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 termination, alleged fiduciary duties, application of state statutes, and more.

JURISDICTION AND PROCEDURE

COURT REFUSES TO DISMISS OR TRANSFER MANUFACTURER'S DECLARATORY JUDGMENT SUIT AGAINST FORMER DISTRIBUTOR

A federal district court in Minnesota has approved a manufacturer's decision to file suit in its home jurisdiction to resolve a dispute with a distributor in *Hearth & Home Technologies, Inc. v. J&M Distributing, Inc.*, 2012 U.S. Dist. LEXIS 170405 (D. Minn. Nov. 30, 2012). J&M, a distributor of fireplaces and other hearth products, in 2011 and 2012 had sent a series of letters to Hearth & Home Technologies (HHT) alleging that HHT gave favorable pricing to other distributors in violation of federal antitrust laws, and that HHT violated the parties' distributorship agreement by failing to provide adequate support. Represented by Gray Plant Mooty, HHT stopped selling to J&M in early 2012 and filed a declaratory judgment action seeking an order ratifying and enforcing the termination of the parties' distribution relationship, as well as declaring that HHT did not violate J&M's rights during the relationship.

In the ruling two weeks ago, HHT successfully defeated J&M's motions to dismiss the case or transfer venue to J&M's own home state of West Virginia.

First, the court rejected J&M's contention that there was no obvious "controversy" between the parties and no federal jurisdiction over the case for that reason. J&M's own complaint against HHT, filed in West Virginia after HHT had commenced its lawsuit in Minnesota, demonstrated that both sides believed there was a real and immediate controversy between them, the court found. The court also disagreed that HHT had engaged in forum shopping or a "preemptive strike" that would warrant discretionary dismissal. HHT logically filed suit in its home forum. There was no evidence that HHT deceived J&M into believing it would not initiate litigation if the parties were unable to resolve their differences. Moreover, the fact that J&M did not file its suit in West Virginia until two months after HHT filed its suit in Minnesota demonstrated that HHT was not racing to the courthouse to file first.

Finally, the court declined to transfer the suit to West Virginia. J&M failed to carry its burden to specifically identify witnesses (particularly third parties) who would be inconvenienced by having the case proceed in Minnesota. A transfer would merely shift the inconvenience to HHT, making transfer inappropriate, the court ruled.

CONTRACTS

INDIANA FEDERAL COURT ALLOWS CLAIM FOR BREACH OF ORAL CONTRACT

In *Andy Mohr Truck Center, Inc. v. Volvo Trucks North America*, 2012 U.S. Dist. LEXIS 145057 (S.D. Ind. Oct. 9, 2012), the United States District Court for the Southern District of Indiana denied Volvo's motion to dismiss a dealer's breach of contract claims. According to plaintiff Mohr, Volvo represented that it would grant him a Mack Trucks franchise in a separate transaction if he first entered into an agreement to operate a Volvo Trucks dealership. Mohr accepted his appointment as a Volvo Trucks dealer based on the understanding that he could later combine that franchise with a Mack Trucks franchise under one dealership. Mohr claimed that Volvo had since failed to honor its commitment to award him the Mack Trucks franchise, in breach of the oral agreement the parties allegedly had reached. He further alleged that Volvo had breached their written dealer agreement by failing to provide him with effective sales support after he opened the Volvo Trucks dealership. Volvo moved to dismiss these claims on the grounds that they were not adequately pled.

The court denied Volvo's motion. It determined that Mohr had adequately set forth facts regarding Volvo's alleged oral offer to grant him a Mack Trucks franchise and its mutual assent to the agreement, as his complaint described the specific representations that Volvo executives had made to him and the dates of those conversations. In addition, taking the facts in the light most favorable to Mohr, he succeeded in stating a

plausible claim that Volvo breached the dealer agreement by refusing to grant him a price concession that would have enabled him to make a lucrative sale.

In a companion opinion, *Volvo Trucks North America v. Andy Mohr Truck Center, Inc.*, 2012 U.S. Dist. LEXIS 145054 (S.D. Ind. Oct. 9, 2012), the same court held that Volvo failed to state claims of fraudulent inducement, promissory estoppel, and constructive fraud against Mohr. Volvo alleged that Mohr had not fulfilled numerous promises, representations, and unqualified guarantees that he made in his application to obtain the Volvo Trucks dealership. The court determined that the promises of which Volvo complained all concerned future conduct and could not form the basis of a fraudulent inducement claim. The court also held that the integration clause in the parties' written dealer agreement superseded any promises Mohr made in his application for the franchise, thereby defeating Volvo's promissory estoppel claim. Lastly, the court dismissed Volvo's constructive fraud claim because no fiduciary or buyer-seller relationship existed between the parties.

NEW YORK APPELLATE COURT UPHOLDS CLAIM OF ORAL DISTRIBUTION AGREEMENT AGAINST SUPPLIER

A New York appellate court has rejected a statute of frauds defense to a claim for breach of oral exclusive distribution agreements. *Last Time Beverage Corp. v. F & V Distribution Co., LLC*, 2012 N.Y. App. Div. LEXIS 6092 (N.Y. App. Div. Sept. 12, 2012). This case began when two separate groups of soft drink distributors sued their common supplier for several breaches of the distribution agreement between one group of distributors (Last Time Beverage) and the original franchisor. The distributors alleged that the supplier had changed their distribution rights without additional compensation, directly sold to distributors' customers, improperly transshipped products, and unreasonably withheld consent to distributor sales of franchises. A referee appointed by the court found F & V Distribution liable to Last Time Beverage for breaching several contract provisions, including the provisions giving the distributors exclusive rights to distribute certain beverages in designated territories.

The second group of distributors, J.C. Tea, did not have a written agreement with F & V Distribution. Instead, they relied on oral and written promises that, among other things, they would receive contracts giving them exclusive rights in their geographic territories. F & V Distribution argued that the statute of frauds prevented J.C. Tea from asserting a claim for breach of an oral contract. The court ruled, however, that the doctrine of partial performance removed the oral agreement from the statute of frauds because J.C. Tea's actions were "unequivocally referable" to the oral agreement. The court determined that J.C. Tea performed substantial obligations based on F & V Distribution's alleged oral promises and that the promises were articulated in express

terms set forth in the distribution agreements that governed Last Time Beverage. Thus, the court affirmed the oral agreements and held that the statute of frauds did not apply.

TERMINATIONS

DISTRIBUTOR SURVIVES SUMMARY JUDGMENT BY USING CUSTOMER AFFIDAVITS TO DEMONSTRATE EXISTENCE OF TRADEMARK LICENSE

The United States District Court for the Northern District of California recently denied a manufacturer's motion for summary judgment on a distributor's claim for a violation of the New Jersey Franchise Practices Act (NJFPA). *Oracle America, Inc. v. Innovative Technology Distributors LLC,* 2012 Bus. Franchise Guide (CCH) ¶ 14,924 (N.D. Cal. Sept. 18, 2012). As a "value added" distributor of Sun Microsystems (Sun) technology products, Innovative Technology Distributors (ITD) sold Sun's products in conjunction with support and customization services. When Sun was acquired by Oracle, Oracle decided to move to a distribution model whereby most sales would be made directly to end users, without the involvement of distributors. For this reason, Oracle sent ITD a series of termination letters. The first letter stated as cause for termination ITD's nonpayment of roughly $19 million in invoices, and provided ITD 60 days to cure. Two subsequent termination letters did not state any grounds for termination. ITD brought an action against Oracle claiming that Oracle had violated the NJFPA by terminating ITD without good cause.

Among other things, Oracle claimed that ITD did not qualify as a franchise under the NJFPA because ITD did not have a trademark license. Although the contract explicitly disclaimed a license, the court stated that the inquiry should focus on whether the franchisee's use of the franchisor's trademark created a perception that the parties were "integrally related." To address this, ITD submitted affidavits from its customers, one of whom stated that he considered ITD to be "essentially an extension of Sun." In addition, the court found persuasive evidence that ITD displayed Sun's banner and logo at ITD's corporate office, that Sun directly warrantied products sold by ITD, and that ITD's value added services promoted the proper functioning of Sun products. In light of all of these factors, the court determined that there was a sufficient factual dispute regarding the existence of a license to preclude summary judgment in favor of Oracle.

The court went on to find that a genuine issue of material fact also existed as to whether Oracle had good cause for termination. While Oracle was able to show that its first termination letter complied with the NJFPA by stating good cause for termination (the nonpayment of $19 million) and providing a cure period, the court apparently

believed that the subsequent termination letters, which did not state any grounds for termination or provide a cure period, negated the previous compliant termination letter. This holding led the court to find that a factual issue existed regarding whether Oracle violated the NJFPA when it terminated ITD.

TRANSFERS

COURT DENIES MANUFACTURER'S MOTION TO DISMISS COUNTERCLAIMS REGARDING AN UNAUTHORIZED TRANSFER OF DEALERSHIP

A federal court in Maryland recently denied a truck manufacturer's motion to dismiss its dealer's counterclaims in an action regarding the unauthorized transfer of a dealership. In *Paccar Inc. d/b/a Peterbilt Motors Company v. Elliot Wilson Capitol Trucks LLC*, 2012 U.S. Dist. LEXIS 166962 (D. Md. Nov. 21, 2012), Peterbilt filed suit alleging that Elliot Wilson had materially breached its dealer agreement by selling rights to the dealership without prior approval. Elliot Wilson responded by filing counterclaims alleging that Peterbilt was aware of the potential sale and that, by refusing its approval, Peterbilt had failed to act in good faith in violation of various statutes. The dealer also claimed the supplier had breached the dealer agreement because it failed to make its "best efforts" to approve the proposed transfer. Elliot Wilson alleged eleven different instances of Peterbilt's misconduct, and Peterbilt argued that ten of those instances were not pled sufficiently to survive a motion to dismiss. The court declined to dismiss the allegations of bad faith, noting that even one unchallenged instance of misconduct, if pled in a sufficiently specific and plausible manner, would be enough to prevent dismissal. The court did caution, however, that these claims could succeed at trial only if Elliot Wilson could demonstrate that Peterbilt violated a contractual provision or a statute, or was responsible for tortious conduct.

The court also found plausible Elliot Wilson's claim for breach of the dealer agreement based on Peterbilt's failure to use its best efforts to approve the proposed transfer. The court interpreted the agreement as including an obligation that Peterbilt not unreasonably reject a proposed transfer. This meant that the supplier still could reject any proposal that it deemed unacceptable as a rational business matter. The court found, however, that Elliot Wilson had plausibly alleged that Peterbilt improperly rejected the proposed transfer because of its insistence that the business be transferred to its preferred buyer. Furthermore, the court found that Elliot Wilson had sufficiently alleged a claim for tortious interference with contract because Peterbilt's preferred buyer had exerted influence on Peterbilt to ignore or reject Elliot Wilson's proposed transfers.

STATE FRANCHISE LAWS

NEW YORK APPEALS COURT AFFIRMS SUMMARY JUDGMENT FOR DEALERS IN DISPUTE OVER INCENTIVE PROGRAM

Last month, another state appellate court in New York affirmed summary judgment in favor of two franchised Audi dealers who challenged as discriminatory Audi of America's incentive programs designed to encourage dealers to purchase more Audi vehicles returned by customers at the expiration of their leases (so-called "lease-returns"). *Audi of Smithtown, Inc. v. Volkswagen of America, Inc., d/b/a Audi of America, Inc.*, 2012 N.Y. App. Div. LEXIS 7586 (N.Y. App. Div. Nov. 14, 2012). The "CPO Purchase Bonus" was a payment by Audi to dealers. Existing dealers qualified for the bonus based on their volume of purchases of lease-returns, while newly franchised dealers, not having a portfolio of maturing lease-returns, qualified by meeting a sales objective for the sale of certified pre-owned vehicles. Under the "Keep It Audi" program, dealers received increasing discounts on the purchase of lease-returns based on achieving three qualification levels. Qualification levels for existing dealers were determined based on the volume of lease-returns purchased by the dealer, while newly franchised dealers were automatically placed in the highest qualification level for three years.

The plaintiffs, who were two established Audi dealers, alleged that the two incentive programs discriminated against existing dealers in favor of newly franchised dealers in violation of New York's Franchised Motor Vehicle Dealer Act and New York's Vehicle and Traffic Law, both of which make it unlawful for any franchisor to discriminate among franchised motor vehicle dealers. In affirming summary judgment on liability for the dealers, the appellate court agreed that the CPO Purchase Program was not "reasonably available to all dealers . . . on a proportionately equal basis." Specifically, the court found that the dealers had established that they faced higher costs to qualify for the CPO Purchase Program than did new dealers. The court also agreed with the lower court's grant of summary judgment in favor of the dealers on the Keep It Audi program in light of their submission of evidence of an actual sale by Audi of a lease-return to a newly franchised dealer at a price lower than that which the dealers were charged for similar vehicles.

FIDUCIARY DUTY

NEW YORK COURT FINDS NO FIDUCIARY DUTY BETWEEN SUPPLIER AND DEALER

In another dealership case involving Audi brand automobiles, the Appellate Division of the Supreme Court of New York overturned a decision by a lower court and granted Audi of America, Inc. summary judgment on the plaintiffs' fiduciary duty claims. *Legend*

Autorama, Ltd. v. Audi of America, Inc., 2012 N.Y. App. Div. LEXIS 7602 (N.Y. App. Div. Nov. 14, 2012). Audi and the plaintiffs, who were franchised Audi dealers, were parties to dealer agreements. After entering into the dealer agreements with the plaintiffs, Audi entered into another dealer agreement with a separate party that enabled that party to operate a dealership in close proximity to the existing dealers. Among other claims, the dealers alleged that by granting the subsequent dealership, Audi breached its fiduciary obligations to dealers. Audi moved for summary judgment on that claim, but the lower court denied Audi's motion.

The appellate court overturned the lower court's decision and granted Audi summary judgment on the dealers' fiduciary duty claims. In doing so, the appellate court stated that a "conventional business relationship, without more, is insufficient to create a fiduciary relationship." The dealers' dependence on Audi alone was not enough to create a fiduciary relationship, and they failed to show that there were additional circumstances to create one.

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