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Judge William R. Wilson, Jr.
D444 Richard Sheppard Arnold U.S. Courthouse
500 W. Capitol Ave.
Little Rock, AR 72201-3325

Re: Otto Dental Supply, Inc. v. Kerr Corporation
U. S. District Court, Eastern District of Arkansas,
Western Division No. 4:06cv01610GH

Dear Judge Wilson:

Please allow me to refer to the above case set for jury trial on December 9, 2008.

I called Your Honor's office today to ask permission to supplement the remaining issues in our Motion for Summary Judgment based upon an Order entered by Judge Holmes on August 22, 2008, a portion of which further authenticates our Motion on the fraud and punitive damage issues. The Hobbs' decision by Judge Holmes involves several disputed claims under the Arkansas Franchise Practices Act. For the purposes of this letter, I reference only the attached pages 13 and 14 whereupon the Court dismissed the fraud allegations. Larry Hobbs Farm Equipment, Inc., d/b/a Hobbs Farm Implement and Hobbs Farm Equipment v. CNH America LLC, U.S. District Court, Eastern Div., No. 2:08CV049JLH.

Therefore, I respectfully offer these additional comments in furtherance to paragraph "D" commencing at page 15 of our Brief in Support of our Motion for Summary Judgment.

In dismissing the fraud allegations, Judge Holmes recognized that "this latter representation from CNH America's representative related solely to its future relationship with [the alleged franchisee]." (Order at 14)

The Court also noted that:

In Arkansas, the general rule "is that an action for fraud or deceit may not be predicated on representations relating solely to future events." Marson v. Backyard Burgers, Inc., 93 F.3d 1183, 1186 (8th Cir. 1996). (Order at 13)

The Court also concluded that the plaintiff had not alleged that the person who made the future representation knew that the representation was false, or that he had intended to deceive; and therefore the Complaint failed to state a claim for fraud under Arkansas Law. (Order at p. 14)

This logic is applicable to Kerr's present motion.

The only allegations of fraud are made at paragraph 42 of Mr. Otto's Amended Complaint.

Those allegations relate solely to the "termination, transfer and assignment of plaintiff's rights." However, A.C.A. § 4-72-207(a) provides that fraud can only exist in situations concerning the "offer, sale, purchase, transfer or assignment of any franchise." That statute does not concern a "termination" and this is a termination lawsuit.

As was true in the Hobbs decision by Judge Holmes, there is no allegation in paragraph 42 that there was any knowing misrepresentation with an intent to deceive; and certainly no allegation that Mr. Otto relied upon any statements connected with his termination as required by AMI 2806.

Accordingly, any statements made concerning the termination of the relationship between Mr. Otto and the defendant, just like in the Hobbs' decision, related solely to their future relationship and cannot be the basis for fraud.

Said another way, A.C.A. § 4-72-207 simply does not create a cause of action for fraud in connection with termination of a relationship.

Therefore, defendant respectfully asks that the fraud allegations and all claims for treble damages be dismissed with prejudice; together with the punitive damage claims which are interconnected and not supported by any proof or evidence as set forth in our previous brief, which also recites that punitive damages are not available in this claimed breach of contract.

We appreciate this opportunity to further comment.

Very truly yours,

WOMACK, LANDIS, PHELPS & McNEILL

J. V. Phelps

JVP/kq

Enclosures

cc: Brandon Lacy (w/encl.)

William Clay Brazil (w/encl.)

the Arkansas Franchise Practices Act recognizes the reasonableness of dual distribution by a franchisor to multiple franchisees in the same area by defining a franchise as the use of a trademark or sale of a particular product "within an exclusive *or nonexclusive*" territory. The DMI Dealer Agreement provided that Hobbs Farm Equipment would be a nonexclusive dealer of the DMI products. Therefore, even if CNH America engaged in dual distribution as Hobbs Farm Equipment has alleged, this dual distribution was not commercially unreasonable. Hobbs Farm Equipment has thus failed to state a claim on which it could recover under Ark. Code Ann. § 4-7-206(6), and that claim is dismissed.

B. SECTION 207(A)(3) AND FRAUD

Hobbs Farm Equipment's complaint alleges that "the representations by [CNH America] and its predecessors that Hobbs [Farm Equipment] would not be terminated were relied upon by Hobbs [Farm Equipment] to its detriment and operated as a fraud upon Hobbs [Farm Equipment]" Section 207(a)(3) makes it unlawful for "any person, directly or indirectly, in connection with the offer, sale, purchase, transfer, or assignment of any franchise in this state to knowingly . . . [e]ngage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." In Arkansas, the general rule "is that 'an action for fraud or deceit may not be predicated on representations relating solely to future events.'" *Morrison v. Back Yard Burgers, Inc.*, 91 F.3d 1184, 1186 (8th Cir. 1996) (quoting *Delta Sch. of Commerce, Inc. v. Wood*, 298 Ark. 195, 200, 766 S.W.2d 424, 427 (1989)). Hobbs Farm Equipment's allegations are insufficient as a matter of law to sustain a claim of fraud under section 207(a)(3). According to Hobbs Farm Equipment, CNH America first made representations in 1998 that Hobbs Farm Equipment would not be terminated as a franchise. CNH America continued to sell DMI products to Hobbs Farm Equipment

for an additional nine years after that representation. Hobbs Farm Equipment also alleges that a similar representation was made in mid-2007. Because this latter representation from CNH America's representative related solely to its future relationship with Hobbs Farm Equipment, and because Hobbs Farm Equipment has not alleged that the person who made the future representation knew that the representation was false or that he intended to deceive, the complaint fails to state a claim for fraud under Arkansas law. Therefore, Hobbs Farm Equipment's claim arising under Ark. Code Ann. § 207(a)(3) is dismissed.

C. SECTION 204: DEFICIENT NOTICE AND TERMINATION WITHOUT GOOD CAUSE

The remaining claims under the Arkansas Franchise Practices Act are based on Ark. Code Ann. § 204. CNH America alleges two violations of section 204: first, CNH America gave insufficient notice; and second, CNH America terminated Hobbs Farm Equipment's franchise without good cause.

1. Deficient Notice

Subsection (b) of section 204 provides:

(b) No franchisor shall directly or indirectly terminate, cancel, or fail to renew a franchise without first giving written notice to the franchisee at least ninety (90) days in advance of such action, setting forth the reasons for the termination, cancellation, or intention not to renew, and, in the case of terminations, shall provide the franchisee with thirty (30) days in which to rectify any claimed deficiency.

With respect to this provision, CNH America contends that Hobbs Farm Equipment was not foreclosed from using the DMI trademark until August 31, 2008, or one year and seventeen days after notice was given. The complaint alleges, however, and the termination letter confirms, that Hobbs Farm Equipment could not order new DMI wholegoods products after August 31, 2007, which was only seventeen days after the date on which CNH America gave notice of termination.