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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. 4:06cv01610WRW*

Dear Judge Wilson:

This letter is in response to two letters from counsel for Kerr Corporation dated March 5, 2008 and August 29, 2008, which address the Court's previous ruling on the Defendant's Motion for Summary Judgment. Although I believe this my letter addresses the procedural and substantive issues raised by counsel in his letters, I would request that, should the Court reconsider its previous ruling denying Kerr's Motion for Summary Judgment based upon the information submitted in both counsels' letters and this response, the parties have the opportunity to supplement the record accordingly.

At the outset, opposing counsel suggests that the Court has not yet ruled on the portion of Kerr's Motion for Summary Judgment addressing Plaintiff's claim for treble damages or punitive damages under the Arkansas Franchise Practices Act. I respectfully disagree. These issues were thoroughly briefed in the parties' motions submitted to the Court as a part of Kerr's Motion for Summary Judgment. On page 16 of the Court's Order, the Court held that Kerr's motion was denied. Accordingly, this issue has been decided. To the extent Kerr maintains that it has not, as this issue has already been thoroughly addressed in section C of Plaintiff's Brief in Support of its Response to Kerr's Motion for Summary Judgment, I will not repeat or belabor those arguments herein.

To the extent Kerr maintains that the *Hobbs* decision merits reconsideration of this issue, again, I respectfully disagree. In *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, the plaintiff brought suit against a supplier of farm equipment for, inter alia, a violation of the Arkansas Franchise Practices Act. The plaintiff was a distributor of farm equipment for a manufacturer that had been the subject of multiple acquisitions. The distribution agreement traced back to the original manufacturer, DMI in 1995. DMI was subsequently acquired by Case Corporation, which was subsequently acquired by CNH America. At the time Case Corporation

acquired the manufacturer, it assured DMI dealers, including Hobbs Farm Equipment, that it would not terminate the dealers' rights to distribute the equipment so long as they continued to perform capably. After CNH America acquired the manufacturer, however, it allowed a competitor distributor of Hobbs' to distribute identical tillage and soil management equipment that was simply painted a different color and branded a bit differently. Hobbs sales of this equipment dramatically dropped thereafter, and, ultimately, the distributorship was cancelled. *Id.*, p. 2-4.

Hobbs' claim for fraud under the Arkansas Franchise Practices Act was based upon the representations that Hobbs would not be terminated as long as Hobbs performed capably. This statement was made by the predecessor manufacturer in 1998, and Hobbs alleged that another similar statement was made in mid-2007. *Id.*, p. 13. Citing the cases referenced in opposing counsel's letter, the court noted that actions for fraud may not be predicated on representations relating solely to future events. The court determined, therefore, that the statements alleged by Hobbs could not have been fraudulent at the time they were made because they related to future events. "[B]ecause 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." *Id.* at 14.

This opinion does not, as opposing counsel suggests, conclude that Ark. Code Ann. § 4-72-207 does not create a cause of action for fraud in connection with the termination of a franchise. The *Hobbs* opinion was the result of a 12(b)(6) motion to dismiss, and was based exclusively upon the facts as alleged in Hobbs' complaint. It simply requires facts demonstrating that the person or entity making the representation knows the representation to be false or deceptive when it was made.

Ark. Code Ann. § 4-72-207 gives rise to a claim for more than simply common law fraud. The statute also makes it unlawful for any person, "in connection with the offer, sale, purchase, transfer, or assignment of any franchise . . . to knowingly [e]mploy any device, scheme, or artifice to defraud." "Artifice" is defined as a "clever plan or idea, esp. one intended to deceive." *Black's Law Dictionary*, 7th ed., p. 108. This language renders the scope of this statute more broad than common law fraud.

In this case, Otto does indeed allege that fraudulent misrepresentations were made by Kerr in connection with the termination, transfer and assignment of Otto's distribution rights, and that these statements were false and deceptive at the time they were made. Otto alleges that these statements were part of an artifice engaged in by Kerr to defraud Otto. Otto does not allege that, at some point prior to Kerr's termination, Kerr represented that it would not terminate Otto. Rather, Otto alleges that, at the time of its termination, Kerr misrepresented the basis for Otto's termination, and had secretly engaged in a deceptive plan to terminate Otto for a non-stated, unjustifiable reason. On August 12, 2005, Ron Malerstein, Vice President of Kerr, mailed a letter to Plaintiff stating that Kerr valued its business relationship with Otto and their mutual success as Partners. Only twelve days later, Mr. Malerstein mailed another letter to Otto announcing that Kerr had implemented a new \$50,000.00 annual purchase requirement and, in the same letter, that Otto was terminated effective

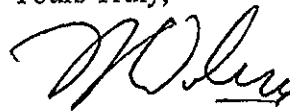
September 30, 2005 for failing to reach the newly revealed \$50,000.00 purchase requirement. The \$50,000.00 minimum purchase requirement was a goal that was unknown to Otto and that had never been communicated to it prior to this correspondence. The basis of the termination of Otto was the "under performance" of a previously unknown goal.

After contacting Kerr and explaining the unfairness of this termination, Otto's credit was reinstated, and Otto was advised that Kerr representatives would meet with Otto at the beginning of 2006 to discuss Otto's purchase goals for that year. In an effort to impress Kerr prior to that meeting, Otto contacted Best Buy Dental in order to sell as much Kerr product as possible. From the time of Otto's reinstatement as an authorized Kerr dealer in September 2005 until the end of 2005, Otto sold approximately \$9,000.00 worth of Kerr product to Best Buy Dental. At no time did Kerr ever advise Otto that it should not sell Kerr product to Best Buy Dental. At the end of the year, and before any meeting between Kerr and Otto could occur, Otto was again terminated. The stated reason for this termination was the failure to meet the minimum annual purchase requirement. Throughout this lawsuit, Kerr has maintained that the basis for Otto's termination was the failure to meet this minimum annual purchase requirement.

Mr. Otto believes Otto could have purchased \$50,000.00 of Kerr product on an annual basis and that he could have met the \$50,000.00 minimum annual purchase requirement in 2006 if given the opportunity. Otto has now learned that the stated reason for its termination, the failure to meet this purchase requirement, was false and pretextual. In fact, Kerr's own documents support the conclusion that Otto was "shut down" for selling Kerr product to Best Buy Dental. Through discovery in this lawsuit, Otto has learned that Kerr has engaged in a systematic effort to prevent Best Buy Dental from purchasing or otherwise obtaining Kerr products for resale to its own customers because Best Buy Dental resales the products at a price lower than that of Kerr's other, more favored distributors. Kerr, however, never informed Otto that selling Kerr products to Best Buy Dental would constitute a basis for termination. Thus, there is certainly a fact issue as to whether Kerr made fraudulent representations to Otto during this four-month time period regarding the basis for Otto's termination, and the transfer and assignment of Otto's distributor rights. There is also a fact issue as to whether Kerr knew these statements were false when they were made.

As the Court can see, these facts are entirely different from those at issue in *Hobbs*. Therefore, Plaintiff respectfully requests that the Court disregard Kerr's request to reconsider its previous holding, and allow its previous ruling denying Kerr's Motion for Summary Judgment in all respects to stand. Thank you in advance for your consideration of this issue.

Yours Truly,



Tony L. Wilcox

cc: John V. Phelps
William Clay Brazil