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VIA EMAIL & U.S. MAIL

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Re: Invitation to Negotiate and Resolve System-Wide Issues with Franchisee Association

Messrs. Bryant, Frock & Jourdan:

Dady & Gardner represents the CPRIOA (the "Association"), a collection of CPR franchisees representing approximately 162 of the 420 CPR franchised businesses, and approximately 40-50% of system-wide revenues. We are writing to open negotiations with Assurant, Inc. and its down-the-line subsidiary, MMI-CPR, LLC (the "CPR" franchisor) (collectively referred to as "Assurant") as to how to fairly and, most importantly, lawfully, expand its business in connection with Assurant's recent competition with its own CPR franchisees.

Below we will share the Association's best understanding of the factual background and the very real legal implications arising out of Assurant's actions, and we will conclude by offering some ideas on how to resolve these issues amicably.

Factual Background

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.

First, on August 6, 2021, Assurant publicly announced its intention to hire cell phone repair technicians (or similar positions), but only in sample or test markets, downplaying the scope of their hiring efforts. However, some Association members learned within days of August 6, 2021, that the scope of the hiring is across most major markets nationwide with a goal of 2000 hires by October 1, 2021, and an eventual total in excess of 4,000 repair related staff. As you can imagine, 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. The sheer number of cell phone repair technicians Assurant aims to hire is significant because the Association estimates that the entire employee base of CPR franchisees is approximately 1,500.

Assurant's timing is incredible. Even without competition from Assurant, staffing is difficult because CPR franchisees are dealing with various exposures to COVID-19 and subsequent quarantines. Assurant is taking key employees from its franchisees at a time when it is publicly known that the retail and service industries cannot find and retain employees, at almost unprecedent levels. CPR franchisees are already on the brink of being forced to reduce their hours. With little effort, we located evidence of Assurant recruiting cell phone repair technicians nationwide with as many as 2,000+ listings. Despite your representations to franchisees that Assurant will not hire from CPR franchised businesses, in one circumstance, Assurant's hiring agent was completely unphased in recruiting and hiring a key employee of a CPR franchisee, even asking the current CPR employee if there were any other interested CPR employees.

Second, we understand that Assurant is placing these newly hired employees (at least some) within T-Mobile retail outlets *within* CPR franchisee territories. Assurant's newly-hired employees repair cell phones within T-Mobile retail outlets and thereby take business—and important repeat and customer network business—from CPR franchisees.

Separate, but relatedly, while Assurant planned to send, and has sent, some customers (with the T-Mobile insurance program) to CPR franchisees, Assurant has apparently chosen only a select few CPR franchised businesses to complete these repairs. This harms CPR franchisees in the same territory as the "chosen" CPR franchisees because these CPR franchisees similarly miss out on important repeat and customer network business (such as family members of customers sent to specific CPR franchised businesses).[1]

[1] Worse, in anticipation of Assurant sending customers to CPR franchisees (through the T-Mobile insurance program), as Assurant promised, these CPR franchisees purchased necessary parts, equipment and tools, and beefed up and trained their staff. However, Assurant ultimately chose only a select few, wasting the

In sum, if Assurant accomplishes its hiring goals, continues to compete with its franchisees, and continues to send T-Mobile business only to select CPR franchised businesses within each market area, Assurant will have taken the majority (if not all) of the competent cell phone repair technicians in the country and taken substantial business (and repeat business away from CPR franchisees), all of which will ultimately force franchisees to reduce hours and close their CPR franchised businesses.

Legal Implications of Assurant's Actions

1. Breach of Contract and the Implied Covenant of Good Faith and Dealing

Most of Assurant's (MMI-CPR, LLC's) franchise agreements call for the application of Ohio law, while some older franchise agreements call for the application of Georgia law.[2] The elements of a breach-of-contract action under Ohio law are: (1) the existence of a contract; (2) performance by the plaintiff; (3) breach by the defendant; and (4) damage or loss to the plaintiff as a result of the breach. *V & M Star Steel v. Centimark Corp.*, 678 F.3d 459, 465 (6th Cir. 2012). The same is true under Georgia law.

Furthermore, in every contract, by operation of both Georgia and Ohio law, there is an implied covenant of good faith and fair dealing, which requires parties to the agreement to act in good faith and in accordance with reasonable standards of fair dealing in the trade. *Capital Health Management Group, Inc. v. Hartley*, 301 Ga. App. 812, 817 (2009) ("The requirement that a party exercise good faith and honest judgment, even where the contractual language grants the party discretion, arises from the implied duty of good faith and fair dealing imposed upon virtually every contract under Georgia law."); *Littlejohn v. Parrish*, 839 N.E.2d 49, 53 (Ohio Ct. App. 2005). Under Ohio law, good faith "requires not only honesty but also reasonableness in the enforcement of the contract." *Id.* (quoting Restatement (Second) of Contracts § 205, cmt. a). *See also Ward v. Cent. Invest. L.L.C.*, 2010 WL 5132776, at *4 (duty to act in good faith was breached when a party to the contract "acted adversely to the agreed common purpose of the consulting agreement").

Assurant (MMI-CPR, LLC) breached and is continuing to breach the applicable franchise agreements and the implied covenant of good faith and fair dealing by:

- unilaterally modifying the reservation of rights by attempting to monopolize all franchisees' employees in the franchisees' Designated Areas without the express right in the franchise agreement to unilaterally adjust the territorial reservations (*see, e.g.*, 2020/2021 franchise agreement at § 4.2);

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time, effort, and money these CPR franchisees spent in anticipation of the customer's promised to them by Assurant.

[2] For example, the 2012 franchise agreement calls for the application of Georgia law at Section 21.1, while the 2017 and 2020/2021 franchise agreements call for the application of Ohio law at Section 21.1.

- improperly restricting the franchisees' ability to operate a Cell Phone Repair franchise business within the franchisees' Designated Areas (*see* 2020/2021 franchise agreement at §§ 3.1, 4.1);
- requiring franchisees to pay training fees for Assurant's employees, as Assurant ultimately monopolizes the cell phone repair employee market, taking franchisees' employees that franchisees have paid to train (*see* 2020/2021 franchise agreement at § 5.2);
- requiring franchisees to adhere to high standards of honesty, integrity, fair dealing, and ethical conduct without a reciprocal obligation on the part of Assurant to its franchisees. Such an unconscionable provision is unreasonable and against public policy (*see* 2020/2021 franchise agreement at § 7.4); and
- engaging in and permitting others to engage in activity that might injure the goodwill of the franchisees with employees and other franchisees in the Designated Area.

Simply put, a franchisor (or its parent) taking employees from its franchisees and competing with them directly and indirectly (all of which Assurant has done) obviously constitutes a failure to act in good faith, in accordance with reasonable standards of fair dealing in the trade, and is adverse to the common purpose of all its CPR franchise agreements. Franchisors (and their parent companies) simply do not compete against their own franchisees this way. Such conduct also constitutes a breach of Assurant's fiduciary duty of loyalty owed to all its franchisees. *See, e.g., Taylor v. Checkrite, Ltd.*, 627 F. Supp. 415, 416 (S.D. Ohio 1986) (finding plaintiffs have shown a principal-agency relationship between franchisor and franchisee and stating that "the existence of a franchisor-franchisee relationship between persons does not in itself preclude the existence of a principal-agent relationship between them.").

In addition, Ohio law imposes liability if a franchisor like Assurant utilizes its authority opportunistically and/or dishonestly. *See Ragen v. Hancor, Inc.*, 920 F. Supp. 2d 810, 836 (N.D. Ohio 2013) (a contract's express terms are subject to breaches of the duty to act in good faith when a party to the contract takes "opportunistic advantage in a way that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties."); *Florence Urgent Care v. Healthspan, Inc.*, 445 F. Supp. 2d 871, 879 (S.D. Ohio 2006) (a federal court employing Ohio law holding that even though the agreement expressly authorized the defendants to terminate the agreement, the plaintiff's claim for breach of the implied covenant could stand if the defendant exercised its right dishonestly and for "invidious purposes."). Assurant's actions, described above, are evidence of taking opportunistic advantage of its CPR franchisees that would subject Assurant to liability.

What does this mean? Assurant (MMI-CPR, LLC) is liable to its entire franchisee base for whatever contractual damages remedy the CPR franchisees choose, whether they seek compensatory or actual damages (such as lost revenues/income) to put them in the position they

would have occupied had Assurant not breached, or rescission damages to place them in the position they occupied prior to entering the relationship.

Moreover, should Assurant continue the conduct described above, each affected franchisee will no longer need to comply with its contractual obligations. Under Georgia and Ohio law, a non-breaching party is excused from complying with its obligations under a contract. *See Brakefire, Inc. Overbeck*, 878 N.E.2d 84, 101 (Ohio Ct. App. 2007); *Perrigo Co. et al. v. Merial Ltd. et al.*, 2018 WL 11350564, at *17 (N.D. Ga. Mar. 7, 2018).

And this principle applies with equal strength in the franchise context. In *BJM & Assocs., Inc. v. Norrell Servs., Inc.*, a franchisor, through a subsidiary, solicited the franchisees' customers (residing in the franchisees' exclusive territories). 855 F. Supp. 1481 (E.D. Ky. 1994). The franchisor's solicitation of its franchisees' customers weighed heavily in the court's finding of prior material breach. *Id.* at 1492. The court stated that: "[t]he law does as we have emphasized provide a remedy in the name of good faith against opportunistic behavior, in the sense of behavior designed to change the bargain struck by the parties in favor of the opportunist." *Id.* at 1495. The court ordered the franchise agreements rescinded. *Id.* at 1500. The court also found that the non-compete covenants were not enforceable. *Id.* Finally, courts have also held that a prior material breach relieves the non-breaching party from his/her non-compete obligations. *See, e.g.*, *Physiotherapy Corp. v. Moncure*, 2018 WL 1256492, at *1 (Del. Ch. Mar. 12, 2018) (prior material breach of an employment agreement excused the former employee's non-compete obligations).

Consistent with the law above, any CPR franchisee facing the competition described above in its territory will have the option to terminate the franchise agreement, void the non-compete obligations, and begin operating independently.

2. Violation of Various State-Specific Franchise Relationship Statutes; State-Specific Unfair and Deceptive Trade Practices Acts; and Tortious Interference

The facts and arguments above related to Assurant's breach of contract and the implied covenant of good faith and fair dealing also constitute violations of various franchise relationship statutes (actionable at the option of franchisee located in those states) and unfair and deceptive trade practices acts (actionable at the option of franchisee located in those states).

For example, franchise statutes in Hawaii, Indiana, Iowa, Minnesota, and Washington declare it unlawful to establish a similar business or to grant a franchise for the establishment of a similar business at a location within the franchisee's exclusive territory. *See* Haw. Rev. Stat. § 482E-6, subd. 2(E), Iowa Code § 523H.6, Ind. Code § 23-2-2.7-1(2), Ind. Code § 23-2-2.7-2(4), Minn. R. 2860.4400(C), RCW 19.100.180(1), RCW 19.100.180(2)(f). And while the Wisconsin Fair Dealership Law does not directly address territorial protection, it prohibits a franchisor from taking any actions that "substantially change the competitive circumstances of a dealership agreement without good cause." *See* Wis. Stat. § 135.03.

In addition, all 50 states have passed deceptive and unfair trade practices acts to protect consumers from deceptive trade practices, as well as certain offensive conduct occurring in the practice of trade or commerce. Various states, such as New Jersey, have held that franchisees are "consumers" under these statutes. *See e.g., Kavky v. Herbalife Int'l of Am.*, 820 A.2d 677 (N.J. Ct. App. 2003). Courts in some states that have extended their deceptive trade practices statutes to franchisees have found that franchisors who "pit franchise siblings against one another while placing the [franchisor] in a position where it can favor (and has favored) one franchise system over the other by way of promotion, development and support" implicates the "broad ethical and equitable concerns" of the state's deceptive trade practices act. *See Hanson Hams, Inc. v. HBH Franchise Co., LLC*, 2003 WL 22768687, at *3 (S.D. Fla. Nov. 7, 2003).

Finally, Assurant, Inc.'s conduct subjects it to liability because it has tortiously interfered with contracts between its indirect subsidiary's (MMI-CPR, LLC) franchise agreements with MMI-CPR, LLC's franchisees. *See, e.g.*, Restatement (Second) of Torts § 766 ("One who intentionally and improperly interferes with the performance of a contract … by … otherwise causing the third person not to perform the contract" is subject to liability) (emphasis added); Restatement (Second) of Torts § 766A (1979) ("One who intentionally and improperly interferes with the performance of a contract … by preventing the other from performing the contract or causing his performance to be more expensive or burdensome" is subject to liability).

We often hear franchisors respond to complaints like this with the principle that franchisors are "justified" in interfering with their own franchise agreements. But that is untrue here. Parent companies do not have an unlimited privilege to interfere with their subsidiaries' contracts. Any justification a parent company may have is lost when a parent acts to the detriment of the subsidiary to advance its own interests or that of a different subsidiary. *See, e.g., Phil Crowley Steel Corp. v. Sharon Steel Corp.*, 782 F.2d 781 (8th Cir. 1986) (holding that parent company's interference with subsidiary's contract was not privileged because the breach was detrimental to the subsidiary and intended to favor a separate subsidiary); *Gossard v. Aida Services, Inc.*, 723 So.2d 182 (Fla. 1998) (finding parent of franchisor liable for tortious interference with contract due to improper competition); *Hyatt Corp. v. Epoch-Florida Capitol Hotel Partners, Ltd.*, 2008 WL 490121 (M.D. Fla. Feb. 20, 2008); *KMS Restaurant Corp. v. Wendy's Int'l, Inc.*, 361 F.3d 1321 (11th Cir. 2004). Moreover, because the conduct at issue was also independently wrongful (*i.e.*, breach of contract, deceptive and unfair trade practices, etc.), any justification that may have existed is lost. *See, e.g.*, Restatement (Second) of Torts § 767, cmt. c ("Conduct specifically in violation of statutory provisions or contrary to established public policy may for that reason make an interference improper.").

Violations of franchise and deceptive and unfair trade practices laws permit the same damages as those described above for breach of contract, plus treble or punitive damages in some cases. So too does tortious interference.

Conclusion

The purpose of describing the legal implications of Assurant's recent (and presumably forthcoming) conduct is not to antagonize Assurant, but to be forthright about its liability in an attempt to dissuade Assurant from moving forward as planned, and ultimately reach a mutually satisfactory resolution. Indeed, contrary to the old-school belief that independent franchisee associations are formed only to file lawsuits, situations such as these are the primary reason franchisee associations exist – to provide a platform for difficult discussions and to resolve disputes in the boardroom, not the courtroom. Assurant is taking steps that affect the livelihood of hundreds of franchisees across the country, and these franchisees need a seat at the table so their interests are accounted for and so franchisees and Assurant can grow a successful franchise system together.

You will notice that the Association has not filed a lawsuit, or even threatened one. Instead, the Association believes the best solution is to resolve these issues in a way that allows both parties to accomplish their goals, with some compromises. To that end, the Association requests that, first and foremost, Assurant stop hiring repair employees nationwide, and simply allow this insurance contract work to be carried out through its already established, vast network of CPR franchisees, all of whom are more than capable of performing these duties. In marketplaces where CPR franchisees do not exist, the Association (obviously) will have no objection to Assurant hiring. Second, the Association requests that Assurant equitably distribute referrals from T-Mobile retail outlets to all interested CPR franchisees in the marketplace, as opposed to just one. Third, the Association would like to develop an appropriate compensation structure for performing the cell phone repair services that result from insurance contracts (which would be a loss leader).

We would like to receive Assurant's substantive response on or before September 10, 2021, and thereafter schedule a meeting to discuss in-person or by telephone conference a resolution to these issues. If Assurant should need more time to respond, please let us know.

Sincerely,

DADY & GARDNER, P.A.

Andrew M. Malzahn

AMM/pg
cc: Mark Dady, Esq.
Rachel Zaiger, Esq.
Clients