the district court's decision.

COURT GRANTS MOTION TO DISMISS PUTATIVE CLASS ACTION LAWSUIT UNDER CALIFORNIA'S UNFAIR PRACTICES ACT

In *Arena Restaurant & Lounge LLC v. Southern Glazer's Wine & Spirits, LLC*, 2018 WL 4334631 (N.D. Cal. Sept. 10, 2018), a federal court in Northern California granted Southern Glazer's motion to dismiss a putative class action lawsuit brought by plaintiffs who purchased liquor from Southern Glazer, an international wine and spirits distributor. The plaintiffs alleged that Southern Glazer engaged in various unlawful and unfair business practices, including violations of California's Unfair Practices Act consisting of (1) below-cost sales, (2) loss-leader sales, (3) secret rebates, and (4) unlawful threats and intimidation. In response, Southern Glazer moved to dismiss the complaint for failing to plead an adequate factual basis for the claims. The court had previously given the plaintiffs leave to amend the complaint three times.

Southern Glazer succeeded on its motion to dismiss all of the plaintiffs' claims. With regard to the Unfair Practices Act claims, the court found the plaintiffs' allegations to be conclusory and lacking the required detailed factual allegations to support a viable claim. The plaintiffs failed to identify any specific occurrences of below-cost sales, loss-leader sales, or secret rebates. The court acknowledged that the plaintiffs had pled a particular threat made by Southern Glazer but ultimately found that the allegation lacked sufficient specificity because the plaintiffs did not assert that the threat was directed at one of them or that they purchased the product as a result of the threat. Because the previous defects in the complaint were not cured, the court dismissed the claims with prejudice.

ARBITRATION

COURT DECIDES DISTRIBUTOR'S ANTITRUST CLAIM DOES NOT RELATE TO DISTRIBUTOR AGREEMENT, DENIES MOTION TO COMPEL ARBITRATION

The United States District Court for the Eastern District of Pennsylvania has denied a drug manufacturer's motion to compel arbitration of a putative class member's antitrust claim. *In re Remicade Antitrust Litig.*, 2018 WL 5314775 (E.D. Pa. Oct. 26, 2018). The plaintiff at issue was an authorized distributor, pursuant to a distributor agreement, of an infliximab medication called Remicade. The distributor alleged the drug manufacturer monopolized the infliximab market and artificially inflated prices by entering into third-party contracts and imposing rebate penalties that prevented insurers from covering, and providers from purchasing, lower-priced competitive drugs. In response, the manufacturer filed a motion to compel arbitration, arguing the claim fell within the scope of the agreement's arbitration clause. That clause required arbitration of all claims "arising out of or relating to this agreement." It also contained a jury waiver, forbade punitive and consequential damages, prejudgment interest, and attorney's fees claims, and disclaimed the right to arbitrate claims on a class basis. However, the arbitration clause did not reference antitrust claims. Nor did the distributor agreement set the price paid by the distributor for Remicade, or address antitrust statutes or anticompetitive conduct.

The manufacturer argued the antitrust claim related to the distributor agreement, since the distributor's standing to sue arose from purchases it made under the agreement. The court disagreed, finding that the parties' obligations under the distributor agreement were separate from the alleged anticompetitive conduct. In finding that the antitrust claim did not depend on the existence of the agreement, the court observed that other claimants who had not entered into distributor agreements with the manufacturer had asserted "identical" claims. It also noted that the prices of other infliximab drugs, not just Remicade, were allegedly inflated by the claimed anticompetitive conduct. Because the antitrust claim did not require interpretation of the distributor agreement, the court found the claim was outside the scope of the arbitration clause, including its jury waiver, damages-limitations, and anti-class action provisions.

Franchisors and manufacturers with arbitration clauses in their agreements should closely review the scope of the language to determine whether the clause is sufficiently broad to cover all potential claims between the parties. They should also ensure that jury, class action, and punitive damages waivers do not depend on the applicability of arbitration clauses.

ANTITRUST

FEDERAL COURT DENIES HYUNDAI'S MOTION TO DISMISS ANTITRUST COUNTERCLAIMS FINDING A RELEVANT MARKET IN REPLACEMENT PARTS FOR HYUNDAI AUTOMOBILES

A federal court in North Carolina recently denied Hyundai's request to dismiss federal antitrust counterclaims brought against it in a trademark infringement lawsuit. *Hyundai Motor Am., Inc. v. Direct Techs. Int'l, Inc.*, 2018 WL 4110544 (W.D.N.C. Aug. 29, 2018). Hyundai sued Direct Technologies International (DTI) for trademark infringement, false advertising, dilution, unfair competition, intentional interference, and unfair and deceptive trade practices, alleging that DTI imported and sold Hyundai-branded parts through an unauthorized distributor. In response, DTI asserted federal antitrust counterclaims, including violations of the Sherman Act, Clayton Act, and Lanham Act, alleging that Hyundai tried to harm its competitors and monopolize the market for Hyundai replacement parts by threatening not to honor its warranties if its cars were found not to contain genuine Hyundai-made parts.

Hyundai moved to dismiss DTI's counterclaims arguing, primarily, that DTI did not identify a relevant market or an actual tying relationship (conditioning the sale of one product on the purchase of another). Hyundai also argued that DTI did not allege that the purported conspiracy underlying its claim harmed competition. The court disagreed. The court held that DTI did, in fact, identify a relevant market—the replacement part market for Hyundai automobiles. It further held that DTI adequately alleged a tying relationship under the theory that Hyundai's vehicle warranties were conditioned on the use of Hyundai-brand replacement parts. The court also held that DTI did, in fact, allege harm to competition under the theory that Hyundai's agreements with its dealers and distributors affect a substantial volume of interstate commerce in the market for replacement parts for Hyundai automobiles, that Hyundai coerced its dealers into entering its dealer agreement in restraint of trade, and that Hyundai used its agreements to acquire a monopoly. Finally, the court denied Hyundai's arguments regarding similar claims made under North Carolina's state antitrust law.

CALIFORNIA FEDERAL COURT DISMISSES DISTRIBUTOR'S ANTITRUST CLAIMS AGAINST A COMPETITOR

A federal court denied a distributor's motion for a preliminary injunction and dismissed its antitrust claims against a competitor, holding that the distributor failed to adequately plead its claims under either Section 1 or Section 2 of the Sherman Act. *Nicolosi Distrib., Inc. v. FinishMaster, Inc.*, 2018 WL 4904918 (N.D. Cal. Oct. 9, 2018). Plaintiff Nicolosi Distributing is a small distributor of automotive paints and supplies that sells to auto body shops in the San Francisco Bay Area. It sued FinishMaster and its Canadian parent company, alleging that FinishMaster entered into exclusive dealing contracts with "A-list" body shops, and that these contracts, along with FinishMaster's practice of purchasing and shutting down smaller distributors, unreasonably restrained trade and contributed to the formation or attempted formation of a monopoly in the relevant market.

The court noted that exclusive dealing contracts, in light of their "well-recognized economic benefits," are analyzed under the rule of reason. It then held that Nicolosi had failed to allege sufficient facts to support a rule-of-reason antitrust claim by failing to (1) provide evidence of the relevant geographic or commercial market, (2) plausibly allege that FinishMaster had foreclosed a substantial share (typically 40% to 50%) of that market, and (3) show that any anticompetitive effects in that market resulted from FinishMaster's contracts. That is, Nicolosi had failed to show: (i) Bay-Area body shops did not buy paint from outside the Bay Area, or even that the Bay Area was a unified market (further, "A-list" shops were not clearly a discrete market); (ii) FinishMaster controlled any more than (on a generous reading) 33% of the market by Nicolosi; and (iii) any reduced output or increased prices had resulted from FinishMaster's contracts. These flaws undermined Nicolosi's monopoly claims, as well, since a plaintiff cannot show that a market is monopolized without defining the relevant market or showing the defendant controls a substantial portion of the market. In dismissing the Sherman Act and identical state-law claims, the court accorded Nicolosi the opportunity to amend its complaint.

KANSAS FEDERAL DISTRICT COURT GRANTS IN PART AND DENIES IN PART MOTION TO DISMISS EPIPEN ANTITRUST CLASS ACTION

The United States District Court for the District of Kansas has granted in part and denied in part motions by the distributor and supplier of EpiPen® products ("Mylan" and "Pfizer," respectively) to dismiss a class action lawsuit initiated by the products' consumers. *In re EpiPen Mktg., Sales Practices, & Antitrust Litig.*, 2018 WL 3973153 (D. Kan. Aug. 20, 2018). The consumers' 1,400-paragraph complaint alleges that Mylan and Pfizer have devised an unlawful scheme to establish a monopoly over the epinephrine auto-injector products market. It claims Mylan and Pfizer's conduct violated state and federal antitrust laws, the federal RICO act, and state consumer protection laws. The court's rulings with respect to certain of the antitrust claims are discussed here.

Among other theories of antitrust liability, the consumers allege that Mylan's switch to the distribution of two EpiPen devices in one package, exclusively, constitutes an unlawful tying arrangement. In denying Mylan's motion to dismiss this claim, the court held that the consumers adequately pled that, although qualitatively identical, the EpiPen devices in the single package involved two separate product markets—one for primary-use devices, the other for back-up devices. Thus, the two-pack arguably forces consumers to buy a product in another market that it may not have otherwise purchased. The class complaint also asserts antitrust claims based on Mylan's alleged exclusive dealing contracts with Pharmacy Benefits Managers (PBMs) (third parties responsible for administering health insurers' prescription drug benefit programs) and public schools. The court held that the complaint adequately alleged that the significant rebates that Mylan offered to PBMs on EpiPen products were designed to have, and had, the anticompetitive effect of excluding competitors from the PBMs' prescription coverage formularies. The court, however, held that the consumers' related claim concerning rebates offered to state-based Medicaid agencies was barred by the *Noerr-Pennington* doctrine, which immunizes a private entity's legitimate use of political process from antitrust liability, even where the intent is to eliminate competition. Finally, the court held that the consumers had adequately alleged that Mylan's exclusive dealing contracts with schools and school districts had the probable effect of foreclosing a substantial share of competition in the market.

PROCEDURE

COURT GRANTS IN PART DEALER'S MOTION TO AMEND ITS CONTRACT-BASED CLAIMS

A federal court in California granted in part and denied in part a dealer's motion to amend its complaint against Ralph Lauren Corp. and related entities. *Card v. Ralph Lauren Corp ,* 2018 WL 4109082 (N.D. Cal. Aug. 29, 2018). Card was an approved dealer of Ralph Lauren Home products. Following termination of the relationship by Ralph Lauren Home, Card filed suit alleging breach of implied contract, breach of the implied covenant of good faith and fair dealing, violations of the Robinson-Patman Act, and a variety of other tort-based and statutory claims. Ralph Lauren moved to dismiss, and, in response, Card sought to amend her complaint.

The court granted Card's motion to amend her claims for breach of implied contract and breach of the implied covenant of good faith and fair dealing, holding that Card's proposed amendments sufficiently alleged plausible claims. However, the court denied Card's motion to amend her remaining claims, including her claim of violation of the Robinson-Patman Act, finding her proposed amendments of those claims "futile and inadequate." For example, Card's Robinson-Patman Act claim contained only the vague allegation that Ralph Lauren had given unfair discounts to Card's competitors, but failed to plead with specificity the actual discounts provided, that they were for comparable products, that they were contemporaneous, and that they had an anticompetitive effect. Nonetheless, the court granted Card leave to file a further amended complaint if she had a good faith basis to do so.

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