



The GPMemorandum

TO: OUR FRANCHISE AND DISTRIBUTION CLIENTS AND FRIENDS

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

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We are issuing the following special edition of *The GPMemorandum* because of a very recent legal development of interest to franchisors:

FRANCHISEE ASSOCIATIONS

COURT ALLOWS FRANCHISEE ASSOCIATION TO PURSUE CHALLENGE TO FRANCHISOR'S RULES AND PRACTICES

In a surprising decision that conflicts with numerous previous opinions on the same topic, a senior judge in the District of Connecticut declined to dismiss a complaint filed by a franchisee association against Edible Arrangements alleging breach of contract, breach of a duty of good faith and fair dealing, and violation of the Connecticut Unfair Trade Practices Act. *EA Independent Franchisee Association v. Edible Arrangements, International, Inc.* 2011 U.S. Dist. Lexis 78008 (D. Conn. July 19, 2011). Significantly, the franchisee association brought these claims in the form of a single count for declaratory judgment under the Declaratory Judgment Act and did not specifically seek damages. Edible Arrangements brought a motion to dismiss the complaint, alleging that the franchisee association lacked standing to bring claims on behalf of its members and that the association's complaint was a blatant attempt to circumvent the individual arbitration clauses in each member's franchise agreement.

The franchisees' claims arose out of their objections to new rules requiring longer store hours, the purchasing of supplies from specific vendors, the implementation of an on-line product ordering fulfillment system that required a software support services agreement, the imposition of a commission for fulfilling corporate orders, and the development of a Web site through which Edible Arrangements sells products that are also sold in Edible Arrangements stores. The franchisees also complained that the enforcement of these new rules and programs was selective and discriminatory.

In arguing that the association lacked standing¹, Edible Arrangements asserted that the complaint failed to identify any specific franchisees who suffered any injury as a result of its allegedly improper actions. The court rejected this argument, stating that "general factual allegations of injury resulting from defendant's conduct may suffice in the early stages of litigation." The court also held that the association's failure to request damages did not make the declaration it sought a speculative form of relief because a declaration would specifically address the defendant's conduct.

Most disturbingly, the court gave very little attention to the significant legal argument that the franchisees were attempting to circumvent the individual arbitration clauses in their franchise agreements by asserting their claims in court through an association. Without citation or analysis to the numerous cases dismissing association claims on these grounds, the court merely stated that "[t]he arbitration provision of the individual members' franchise agreements does not require the Court to conclude that that plaintiff lacks standing." By failing to follow substantial precedent dismissing franchisee association claims for lack of standing, the court in this case has created uncertainty as to the viability of the defensive use of arbitration clauses to prevent multiple franchisees from joining together to bring a single action.

Edible Arrangements also argued that because multiple versions of its franchise agreement were at issue, the lawsuit would require individual participation by franchisees to articulate how the alleged wrongdoing applied to each agreement. This is another basis on which courts typically deny standing to associations. Again, the court rejected this argument, finding that each version of the agreement contains a fee "and the propriety of such fees is the focus of plaintiff's complaint. The court can

¹ The Second Circuit law on associational standing is as follows: "An association, such as the plaintiff in this case, has standing to sue if: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Building & Constr. Trades Council of Buffalo, N.Y. & Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138, 144 (2d Cir. 2006)).



consider each of the versions and their corresponding fees without receiving individual guidance from plaintiff's members."

Finally, Edible Arrangements argued that the association's members may have had different experiences with the new rules and programs that it implemented. Indeed, the association alleged that Edible Arrangements' enforcement of the new rules and programs was inconsistent and discriminatory, requiring individual testimony of association members. Once again, the court rejected the argument, stating that the association challenged the propriety of Edible Arrangements' rules and actions, not the degree to which individual franchisees may have been hurt by the franchisor's conduct.

The court noted that the association claimed that it could prove its case by using only experts and Edible Arrangements' documents: "At this early stage of litigation, the court will afford plaintiff the opportunity to do so. As the case progresses, the court may reconsider plaintiff's ability to maintain standing if circumstances warrant."

Thus, by couching its claims as a request for a declaratory judgment and by not specifically seeking money damages, the association dodged the early effort to dismiss its complaint for lack of standing. However, the association may have painted itself into a corner. By forgoing a claim for damages and by representing that it can prove its claims through expert testimony and documents alone, the franchisee association may have significantly limited the evidence it can present to the court in support of its claims. However, if the association is successful and obtains a declaration that Edible Arrangements' actions and conduct breached the franchise agreements or violated the Connecticut Unfair Practices Act, it can expect hundreds of arbitration claims to be filed against it with the declaratory judgment decision attached as Exhibit A.



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