The GPMemorandum

TO: OUR FRANCHISE AND DISTRIBUTION CLIENTS AND FRIENDS

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

Quentin R. Wittrock, Editor of *The GPMemorandum*

Maisa Jean Frank, Assistant Editor

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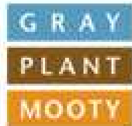
ANNOUNCEMENT

GRAY PLANT MOOTY WELCOMES SANDY BODEAU TO ITS FRANCHISING MERGERS & ACQUISITIONS TEAM

Sandy Bodeau recently joined Gray Plant Mooty's Minneapolis office as a member of its Franchise & Distribution practice group and Franchise Mergers & Acquisitions team.

For more than 12 years, Bodeau has advised clients on a broad range of franchising and commercial issues. In addition to her law firm practice, her past experience includes in-house counsel work for a multi-concept retail franchisor, giving her firsthand experience with issues facing franchisors. Her current practice focuses on advising franchisors on system development and ongoing program issues, and helping clients purchase or sell franchise-related businesses in the middle market—with a specialty in multi-unit franchise transfers.

Bodeau has provided legal services to franchisors and other companies in a variety of industries, including restaurants, other food services, hotels, retail, home services, health care, and printing and personal care services.



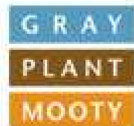
This issue of *The GPMemorandum* continues with our series of retrospective articles in celebration of our 15th year of publication. We then summarize recent decisions of interest to franchisors.

RETROSPECTIVE

COURTS ROUTINELY ENFORCE COMPLIANCE WITH SYSTEM STANDARDS FOLLOWING *DUNKIN' DONUTS V. PRIYA*

This is the sixth of our year-long series of articles reviewing the recent progeny of what we identified in December 2007 as the most significant franchise case decisions summarized in Issues 1 through 100 of *The GPMemorandum*. The sixth of those cases was *Dunkin' Donuts Inc. v. Priya Enterprises, Inc.*, 89 F. Supp. 2d 319 (E.D.N.Y. 2000), a case handled by current Gray Plant Mooty attorneys before they joined our firm. In *Priya,* Dunkin' Donuts initiated a lawsuit seeking an injunction to compel Priya's compliance with its health, safety, and sanitation standards, as required under the franchise agreement. Within a few months after the lawsuit was filed, the franchisees had come into substantial compliance with Dunkin's standards. Dunkin' abandoned its request for injunctive relief, but continued to seek the attorneys' fees and costs it incurred in initiating the action, pursuant to the franchise agreement. The court granted Dunkin's motion for summary judgment on its claim for attorneys' fees and costs. The *Priya* decision is significant because it demonstrates that a franchisor can successfully sue its franchisees to obtain compliance with system standards, obey all laws clauses, and other franchise agreement provisions, and can collect the attorneys' fees and costs it incurs in doing so.

Since *Priya*, courts nationwide have continued to hold that franchisors have the right to enforce system standards contained in the franchise agreement and also to collect contractually mandated attorneys' fees and costs incurred in enforcing standards. Although *Priya* involved health, safety, and sanitation standards, these principles have been extended to various other contractual obligations, including those related to franchisors' decisions to rebrand, to implement new programs, to upgrade computer and other systems, to introduce new products, and to require remodels and refurbishments. In the past 60 issues, *The GPMemorandum* has reported on several additional standards cases, such as *Burger King Corporation v. E-Z Eating, 41 Corporation*, a 2009 Eleventh Circuit case summarized in our Issue 122, and *LaQuinta Corp. v. Heartland Properties, LLC*, a Sixth Circuit decision from 2010 that was summarized in Issue 131. In deciding these cases, as in many franchise disputes, the courts turn first to the contract between the parties, and this sometimes cuts against the franchisor. For example, as we reported in Issue 144, an Illinois federal court *Stuller v. Steak N Shake Enterprises*, held in 2011 that a franchisee was likely to succeed on its claim that the



franchisor could not terminate it for failing to comply with pricing and promotional policies because the franchise agreement was ambiguous on the issue. That decision was affirmed by the Seventh Circuit, as we later reported. But when the franchise agreement plainly contemplates compliance with particular system standards, courts remain willing to enforce such provisions.

POST-EXPIRATION INJUNCTIONS: NONCOMPETE COVENANTS

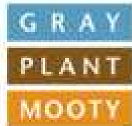
FRANCHISOR ENFORCES POST-EXPIRATION NONCOMPETE AGREEMENT

In *Curves International, Inc. v. St. Paul Ungewitter, Inc.*, No. 62-cv-12-6568 (Minn. Dist. Ct. Oct. 17, 2012), Curves successfully enforced a one-year, ten-mile post-term noncompete agreement against a former franchisee whose franchise agreement had expired. (Gray Plant Mooty represented Curves.) The court found that Curves had met its burden of demonstrating that it would be irreparably harmed absent injunctive relief because the former franchisee had converted her Curves operation into a new women's exercise/fitness facility using Curves equipment and serving Curves' customers. The court noted that the former franchisee failed to cease using the Curves equipment, failed to return Curves' operation manual, and continued to use the phone number associated with the Curves franchise. These facts created a reasonable inference that Curves faced a threat of irreparable harm. With respect to the balancing of the harms, the court found that Curves' damages would not be susceptible to a calculation of monetary compensation, and the former franchisee's continued use of techniques and systems associated with Curves would reduce the potential for introducing a successful new franchise in the territory. Finally, the court found that Curves was likely to succeed on the merits of its breach of contract claim against the former franchisee under either Texas law, as chosen by the parties in their franchise agreement, or Minnesota law, where the franchisee and the court were located.

CLASS ACTIONS/AMERICANS WITH DISABILITIES ACT

CALIFORNIA FEDERAL COURT APPROVES ADA CLASS ACTION SETTLEMENT

A federal court in California recently approved the settlement of a disability-access class action lawsuit in *Vallabhapurapu v. Burger King Corp.*, 2012 U.S. Dist. LEXIS 154867 (N.D. Cal. Oct. 26, 2012). The settlement involved the second part of a class action originally asserted by ten plaintiffs against Burger King in *Castaneda v. Burger King Corp.*, 2010 U.S. Dist. LEXIS 78299 (N.D. Cal. July 12, 2012), the settlement of which was reported in Issue 134 of *The GPMemorandum*. The approximately 86 plaintiffs in *Vallabhapurapu* contended that restaurants leased by Burger King to its franchisees in California were not accessible to customers who use wheelchairs and scooters, and they



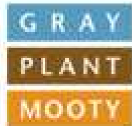
contended that Burger King had violated the Americans with Disabilities Act, California's Unruh Act, and the California Disabled Persons Act. Under the terms of settlement, Burger King agreed to an injunction to eliminate accessibility barriers and to pay $14 million in damages and approximately $4.7 million in attorneys' fees and costs. The settlement provides the court with ongoing jurisdiction until 2016 to monitor the terms of settlement and Burger King's compliance with the injunction.

ARBITRATION

ILLINOIS FEDERAL COURT GRANTS MOTION TO COMPEL ARBITRATION

In *Ace Hardware Corp. v. Advanced Caregivers, LLC*, 2012 U.S. Dist. LEXIS 150877 (N.D. Ill. Oct. 18, 2012), the United States District Court for the Northern District of Illinois granted franchisor Ace Hardware's motion to compel arbitration of the fraud claims of the franchises, Advanced Caregivers. Advanced Caregivers had brought suit in federal court in Florida on behalf of itself and a putative nationwide class, alleging that Ace defrauded them in connection with their decision to acquire Ace franchises. The dispute arose after Ace requested that Advanced Caregivers sign a set of revised franchise agreements to correct a minor error. The franchisees claim that they did not notice that the revised agreements also contained arbitration provisions, which were not included in the original set of agreements that they had executed a few months earlier. Ace moved to compel arbitration in federal court in Illinois on the grounds that Advanced Caregivers' allegations fell within the mandatory arbitration provisions found in the second set of agreements. In opposing the motion, Advanced Caregivers argued that the clauses were unenforceable because they were procedurally unconscionable, fraudulent, or obtained by mutual mistake.

The court held that the arbitration clauses were enforceable based on the second set of executed agreements. According to the court, the franchisees' claim of mutual mistake failed as a matter of law because they were presumed to have read the contracts before signing them. By signing the second set of agreements, the franchisees expressed their assent to the arbitration clauses. The court further concluded that Ace had no duty to inform Advanced Caregivers of the changes to the contract and that the clauses were not procedurally unconscionable because they were not too difficult to find, read, or understand. Finally, the court rejected Advanced Caregivers' argument that the contracts had been formed by fraud, reasoning that they easily could have discovered the arbitration provisions given that they appeared directly above the signature lines and that the word "arbitrate" appeared at least a dozen times in one of the documents.



CONTRACTS

COURT ENFORCES CONTRACT DESPITE INABILITY TO PRODUCE SIGNED COPY

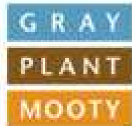
A Florida federal district court judge has enforced a forum selection clause set forth in a form franchise agreement attached to a Uniform Franchise Offering Circular even though neither party to the contract could produce a fully executed copy. *Alloy Wheels, Inc. v. Wheel Repair Solutions Int'l, Inc.*, 2012 U.S. Dist. LEXIS 118600 (S.D. Fla. Aug. 21, 2012). The plaintiff franchisee alleged that it negotiated with the defendant franchisor, headquartered in Georgia, for a wheel repair franchise that included a specific, exclusive territory in South Florida. After the franchisee had been in business for three years, the franchisor granted a portion of the territory to another franchisee. The franchisee asserted in its Florida complaint that it had been defrauded by the franchisor as to the territory, and that the franchise agreement itself was not an enforceable agreement. The franchisor moved to dismiss the lawsuit for improper venue based on a forum selection clause in its standard franchise agreement, which would require the franchisee's claims to be brought in Georgia. The copy of the agreement attached to the motion had been taken from the franchisor's UFOC. In its opposition to the motion, the franchisee asserted that the forum selection clause could not be enforced without a signed franchise agreement specifically between these parties.

The court determined, however, that the franchisor had submitted sufficient evidence of the existence of the franchise agreement, even though it did not produce a copy of the fully executed agreement. For example, the franchisor showed that it had provided the franchisee with a copy of the franchise agreement in an email sent during the contract negotiations, and submitted an affidavit from one its executive vice presidents stating that he had seen the signed copy of the agreement in the franchisee's file. The court noted that the franchisee failed to challenge this evidence with an affidavit of its own. Therefore, the court concluded that the franchisee did not meet its burden of raising a factual issue with respect to the existence of the fully executed agreement and dismissed its complaint on the basis of the forum selection clause.

FRAUD

COURT DISMISSES FRANCHISEE'S FRAUD AND STATUTORY CLAIMS

In an action brought by a hotel franchisor against a recently terminated franchisee, a New Jersey federal court dismissed without prejudice several fraud-based counterclaims asserted by the franchisee. In *Wingate Inns International, Inc. v. Swindall*, 2012 U.S. Dist. LEXIS 152608 (D.N.J. Oct. 23, 2012), the court rejected the franchisee's claim that Wingate Inns had fraudulently induced her purchase of the franchise with personal



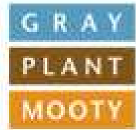
assurances of profitability and support. The court noted that the franchise agreement contained integration clauses in which Swindall agreed and acknowledged that she was not relying on any promises that were not written in the agreement, and the agreement also released Wingate Inns from any claim based on prior representations not specifically included in the agreement. Based on these integration clauses, the court concluded that any reliance on prior representations regarding profits and expectations of support was not reasonable could not support a finding of fraudulent inducement.

The court also rejected two counterclaims brought under the New Jersey and Georgia consumer protection statutes. First, the court ruled that Swindall was not entitled to protection under the New Jersey Consumer Fraud Act because, as a franchisee, she was not a "consumer" of goods or services and her franchise was not "merchandise," both of which are required for application of the Act. Second, the court rejected Swindall's claim that Wingate Inns' alleged misrepresentations violated the Georgia Fair Business Practices Act. Because the Georgia Act is intended to protect the general consuming public, the court ruled that it does not cover allegations of deceptive or unfair acts occurring in private negotiations. Swindall made no argument that the alleged misrepresentations were disseminated to the general public; instead she alleged that the misrepresentations occurred in personal conversations between herself and Wingate Inns. Furthermore, the court noted that the Georgia Act only applies to consumer transactions made "primarily for personal, family, or household purposes." Because the franchisee purchased and operated the hotel as a business, the court held that the Georgia Act did not apply.

STATE LAWS

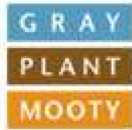
COURT CONCLUDES THAT REMEDIES UNDER MAINE'S UNFAIR TRADE PRACTICES ACT DO NOT APPLY TO RELATIONSHIPS GOVERNED BY FRANCHISE ACT

In a case that could apply to all types of franchises, a former machinery distributor's claims under the Maine Unfair Trade Practices Act (MUTPA) were dismissed last month in *The Oliver Stores v. JCB, Inc.*, Bus. Franchise Guide (CCH) ¶ 14,913 (D. Maine Oct. 5, 2012). Defendant JBC brought a motion to dismiss the MUTPA claim on the grounds that the remedies of attorney's fees and other relief under the MUTPA are not available when the parties had a commercial relationship such as a franchise or distributorship. In 1993, Maine's legislature had amended the Maine Franchise Act to include a "penalty" provision stating that a violation of the MFA also constituted a violation of the MUTPA. The MUTPA, however, allows for private *remedies* only in consumer transactions where the purchase is "primarily for personal, family or household purposes." When distributor The Oliver Stores brought both MFA and MUTPA claims, the Maine federal court was tasked with reconciling the MFA penalty provisions and MFA reference to the MUTPA



with the precedent holding that MUTPA remedies do not apply in commercial transactions. In this case the relationship was a distributorship, but the same rationale would appear to apply in a traditional business format franchise situation, as well.

After analyzing legislative history and construing the language used in both statutes, the court found that any interpretation that would make MUTPA's private remedies section applicable to franchises would render meaningless the words "primarily for personal, family or household purposes" within MUTPA. The plaintiff's proposed construction of the statutes also would make the MFA's own civil remedies section superfluous, the court reasoned. Thus, the court concluded that the plaintiff had no private right of action against JCB through the MFA or otherwise for the extra remedies set forth in the MUTPA.



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