GRAY PLANT MOOTY

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

DATE: August 6, 2014—No. 183 (Distribution Issue)

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 antitrust, terminations, and the application of state statutes.

ANTITRUST

FOURTH CIRCUIT UPHOLDS SUMMARY JUDGMENT FOR MANUFACTURER IN EXCLUSIVE DEALING CASE

Despite being one of two manufacturers that control 99% of the market, E.I. DuPont de Nemours and Co. has persuaded the United States Court of Appeals for the Fourth Circuit to affirm dismissal of exclusive dealing claims against it. *Kolon Indus. Inc. v. E.I. DuPont de Nemours & Co.*, 748 F.3d 160 (4th Cir. Apr. 3, 2014). Kolon, a would-be competitor, claimed DuPont's multi-year supply agreements with large customers comprised an unlawful attempt or successful creation of a monopoly in the market for para-aramid fiber, a synthetic product used in body armor, tires, and other goods. According to Kolon, these long-term exclusive contracts violated section 2 of the Sherman Act. As reported in Issue 157 of *The GPMemorandum*, the district court disagreed and granted summary judgment in 2012.

On appeal, the Fourth Circuit analyzed the exclusive dealing claims using a two-pronged approach. The court first analyzed Kolon's claim that DuPont possessed monopoly power, and second it determined whether DuPont had willfully acquired or maintained that power through exclusive dealing arrangements. As to the monopoly claim, while there is no fixed percentage of market control that demonstrates a monopoly exists, the Supreme Court

has never found that a monopoly existed when a company owned less than 75% market share. Kolon's own expert identified DuPont's market share to be less than 60%, a number that decreased during the time period of the alleged monopoly. Based on DuPont's decreasing market share and lack of a controlling percentage of the market, the court found that no monopoly existed because DuPont lacked the power to control prices or restrict others from entering the industry.

Even if it presented a triable issue regarding DuPont's alleged monopoly power, Kolon also needed to demonstrate that DuPont willfully maintained that power. Kolon alleged that DuPont's exclusive dealing agreements satisfied this requirement. DuPont did enter into exclusive contracts with 21 of 1,000 customers, which Kolon argued barred Kolon from crossing a "critical bridge" to larger customers in the U.S. market. The court acknowledged Kolon's argument, but concluded that it failed to show that DuPont's agreements foreclosed a large enough volume of the market. Because DuPont neither controlled the para-aramid market nor attempted to willfully exclude Kolon, the appellate court affirmed the grant of summary judgment.

GROCERY STORE'S MARKET-DIVISION CLAIM AGAINST WHOLESALERS SURVIVES SUMMARY JUDGMENT

The United States Court of Appeals for the Eighth Circuit has concluded neither side could prevail on summary judgment motions in an antitrust action brought by a "small town, family-owned grocery store" against SuperValu Inc. and C&S Wholesale Grocers, Inc., two of the largest grocery wholesalers in the United States. *In re: Wholesale Grocery Prods. Antitrust Litig.,* 652 F.3d 728 (8th Cir. May 21, 2014). This case arose out of negotiations by SuperValu and C&S to buy assets of a third grocery wholesaler, Fleming Companies, and to acquire certain territories from each other. D&G brought a class action complaint against the wholesalers, alleging that the true basis for their ultimate deal was a territorial division of the market. Among other things, the district court denied D&G's motion for partial summary judgment, concluding that there was no clear division of geographical territories in the formal agreement between the parties and thus, no *per se* violation of Section 1 of the Sherman Act.

The Eighth Circuit shifted the focus from whether the evidence established a *per se* violation of the antitrust laws and concluded that a reasonable jury could find that the parties' true agreement involved a geographical division of the market. This conclusion was based, in part, on the possibility that extrinsic evidence—such as the fact neither of the wholesalers actually competed in the other's regions after the sales—may persuade the jury. Also, a key email written by C&S's executive vice president indicated that "the basis of the deal" was that SuperValu would "depart[] from New England" and "wo[uld]n't compete with [C&S] in New England." C&S also indicated that it was "not interested in a transaction that leaves SuperValu in New England." If the jury were to

find that the true agreement was a market division, then the wholesalers committed a *per se* antitrust violation. Therefore, the Eighth Circuit concluded that the differences between the written agreement and the apparent intention of the agreement, when viewed in light of the subsequent actions taken by the wholesalers and other evidence, created a genuine and material factual dispute about the nature of the alleged scheme.

RESTRAINT OF TRADE CLAIMS GO FORWARD AGAINST FOOTBALL "FRANCHISES" AND LEAGUE

The United States District Court for the Northern District of Illinois has paved the way for what will be a closely-watched antitrust trial in *American Needle, Inc. v. New Orleans Saints*, 2014 U.S. Dist. LEXIS 47527 (N.D. Ill. Apr. 4, 2014). As reported in Issue 131 of *The GPMemorandum*, the United States Supreme Court in 2010 allowed plaintiff American Needle, an apparel manufacturer, to allege that the National Football League and thirty of its teams conspired, in violation of Sherman Act Section 1, to award Reebok an exclusive apparel license to make hats for all NFL teams. In a decision that could have meaning to franchise systems and product distribution networks of all kinds, the Supreme Court did not agree with the NFL's defense that it and its teams were a single entity incapable of conspiring in violation of Section 1. The case was sent back to the district court for further proceedings.

On remand, the district court rejected American Needle's request to apply a "quick look" analysis to the licensing arrangement and to dismiss the claims. The district court held, instead, that a full trial will be required to judge whether the procompetitive effects of the arrangement justify the exclusion of other suppliers such as American Needle. The court also declined to grant summary judgment to the NFL on its argument that American Needle's proffered relevant market is overly narrow, holding that proof of actual detrimental effects in the marketplace can obviate the need for an inquiry into market power and definition. Further, the court alternatively held that American Needle's evidence supported a submarket for the "wholesale market for NFL trademarked hats."

We will continue to monitor and report on any judicial developments in this case that are relevant to product distribution systems or franchising.

COURT DENIES MOTION TO DISMISS ROBINSON-PATMAN ACT CLAIM BASED ON UNEVEN APPLICATION OF INCENTIVE PROGRAM

A federal court in California denied in part a motion to dismiss a car dealer's price discrimination claim against its distributor under the Robinson-Patman Act. *Mathew Enterprise, Inc. v. Chrysler Group LLC*, 2014 U.S. Dist. LEXIS 95522 (N.D. Cal. July 11, 2014), involved a franchised dealer, Mathew Enterprise, that purchased its vehicle

inventory directly from Chrysler at a standard invoice price. Chrysler, however, also offered earned subsidies to its dealers through "volume growth" incentive programs based on the dealer's prior sales. Although incentive programs are not prohibited under the statute so long as they are functionally available to all purchasers, Mathew Enterprise alleged that Chrysler had unfairly rewarded Mathew Enterprise's newly-opened competitors by granting incentives based on different sales formulas. Mathew Enterprise also argued that Chrysler had given "disguised price discounts" by granting favorable, below-market rent terms to Mathew Enterprise's competitors and not to it.

Chrysler moved to dismiss the claims, arguing the incentive program was not "functionally unavailable" to Mathew Enterprise, since Mathew Enterprise had been awarded the incentive whenever its sales met expectations based on a prior year's statistics. Mathew Enterprise, in turn, argued that Chrysler's establishment of new competing dealers within Mathew Enterprise's geographic region made the incentives available to it only in theory, not in fact, because Chrysler had failed to adjust Mathew Enterprise's sales formula in recognition of the impact new competition would have on its prior sales. Meanwhile, according to Mathew Enterprise, its new competitors qualified for the incentives despite much lower sales, because they had no prior sales to use as a metric. The court concluded that this allegation was sufficient to survive a motion to dismiss because Mathew Enterprise presented a plausible claim Chrysler treated newly opened dealers as "favored purchasers," while imposing more onerous objectives on pre-existing dealerships such as Mathew Enterprise. Although it denied Chrysler's motion to dismiss on the incentive claim, the court granted the motion with regard to Mathew Enterprise's theory based on favorable rent terms because Mathew Enterprise failed to allege that a rental agreement was somehow tied to the volume of cars sold such that it might constitute a "disguised discount," or that it could otherwise be classified as a commodity for consideration under the Robinson–Patman Act.

NEW YORK FEDERAL COURT REJECTS CLAIMS BASED ON SINGLE-BRAND MARKET

A federal district court in New York dismissed a value-added reseller's antitrust claims against its competitor based on its failure to properly define a relevant market. *Techreserves Inc. v. Delta Controls, Inc.*, 2014 U.S. Dist. LEXIS 47080 (S.D.N.Y. Mar. 31, 2014). Techreserves operates as a reseller in the building management systems sales, installation, and maintenance markets, in which Delta is a manufacturer. Techreserves claimed that its competitors, including defendant IBC, and Delta excluded other value-added resellers from selling, installing, and servicing Delta building automation and control software specified products.

Delta and IBC made a joint motion to dismiss Techreserves' complaint for failure to state a claim, arguing that Techreserves failed to plead the requisite geographic and product markets. The court granted the motion and dismissed Techreserves' antitrust

claim based on its failure to plead a plausible relevant product market. The court noted that Techreserves attempted to describe the alleged market in various ways, but, in essence, it claimed that it was excluded only from selling a single brand of product, Delta. "It is well-established that a non-unique single-brand product, like Delta's, does not a market make," the court stated.

NONRENEWAL

FEDERAL COURT FINDS OKLAHOMA STATUTE REQUIRES CAUSE FOR NONRENEWAL OF DEALERSHIP AGREEMENT

A federal court in Oklahoma recently granted in part and denied in part a motion to dismiss brought by an equipment distributor. *Charles Mach. Works, Inc. v. Valley Ditch Witch, Inc.*, 2014 U.S. Dist. LEXIS 60522 (W.D. Okla. May 1, 2014). Oklahoma-based tractor parts and equipment manufacturer Charles Machine Works brought suit against one of its Texas distributors, Valley Ditch Witch, seeking a judgment declaring the validity of its nonrenewal of the parties' dealership agreement. Valley Ditch Witch moved to dismiss the suit on its merits and on procedural grounds, including lack of personal jurisdiction and improper venue. The court granted in part and denied in part the motion as it related to the merits, and denied the motion as it related to the procedural arguments.

Addressing the merits of the claims, the court held that Charles Machine Works adequately pled a claim for declaratory relief because it alleged that it had good cause for not renewing the dealership agreement. The court, however, dismissed the portion of its claims asserting that Oklahoma law did not require cause for nonrenewal. Oklahoma's Fair Practices of Equipment Manufacturers, Distributors, Wholesalers and Dealers Act in effect at the time plainly required cause for the termination or nonrenewal of a dealership agreement, the court noted. Furthermore, the statute prohibited language in the dealership agreement that purported to waive compliance with the law. In rejecting Valley Ditch Witch's personal jurisdiction argument, the court held that Valley Ditch Witch's decades of business with the Oklahoma-based Charles Machine Works established sufficient contact with the state for the court to exercise personal jurisdiction over Valley Ditch Witch.

TERMINATIONS

DEALER'S WRONGFUL TERMINATION SUIT SURVIVES MOTION TO DISMISS

A federal court in Ohio partially granted a manufacturer's motion to dismiss certain claims in a suit challenging the termination of a distribution agreement brought by one of its former dealers. *Palmer-Donavin Manufacturing Co. v. Rheem Sales Co.,* 2014 U.S.

Dist. LEXIS 82993 (S.D. Ohio June 18, 2014). Palmer-Donavin had been a dealer of the manufacturer Rheem's heating, ventilation, and air conditioning equipment for more than forty years pursuant to a series of written distribution agreements, the last of which had expired in 2009. After 2009, they had continued their relationship through Rheem's approval of Palmer-Donavin's yearly sales plan. The complaint alleged that, after the written contract had lapsed, Rheem convinced Palmer-Donavin to take various actions to promote its products and discontinue the sale of any of its competitor's HVAC equipment, based on the understanding that the relationship would continue. Nonetheless, without Palmer-Donavin's knowledge, Rheem entered into discussions with a different distributor and eventually terminated its relationship with Palmer-Donavin in early 2013. Palmer-Donavin brought claims for breach of a written contract, breach of an oral agreement, promissory estoppel, breach of fiduciary duty, and negligent misrepresentation, among others. Rheem moved to dismiss on the ground that the complaint failed to state a claim upon which relief could be granted.

The court denied the motion as to some of the claims. It held that the lapsed written agreement, which permitted Rheem to terminate the relationship at any time, no longer governed the relationship between the parties. Although expired written commercial contracts are generally enforced if the parties continue to act according to their terms, the court noted that these parties had significantly altered their positions by moving from a nonexclusive to an exclusive distribution relationship. Thus, it concluded that they were no longer operating under the expired written agreement, but instead had formed a series of new contracts evidenced by their agreed-to annual sales plans. Since the new agreements arguably prohibited Rheem from terminating the relationship before the end of the calendar year, the court rejected Rheem's attempt to dismiss Palmer-Donavin's breach of contracts claims. The court also kept Palmer-Donavin's promissory estoppel claim alive because it sufficiently alleged that it had taken various actions in reliance on explicit assurances from one of Rheem's employees that the relationship would not be terminated. The court did dismiss Palmer-Donavin's claim for breach of a fiduciary duty because, although close and long-lasting, the parties relationship was essentially "arm's-length." Similarly, the court dismissed Palmer-Donavin's claim for negligent misrepresentation because the parties had not been in the kind of "special relationship" that such claims require.

FEDERAL COURT DENIES REQUEST FOR INJUNCTION TO PREVENT TERMINATION

A federal district court in North Carolina denied a bakery goods distributor's motion to enjoin his termination because disputed issues of fact precluded a finding that he was likely to succeed on the merits of his wrongful termination claim. In *Martin v. Bimbo Foods Bakeries Distribution, Inc.*, 2014 U.S. Dist. LEXIS 73992 (E.D.N.C. May 30, 2014), the manufacturer, Bimbo, terminated the parties' distribution agreement after

discovering that Martin had created and transmitted false invoices to receive credit for extra inventory and had committed other material violations. Martin brought suit and sought a preliminary injunction, arguing that Bimbo's stated reasons for termination were pretextual and meant to retaliate against him for his opposition to Bimbo's plan to reduce compensation for all independent distributors.

The court determined that Martin had not clearly shown that he was likely to succeed on the merits because there were significant factual disputes regarding the propriety of his termination. The parties presented conflicting testimony as to the methods Martin employed in seeking credit for extra product left on his truck, whether he benefitted financially from his actions, and whether he received adequate notice of Bimbo's credit policies. The court also held that Martin failed to establish that he would suffer irreparable harm to his reputation and goodwill absent a preliminary injunction. While the court acknowledged that loss of goodwill can sometimes satisfy the irreparable harm requirement, the specific facts of each case must be analyzed to determine whether the potential harm to a claimant's goodwill makes damages difficult to ascertain. In this case, Martin's monetary damages were calculable because his distribution route was well established at the time of the termination and there was sufficient historical data from which to determine the route's value.

CONTRACTS

SUPPLIER'S SUMMARY JUDGMENT MOTION DENIED BY WASHINGTON FEDERAL COURT ON CLAIMS RELATED TO SALE OF PRODUCTS IN THE PHILIPPINES

A federal court in Washington denied a product supplier's motion for partial summary judgment on numerous claims related to an oral contract. *Mastaba v. Lamb Weston Sales*, 2014 U.S. Dist. LEXIS 72865 (E.D. Wash. May 27, 2014). Mastaba, a seller of frozen potato products in the Philippines, brought an action against Lamb Weston, its sole supplier of potatoes, for breach of contract, promissory estoppel, quantum meruit, unjust enrichment, negligent representation, and fraud, all based on the supplier's alleged oral representations that it would enter into a written, five-year contract in exchange for Mastaba making certain capital investments, including constructing a test kitchen, hiring additional staff, and creating a succession plan. After Mastaba began making significant investments, Lamb Weston declined to enter into the agreement.

The court allowed Mastaba's lawsuit to proceed because of genuine issues of material fact regarding most of the claims. In reaching its conclusion, the court found significant the allegation that Lamb Weston made multiple oral promises, the existence of which were supported by emails between the parties, indicating Lamb Weston's awareness that Mastaba was investing significantly in the construction of a test kitchen, and even took a hands-on approach to the kitchen's development by directing Mastaba to take

specific actions for its construction. The court noted that the construction of a test kitchen is not a "typical" exchange between business associates; rather, it was specific to each party's unique circumstances. The court also rejected Lamb Weston's arguments that any discussions were merely "mutual expressions of an expectation of a long-term business relationship," and the discussions were merely agreements to agree, which are unenforceable in Washington. The court, however, denied Mastaba's unjust enrichment claim, which sought recovery based on establishing the potato market in the Philippines to Lamb Weston's benefit, because it determined that the benefit was not distinct from Mastaba's duties created under previous contracts made during the twelve-year relationship between the parties.

STATE FRANCHISE LAWS

COURT BROADLY INTERPRETS INVENTORY REPURCHASE OBLIGATIONS UNDER THE NORTH CAROLINA FARM MACHINERY FRANCHISE ACT

In *Interstate Equipment Co. v. ESCO Corp.*, 2014 U.S. Dist. LEXIS 97263 (W.D.N.C. July 17, 2014), a court established a broad interpretation of a supplier's obligations under the North Carolina Farm Machinery Franchise Act to repurchase inventory from a dealer upon termination of the parties' relationship. In particular, the court held that: (1) the repurchase requirements applied even if the dealer originally purchased the inventory for resale at a location outside of North Carolina; (2) so long as title to inventory would be free and clear at the time it was transferred back to the supplier, it was eligible for repurchase under the Act; (3) the Act's requirement that repurchase of inventory occur within ninety days after termination was either tolled or waived given that litigation ensued prior to expiration of that period; (4) the supplier was not required to meet the Act's deadline to inspect parts within sixty days of issuance of the notice of termination because the pending lawsuit made that impractical; (5) "inventory" purchased more than thirty-six months prior to issuance of the notice of termination need not be repurchased, but the Act has no similar exception for "repair parts"; and (6) although the repurchase prices set by the Act are based on the parts' "current net price," the supplier could not avoid its repurchase obligation by claiming that certain replaced or superseded parts had no current net price and therefore were not required to be repurchased.

The court also held that to the extent there was conflict between the parties' written agreement and the Act, the Act would govern. However, provisions of the agreement that provided the supplier with greater rights than the Act otherwise would have given were still enforceable. Accordingly, although repair parts that were not resalable as new without repackaging or reconditioning are not required to be repurchased under the Act, because the supplier's return policy provided for return of certain repair parts in

non-new condition after applying appropriate discounts, that practice would apply to the final repurchase of inventory as well.

MASSACHUSETTS SUPREME COURT CLARIFIES MANUFACTURER'S DUTY TO DEFEND

In a case of first impression, the Massachusetts Supreme Judicial Court has clarified the duty that a motor vehicle manufacturer owes a dealer to assume defense of a claim. *Ferreira v. Chrysler Grp. LLC*, 2014 Mass. LEXIS 336 (Mass. June 11, 2014). Ferreira purchased a new Jeep Wrangler from Somerset Auto Group, which came with a limited warranty by Chrysler. After experiencing ongoing problems with the vehicle, Ferreira sent a letter to Somerset and Chrysler alleging that both were at fault for the problems with the vehicle. In response, Somerset demanded that Chrysler assume its defense and indemnify it against Ferreira's claims pursuant to state law. After Ferreira filed suit, the trial court granted Chrysler's motion for summary judgment, and an intermediate appellate court affirmed.

The issue before the Massachusetts Supreme Judicial Court was whether Chrysler had a duty to defend Somerset in the specific context the case presented. The court affirmed the dismissal of Somerset's claims on a basis not accepted by the courts below. In construing the particular Massachusetts statute involved, the state's high court held that, when a plaintiff's claim is against both the manufacturer and the dealer, neither owes a statutory duty to defend the other.

Along with the attorneys indicated on the next page summer associates Ashley Bailey, Riley Conlin, Kathryn Hauff, Leah Leyendecker, Lynn Ling, and Amanda Sicoli all contributed to this issue.

Minneapolis, MN Office

John W. Fitzgerald, cochair (612.632.3064)
Megan L. Anderson (612.632.3004)
Sandy Y. Bodeau (612.632.3211)
Phillip W. Bohl (612.632.3019)
Jennifer C. Debrow (612.632.3357)
Danell Olson Caron (612.632.3383)
Elizabeth S. Dillon (612.632.3284)
Ashley Bennett Ewald (612.632.3449)
* Michael R. Gray (612.632.3078)
* Kelly W. Hoversten (612.632.3203)
Franklin C. Jesse, Jr. (612.632.3205)
* Jeremy L. Johnson (612.632.3035)
* Richard C. Landon (612.632.3429)
Gaylen L. Knack (612.632.3217)

Kirk W. Reilly, cochair (612.632.3305)
Craig P. Miller (612.632.3258)
Bruce W. Mooty (612.632.3333)
John W. Mooty (612.632.3200)
* Kevin J. Moran (612.632.3269)
Kate G. Nilan (612.632.3419)
Karli B. Peterson (612.632.3278)
Matthew G. Plowman (612.632.3425)
Max J. Schott II (612.632.3327)
Michael P. Sullivan, Jr. (612.632.3350)
Michael P. Sullivan, Sr. (612.632.3351)
Henry T. Wang (612.632.3370)
Lori L. Wiese-Parks (612.632.3375)
* Quentin R. Wittrock (612.632.3382)

Washington, DC Office

Robert L. Zisk, cochair (202.295.2202)
* Julia C. Colarusso (202.295.2217)
* Maisa Jean Frank (202.295.2209)
Jan S. Gilbert (202.295.2230)
* Jeffrey L. Karlin (202.295.2207)
Mark A. Kirsch (202.295.2229)
Peter J. Klarfeld (202.295.2226)
Sheldon H. Klein (202.295.2215)

Janaki J. Parmar (202.295.2235)
Iris F. Rosario (202.295.2204)
* Justin L. Sallis (202.295.2223)
Stephen J. Vaughan (202.295.2208)
* David E. Worthen (202.295.2203)
Eric L. Yaffe (202.295.2222)
Carl E. Zwisler (202.295.2225)

**** Wrote or edited articles for this issue.***

For more information on our Franchise and Distribution practice and for recent back issues of this publication, visit the **Franchise and Distribution** practice group at www.gpmlaw.com/practices/franchise-and-distribution.aspx.

GRAY PLANT MOOTY

500 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-3796
Phone: 612.632.3000

Suite 700, The Watergate
600 New Hampshire Avenue, N.W.
Washington, DC 20037-1905
Phone: 202.295.2200

franchise@gpmlaw.com

The GPMemorandum is a periodic publication of Gray, Plant, Mooty, Mooty & Bennett, P.A., and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult your own franchise lawyer concerning your own situation and any specific legal questions you may have.

GP:3741117 v1