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September 10, 2021

VIA EMAIL AND REGULAR MAIL

Andrew M. Malzahn
Dady & Gardner P.A.
5100 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402

Re: Invitation to Negotiate Nationwide No-Hire Agreement with CPRIOA

Dear Mr. Malzahn:

This firm represents Assurant, Inc. ("Assurant") and its indirectly owned subsidiary, MMI-CPR, LLC ("MMI-CPR"), transacting business generally as "CPR by Assurant." We are in receipt of your letter on behalf of the CPRIOA ("the Association") dated August 25, 2021. The Association sought a "substantive response" from Assurant and MMI-CPR by September 10, 2021. This letter constitutes that response.

I. Preliminary Statement.

Outside staffing recruiters were recently engaged to assist in hiring repair technicians to work in select T-Mobile repair stores. These recruiters have been instructed not to target existing CPR franchisee employees. If a franchisee's employee applies directly for a position, however, that applicant will be considered for the position on the same basis as all other applicants.

The Association expresses concern with this development. Its letter asserts that "Assurant has recently started to compete with its own CPR franchisees by: (1) hiring cell phone repair technicians (and other similar industry-specific roles) in franchisees' territories; and (2) repairing cell phones and handheld electronic devices in franchisees' territories." On this basis, the Association proposes, "first and foremost," that "Assurant stop hiring repair employees nationwide." It further proposes that "Assurant equitably distribute referrals from T-Mobile retail outlets to all interested CPR franchisees" and "develop an appropriate compensation structure for performing the cell phone repair services." The Association invites negotiations on its proposals.

Assurant and MMI-CPR have deep respect for the Association's larger mission of supporting independent CPR franchisees, which are an important component of the franchise system. Assurant and MMI-CPR are nonetheless unable to participate in the negotiations the Association proposes. In fact, they may be legally prohibited from doing so. As explained more fully in this letter, even mere negotiations about the Association's proposals could be construed as a conspiracy or attempt to violate state and federal antitrust laws. A nationwide "no-hire" or "no-poach" agreement with franchise businesses that compete in hiring from the same labor pool would arguably amount to an illegal market allocation.

The Association also presents its view of the "very real legal implications arising out of Assurant's actions." It posits a series of possible legal claims and theories against Assurant and MMI-CPR: breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, tortious interference with contracts and—for good measure—purported violations of unspecified state franchise and consumer protection acts. As explained more fully in this letter, however, there is no merit to the claims posited. Neither Assurant nor MMI-CPR are impinging on CPR franchisees' contractual or other rights.

II. The Association's Invitation To Negotiate Risks Violation Of The Antitrust Laws.

As an initial matter, Assurant and MMI-CPR are troubled by the significant antitrust issues that lurk, unacknowledged, in the Association's proposals.[1] They must decline the Association's invitation to negotiate.

Some background is necessary. Section 1 of the federal Sherman Act declares illegal every "contract," "combination," and "conspiracy" in "restraint of trade." 15 U.S.C. § 1. Many states have analogous antitrust statutes which are construed according to decisional law that, in general, tracks the decisional law construing the federal statute. Under the Sherman Act, restraints of trade are often subject to the "rule of reason," under which the courts analyze whether the questioned practice is unreasonable. *See State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). Certain types of restraints, however, are considered *per se* illegal because they have "such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit." *Id.*; *see also Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49 (1990) (territorial market allocation is a *per se* violation); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972) (market allocations "between competitors at the same level of the market structure" are *per se* illegal).[2]

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[1] Assurant and MMI-CPR also are troubled by the fact that the Association's membership constitutes only a minority of the CPR franchisees and that the Association appears to be unsure of its exact membership ("approximately 162"). In addition, the Association's interests appear to be adversarial to the interests of the CPR franchisees it says are actually benefited by the conduct asserted. For the time being, we set aside these concerns to provide a substantive response to the Association's letter.

[2] There is a third, intermediate mode of analysis referred to as the "quick-look" approach. Courts take a "quick-look" where the *per se* rule is inapplicable, but the anticompetitive effects of an agreement are so obvious that "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999).

In determining whether a restraint is subject to the rule of reason or the *per se* rule, courts first look to whether the restraint is horizontal (between competitors) or vertical (between firms at different levels of distribution). *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283-84 (2018). Vertical restraints are ordinarily subject to the rule of reason while horizontal restraints are ordinarily condemned as illegal, *see id.*, unless the horizontal restraint is ancillary to a separate, legitimate joint venture between competitors. *See Texaco, Inc. v. Dagher*, 547 U.S. 1, 7 (2006); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 689 (1978).[3]

In recent years, courts, antitrust experts, and regulators (including the United States Department of Justice's Antitrust Division) have raised concerns about "no-hire" or "no-poach" agreements in the franchise industry. The typical franchise no-hire agreement can be a vertical market allocation limiting the number of employers competing for a given group of employees, and its anticompetitive effects can be policed under the rule of reason.

As the Antitrust Division has explained,[4] however, even though the typical no-hire agreement between a franchisor and its franchisee is vertical, it becomes horizontal if it restrains competition between the two interrelated entities. Specifically, a franchisor and its franchisee may actually or potentially compete in the labor market in which the relevant employees are hired. This is true even though the franchisor and franchisee do not directly compete in the market in which their products or services are sold. If there is direct competition between a franchisor and its franchisees to hire employees with similar skills, however, a no-hire agreement between them may be characterized as horizontal and, if not ancillary to a legitimate and procompetitive joint venture, would be *per se* illegal. On this basis, in recent years, many courts have allowed Sherman Act and similar antitrust claims to proceed against franchise businesses.[5]

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[3] "Criminal prosecution, incarceration, and substantial fines are the most effective, but not exclusive, deterrents to antitrust crimes. In those instances when the federal government or its agencies have been the victims of antitrust violations, the Department of Justice may obtain treble damages under the Clayton Act (15 U.S.C. § 15a) and civil penalties up to treble damages under the False Claims Act (31 U.S.C. § 3729). In addition, private parties (including state and local governments) can recover treble damages they suffer as a result of an antitrust violation, and they may use successful federal prosecution of collusion as prima facie evidence against a defendant in a follow-on suit for treble damages." U.S. Dep't of Justice, Antitrust Div., *An Antitrust Primer for Federal Law Enforcement Personnel* 7 (rev. 2018) ("*Antitrust Primer*").

[4] The Division's views on franchise no-hire agreements are articulated in the United States' Corrected Statement of Interest, *Stigar v. Dough, Inc.*, No. 18-CV-244, 2019 WL 7756377 (E.D. Wash. filed Mar. 8, 2019), and adhered to in footnote 4 of its Brief of *Amicus Curiae* United States, *Arrington v. Burger King Worldwide, Inc.*, No. 20-13561, 2020 WL 7241001 (11th Cir. filed Dec. 7, 2020). More broadly, the Division "has consistently taken the position that naked no-poach and wage-fixing agreements" are "per se unlawful violations of the Sherman Act." *Antitrust Primer*, *supra*, at 6.

[5] *See, e.g.*, *Turner v. McDonald's USA, LLC*, No. 19-CV-5524, 2020 WL 3044086, at *2-3 (N.D. Ill. Apr. 24, 2020); *In re Papa John's Employee & Franchisee Employee Antitrust Litig.*, No. 18-CV-825, 2019 WL 5386484, at *8-9 (W.D. Ky. Oct. 21, 2019); *Blanton v. Domino's Pizza Franchising LLC*, No. 18-CV-13207, 2019 WL 2247731, at *5 (E.D. Mich. May 24, 2019); *Yi v. SK Bakeries, LLC*, No. 18-CV-5627, 2018 WL 8918587, at *5 (W.D. Wash. Nov. 13, 2018); *Deslandes v. McDonald's USA, LLC*, No. 17-CV-4857, 2018 WL 3105955, at *7-8 (N.D. Ill. June 25, 2018); *Butler v. Jimmy John's Franchise, LLC*, 331 F. Supp. 3d 786, 796-97 (S.D. Ill. 2018).

In proposing that the Assurant Connected Living companies[6] agree to "stop hiring repair employees nationwide," the Association advances a transparently horizontal franchise no-hire agreement. The Association itself asserts that these companies "compete with [their] own CPR franchisees" in the same labor pool—they essentially offer different employment "brands." As direct competitors in the market for the same employees, the no-hire agreement would be horizontal and thus likely *per se* illegal. It would ossify what is currently a fluid labor pool. Worse still, the overt goal of the Association's proposed no-hire agreement is to artificially depress repair technicians' compensation. The Association itself asserts that "Assurant has an extreme competitive advantage (in terms of hourly pay and benefits, offering $20 per hour, incentive plans, benefits (health, dental, vision, life insurance, 401(k)) over its franchisees when it comes to hiring." With a nationwide no-hire agreement in place, repair technicians could not enjoy that quantifiable "advantage." "No-poach agreements hurt workers." *Antitrust Primer*, *supra*, at 6.

Antitrust concerns aside, Assurant and MMI-CPR do not believe that artificially depressing worker compensation is good for the long-term health of the mobile repair industry. Underpaid repair technicians will be more inclined to permanently exit the industry, and below-market wages will dissuade potential technicians from entering in the first place. This will hamstring the entire franchise system. What the Association proposes is thus likely contrary to its members' interests.

The Association worries that competition for labor "will ultimately force franchisees to reduce hours and close their CPR franchise businesses," but even assuming the truth of this sort of conjecture, cost savings are not a valid antitrust defense to a horizontal restraint. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-21 (1940) (concerns about "[r]uinous competition, financial disaster," and other "competitive evils" offer "no legal justification"). The Sherman Act "precludes inquiry into the question whether competition is good or bad." *Nat'l Soc'y*, 435 U.S. at 695; *see also Topco*, 405 U.S. at 610-11 (there is "no authority under the Sherman Act to determine the respective values of competition in various sectors of the economy"). From an antitrust perspective, a no-hire agreement would not produce "real" cost savings anyway. By depressing compensation, the no-hire agreement proposed would not reduce the resources deployed to repair devices; it would only allow CPR franchisees to capture a larger share of the surplus created by those resources than would repair technicians. Nor is there anything special about the mobile repair industry that would otherwise exempt it from the law's application. *See NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100 n.21 (1984) ("The likelihood that horizontal price and output restrictions are anticompetitive is generally sufficient to justify the application of the *per se* rule without inquiry into the special characteristics of a particular industry.").

Assurant and MMI-CPR are unwilling to assume the extraordinary legal risk associated with the Association's invitation to negotiate. Even *discussing* the matter could garner unwanted scrutiny from regulators and the plaintiffs' bar. *See United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 534 n.13 (1972) ("circumstantial evidence is the lifeblood of antitrust law"); *Interstate Circuit v. United States*, 306 U.S. 208, 226 (1939) ("It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it."). Assurant and MMI-CPR must therefore decline the Association's invitation.

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[6] As a mere public holding company, Assurant itself has no employees, no mobile repair operations of its own, and would not employ any of the repair technicians in question.

III. The Legal Claims Posited Are Not Colorable.

The Association purports to describe "the legal implications of Assurant's recent (and presumably forthcoming) conduct" not "to antagonize Assurant" but "to be forthright about its liability." In the interest of reciprocal forthrightness, Assurant and MMI-CPR wish to explain the meritlessness of the "legal implications" posited. If presented in court, the various legal claims and theories described—breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, tortious interference with contracts, and violations of state franchise and consumer protection acts—would not withstand an early motion to dismiss.[7]

A. Breach Of Contract And Implied Covenant Of Good Faith And Fair Dealing.

The Association asserts that MMI-CPR is breaching the CPR franchise agreements and the implied covenant of good faith and fair dealing. (Assurant is not a party to any CPR franchise agreement.) The Association points out that the agreements contain choice-of-law provisions selecting either Ohio or Georgia law. The vast majority select Ohio law.

No language in the franchise agreements prohibits MMI-CPR from either hiring repair technicians or repairing devices in (or out of) the CPR franchisees' territories. The only provisions cited in the Association's letter—§§ 3.1 ("License of Franchise; Restrictions"), 4.1 ("Designated Area"), 4.2 ("Reservation of Rights"), 5.2 ("Training Fees"), and 7.4 ("Compliance with Laws and Ethical Business Practices")—neither restrict nor obligate MMI-CPR; they restrict and obligate the franchisees. There is no plausible breach of any specific contractual obligation.

Absent a specific, actionable breach of contract claim, an implied covenant claim must also fail. "Some jurisdictions do not recognize the implied covenant at all, and most jurisdictions do not recognize it as a cause of action distinct from breach of contract." 2 W. Michael Garner, *Franchise and Distribution Law and Practice* § 8:25 (2020-2021 ed.) ("Garner"). That is true under the law of Ohio, whose courts have "recognized that there is no independent cause of action for breach of the implied duty of good faith and fair dealing apart from a breach of the underlying contract." *Lucarell v. Nationwide Mut. Ins. Co.*, 97 N.E.3d 458, 469 (Ohio 2018). There cannot be a breach of the implied covenant unless a specific contractual obligation is not met. *Id.* at 464. The same is equally true under Georgia law—"there is no independent cause of action for violation of the covenant apart from breach of an express term of the contract." *Morrell v. Wellstar Health Sys., Inc.*, 633 S.E.2d 68, 72 (Ga. Ct. App. 2006).

In addition, the implied covenant cannot be breached by acting in accordance with the contract. *See Lucarell*, 97 N.E.3d at 464. At § 4.2, the franchise agreements pointedly exclude a grant to franchisees "of any rights with respect to other and/or related businesses, products and/or services, in which [MMI-CPR] or our Affiliates may be involved, now or in the future." That

[7] Of course, the claims cannot be presented in court. The CPR franchise agreements call for mandatory individual (non-class) arbitration of all franchise-related claims, whether asserted against MMI-CPR, Assurant, both of them, or any of their affiliates, *viz.*, § 20.3. *See generally CPR—Cell Phone Repair Franchise Sys., Inc. v. Nayrami*, 896 F. Supp. 2d 1233 (N.D. Ga. 2012).

includes any business in competition with the franchisees, as long as the competing business is not itself a CPR Franchise Business. At § 4.2(A), MMI-CPR reserved the right to

> sell or otherwise distribute any products (including the Products) or services (including the Services) anywhere, whether at wholesale, retail or otherwise and whether or not using the Marks or System, without restriction of any kind, in any alternative or other channel of distribution (except for a CPR Franchise Business located within the Designated Area), including but not limited to the Internet, World Wide Web and/or similar venues, whether or not located in the Designated Area, and to customers located anywhere[.]

The right to compete was further reserved at § 4.2(B) through (F), including the right to "engage in any transaction with other businesses (whether competitive or not)." A right to compete encompasses competition in the labor market, including the ability to hire another's at-will employees. This negates any reliance on at least three of the provisions cited in the Association's letter, *viz.*, §§ 3.1, 4.1, and 4.2. MMI-CPR cannot impliedly breach what the franchise agreements expressly permit. *See Bill Call Ford, Inc. v. Ford Motor Co.*, 48 F.3d 201, 207 (6th Cir. 1995) ("Under Ohio law, [the franchisee] cannot complain that [the franchisor] violated the duty of good faith simply because [the franchisor] exercised its clearly expressed contractual rights."). Cases like *Ragen v. Hancor, Inc.*, 920 F. Supp. 2d 810 (N.D. Ohio 2013)–which, incidentally, found that a manufacturer did *not* breach the implied covenant, *id.* at 836—are inapposite to this extent.

The Association's reliance on two other provisions—§§ 5.1 and 7.4—is, frankly, incoherent. Obligations that *franchisees* pay training fees and comply with applicable laws cannot be transfigured into an obligation that *MMI-CPR* never hire franchisees' employees and refrain from repairing devices in franchisees' territories, especially when § 4.2 permits just that. The text is not sufficiently malleable to read such an implied obligation into these off-topic provisions.

Moreover, the implied covenant is only implicated by an act or omission that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties. *Ragen*, 920 F. Supp. 2d at 836. The possibility that MMI-CPR or its affiliates might compete with CPR franchisees in their territories, including by hiring franchisee employees or repairing devices there, could easily have been contemplated at the time of contracting. And, in fact, it was—in MMI-CPR's "Reservation of Rights."

The Association suggests that, "should Assurant continue the conduct described," any CPR franchisee "will have the option to terminate the franchise agreement, void the non-compete obligations, and begin operating independently." This is reckless legal counsel. No breach is plausibly asserted. Any self-declared termination, moreover, may be subject to the agreement's default and termination provisions, *viz.*, §§ 18, 19, including payment of the Termination Remedy, *viz.*, § 19.5, and cross-default of the franchisee's lease, loan, and other agreements, *viz.*, § 18.4.

B. Breach Of Fiduciary Duty.

The CPR franchise agreements establish independent contractor relationships between the franchisees and MMI-CPR, *viz.*, § 13.3. The agreements repeatedly, unequivocally disclaim the notion that the relationships are fiduciary in nature, *viz.*, §§ 9.1, 13.3.

The Association nevertheless posits that fiduciary relationships exist. As a general rule, including under Ohio law, franchise agreements do not give rise to such relationships. *See Franklin Park Lincoln-Mercury, Inc. v. Ford Motor Co.*, 530 F. App'x 542, 546 (6th Cir. 2013); Garner, *supra*, § 8:34 ("Franchise agreements do not, by their terms, create fiduciary relationships. Indeed, most franchise agreements state that the parties are dealing at arm's length and that no special relationship exists between them. Such provisions have led courts to conclude that no special relationship existed between them."). In fact, "a franchisor-franchisee relationship does not create a fiduciary duty unless by specific and mutual agreement." *Franklin Park*, 530 F. App'x at 548. "The Ohio Revised Code," moreover, "contains no statute which creates a fiduciary relationship between franchisor and franchisee." *Interim Healthcare of Ne. Ohio, Inc. v. Interim Servs., Inc.*, 12 F. Supp. 2d 703, 715 (N.D. Ohio 1998). Georgia franchise law is to the same effect. *See Allen v. Hub Cap Heaven, Inc.*, 484 S.E.2d 259, 264 (Ga. Ct. App. 1997).

The Association's contrary reliance on *Taylor v. Checkrite, Ltd.*, 627 F. Supp. 415 (S.D. Ohio 1986), is misplaced. *Taylor* concerned whether a principal-agent relationship existed for purposes of establishing the franchisor's vicarious liability to a third party for the franchisee's conduct. *Taylor* had nothing to do with whether the franchisor was the franchisee's fiduciary. Nor did it conclude that an agency relationship existed. And even if a principal-agent relationship existed between MMI-CPR and a franchisee—which it does not—it would be irrelevant anyway. Although "the agent owes a fiduciary obligation to the principal," the "obligations that a principal owes an agent … are not fiduciary." Restatement (Third) of Agency § 1.01 cmt. e (2006).

C. Tortious Interference With Contracts.

The Association asserts that Assurant tortiously interfered with the CPR franchisees' contractual relations with MMI-CPR. Such a claim necessarily depends on the franchisees' ability to establish that the franchise agreements were breached. As discussed above, they were not.

Furthermore, Assurant, a parent company, cannot be liable for tortiously interfering with the contracts of MMI-CPR, its indirectly owned subsidiary. Although the Association's letter portrays it otherwise, this is categorically true in a number of jurisdictions. Under Georgia law, for example, a parent company cannot be considered a stranger to its subsidiary's contractual relations, and no claim can be sustained against a parent for tortious interference with such relations. *See Lyman v. Cellchem Int'l, LLC*, 779 S.E.2d 474, 480 (Ga. Ct. App. 2015), *rev'd on other grounds sub nom. Lyman v. Cellchem Int'l, Inc.*, 796 S.E.2d 255 (Ga. 2017). The same is true under the laws of Texas, *see ProTradeNet, LLC v. Predictive Profiles, Inc.*, 369 F. Supp. 3d 788, 793 (W.D. Tex. 2019) ("a corporate parent is incapable of tortiously interfering with the contracts of its subsidiary"), Michigan, *see Knight Capital Partners Corp. v. Henkel AG & Co.*, 930 F.3d 775, 783 (6th Cir. 2019) ("Under Michigan law, a parent company cannot tortiously interfere with the affairs of its wholly-owned subsidiary."), New York, *see Koret, Inc. v. Christian Dior, S.A.*, 161

A.D.2d 156, 157 (N.Y. App. Div. 1990) (corporate parent "had a right to interfere with the contract of its subsidiary, in order to protect its economic interests"), Montana, *see Lachenmaier v. First Bank Sys., Inc.*, 803 P.2d 614, 619 (Mont. 1990) ("A parent corporation is privileged to 'interfere in a contract between its subsidiary and a third party to protect its own legitimate economic interest and such interference will not give rise to tort liability."), and other states.

We recognize that although some courts treat the parent-subsidiary relationship as "an absolute bar to liability," others describe it as affording a qualified privilege, holding that a parent can still be held liable for interfering with the economic relations of its subsidiary if the parent employs "improper" means or acts with an "improper" purpose. *HSK v. Provident Life & Accident Ins. Co.*, 128 F. Supp. 3d 874, 887 (D. Md. 2015). Notably, however, "a plaintiff must prove that the parent company wrongfully coerced its subsidiary, not the third-party to whom the subsidiary was contractually obligated." *Id.* at 888. The Association's letter does not assert that Assurant has directed any improper conduct at MMI-CPR; the conduct—purported statutory violations and contract breaches—is supposedly directed at CPR franchisees. Regardless, the supposed conduct would, at most, amount to Assurant's honest misinterpretation of franchise agreements it firmly believes do not prohibit hiring franchisees' employees or repairing devices in franchisees' territories. "Contractual misinterpretation is a far cry from deliberately breaching an unprofitable contract, let alone employing physical violence or fraud to induce a breach." *Id.*

D. State Franchise And Consumer Protection Acts.

The Association also asserts violations of state franchise and state consumer protection acts. Absent unusual circumstances, however, only one state's statutes apply—the state whose law is selected by the CPR franchise agreement's choice-of-law provision. Most of the agreements have provisions selecting Ohio law, *viz.*, § 21.1. These same provisions also waive the applicability of non-Ohio laws governing the franchise relationship. *See* Garner, *supra*, § 9:34 ("Application of a state 'little FTC Act' may be avoided by an express waiver or by a choice-of-law provision."); *Gre-Ter Enters. v. Mgmt. Recruiters Int'l, Inc.*, 329 F. Supp. 3d 667, 675-76 (S.D. Ind. 2018) (Indiana franchise act inapplicable where agreement contained Ohio choice-of-law provision).

The Association's letter did not cite any Ohio statutes and we are unaware of any Ohio franchise act (*e.g.*, the Business Opportunity Plan Act, Ohio Rev. Code § 1334.01 *et seq.*) that prohibits the sort of conduct asserted in the letter. Other states' franchise acts would not necessarily apply anyway. The letter cites, for example, Haw. Rev. Stat. § 482E-6, but overlooks that there are no CPR franchisees located in Hawaii. The Association's letter also cites Iowa Code § 523H.6, but overlooks that the entire chapter in which that section is situated "does not apply to a franchise agreement which is entered into on or after July 1, 2000." Iowa Code § 523H.2A. Still other rules cited, including Wash. Rev. Code § 19.100.180 and Minn. R. 2860.4400(C), apply only if the franchise agreement provides that an "exclusive territory" has been granted. Section 4.2 of the CPR franchise agreements specifically provides that MMI-CPR and its affiliates may operate competing businesses in franchisees' territories. The territories are not exclusive. *See Newpaper, LLC v. Party City Corp.*, No. 13-CV-1735, 2014 WL 2986653, at *8 (D. Minn. July 1, 2014).

State consumer protection acts are even less availing. The Ohio Consumer Sales Practices Act, Ohio Rev. Code § 1345.01 *et seq.*, does not apply to franchise transactions, which are not for primarily personal, family, or household purposes. *See Yo-Can, Inc. v. The Yogurt Exchange, Inc.*, 778 N.E.2d 80, 84-85 (Ohio Ct. App. 2002). Furthermore, that Act applies only in a consumer transaction involving an "individual"—a natural person—which CPR franchisees are not. *See Culbreath v. Golding Ents., LLC*, 872 N.E.2d 284, 290 (Ohio 2007).

Even if non-Ohio acts did apply, most states do not give statutory standing to businesses. *See* Garner, *supra*, § 9:34. The two examples the Association offers actually undercut its position. The New Jersey Consumer Fraud Act does not apply to business disputes between franchisees and franchisors. *See Baymont Franchise Sys., Inc. v. Bernstein Co.*, No. 18-CV-620, 2021 WL 2935426, at *10 (D.N.J. July 13, 2021). The court in *Kavky v. Herbalife International of America*, 820 A.2d 677 (N.J. App. Div. 2003), "carved out a narrow exception to the rule" that "'even where franchises or distributorships are available to the public at large in the same sense as are trucks, boats or computer peripherals, they are not covered by the Consumer Fraud Act because they are businesses, not consumer goods or services.'" *Fabius v. Medinexo USA, LLC*, No. 19-CV-2526, 2020 WL 1666468, at *9 (E.D. Mo. Apr. 3, 2020) (quoting *J&R Ice Cream Corp. v. CA Smoothie Licensing Corp.*, 31 F.3d 1259, 1274 (3d Cir. 1994)). *Kavky* applied the Act because the franchisor offered a franchise to anybody for a nominal fee, so the purchaser's role was more akin to that of a traditional consumer than a true franchisee. *Id.* No similar assertion could be plausibly made with respect to CPR franchises, which are established only after extensive due diligence, investment of tens (and even hundreds) of thousands of dollars, and other significant commitments.

Likewise, *Hanson Hams v. HBH Franchise Co.*, 2003 WL 22768687 (S.D. Fla. Nov. 7, 2003), has been distinguished as an outlier case where "the plaintiff alleged that the defendant had entered into a transaction with bad faith and sought to drive the plaintiff out of business entirely." *Matrix Group Ltd., Inc. v. Rawlings Sporting Goods Co.*, 477 F.3d 583, 596 (8th Cir. 2007) (applying Florida law and distinguishing *Hansom Hams* because no allegations gave "rise to an inference that the appellants wanted to ruin Matrix totally"). No similar assertion could be plausibly made that MMI-CPR entered into the franchise relationships with bad faith and now seeks to drive CPR franchisees out of the business entirely.

The Association's statutory claims do not transcend a simple contractual dispute. Its letter does not even hint at fraudulent or deceptive acts or practices. "A breach of contract, without aggravating circumstances, usually does not amount to a violation of an unfair trade practices act. For example, a franchisor's diversion of resources and attention from a franchisee might have been a breach of contract but was not a violation of the Texas Act, which requires that the defendant engage in false, misleading, or deceptive acts or practices." Garner, *supra*, § 9:36.

Finally, the Association suggests that, under the state franchise and consumer protection acts, CPR franchisees can recover "treble or punitive damages." This ignores the franchise agreement's terms, which expressly waive recovery of treble and punitive damages, and limit recovery to equitable relief and actual damages sustained, *viz.*, §§ 20.3, 21.3.

* * * * * *

Although Assurant and MMI-CPR are unable to negotiate about the Association's proposals, and consider the legal claims posited toothless, neither Assurant nor MMI-CPR are insensitive to independent CPR franchisees' concerns. To the contrary, Assurant and MMI-CPR are proud of, and resolved to continue promoting, the franchise system's growth, brand, model, and franchise partner value-add. These are not empty words. Recent actions bear this out. For example, this summer CPR by Assurant joined Apple's Independent Repair Provider program, giving franchisees access to genuine iPhone parts sourced from Apple, diagnostic tools, processes, and training for out-of-warranty repairs.

We trust that this adequately responds to the Association's letter. If you have any questions or issues to raise vis-à-vis this matter, you should direct them to my attention.

Respectfully submitted,