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INTEROFFICE MEMORANDUM

To: Ralph E. Cascarilla; Gary Zwick, Carl Dyczek
From: Donald E. Miehls
Date: March 26, 2009
Subject: Summary of Ohio Trade Laws for Lexwork web site

I. OHIO TRADE STATUTES

A. Introduction

In addition to its passage of the Uniform Commercial Code, the Ohio General Assembly has passed several other statutes that may affect the distributorship or franchise agreement between manufacturers and Ohio distributors, and franchisors and Ohio franchisees. Those statutes include, for example, certain prohibitions against monopolies and unfair trade practices, and statutes governing wine and beer distributorships and new motor vehicle dealerships. Following is a limited summary of several of those Ohio statutes. Excluded from this summary are Ohio consumer protection laws, including, without limitation, the Ohio Consumer Sales Practices Act and the Ohio's "lemon law," which provides certain protections to Ohio purchasers of new motor vehicles, Ohio's tax laws, and Ohio's workers' compensation statutes.

B. Monopolies and Trade Practices

The Ohio Revised Code contains several sections regulating monopolies or prohibiting or restricting certain trade practices, and those sections may affect foreign entities or individuals doing business in Ohio. For example, Ohio prohibits the issuance or ownership of trust certificates, where the trustee, acting on behalf of the trust certificate owners, refuses to buy from, sell to, or trade with any person because that person appears on a blacklist issued by, or is being boycotted by, any foreign corporate or governmental entity.¹ Whoever violates that section is guilty of a felony of the fifth degree.²

Similarly, no individual or entity may acquire control of an Ohio corporation or its assets, the effect of which is to (i) substantially lessen competition in any market for petroleum products in Ohio, (ii) substantially lessen the number of competitors in any market for petroleum products in Ohio, or (iii) reduce the supply of any petroleum product to persons intending to resell those products in Ohio.³ Upon a request from the Governor of Ohio or the Ohio General Assembly, the Ohio Attorney General will bring an action to enjoin any actual or threatened violation of any of those restrictions.⁴ Moreover, whoever continues to violate any of those restrictions, after

¹ Ohio Revised Code 1331.02.

² Ohio Revised Code 1331.99.

³ Ohio Revised Code 1331.021.

⁴ Id.

receiving a notice to cease from the Ohio Attorney General or a county prosecuting attorney, is liable for a penalty of \$500.00 per day while the violation continues.⁵

Ohio also prohibits the formation of a combination to control the price or supply, or control competition, in the sale of bread, butter, eggs, flour, meat, or vegetables.⁶ To further protect Ohio's dairy consumers, Ohio prohibits discrimination in the pricing of milk, cream, or butter fat based on the purchaser's community or city, other than variances based on actual differences in transportation costs.⁷

C. Ohio Alcoholic Beverage Franchise Act

The Ohio Alcoholic Beverage Act regulates the granting of franchises to Ohio distributors for the re-sale of "alcoholic beverages" to Ohio retailers. As used in that Act, the term "alcoholic beverages" includes beer and wine, whether manufactured in Ohio or elsewhere.⁸ Every manufacturer of beer or wine must offer, in good faith, a written franchise agreement to its distributors in Ohio. No franchise agreement can waive any provision of the Ohio Alcoholic Beverage Franchise Act, as set forth in sections 1333.82 to 1333.87 of the Ohio Revised Code.⁹

If a manufacturer distributes beer or wine to an Ohio distributor for 90 days without a written franchise agreement, a "franchise relationship" is nonetheless established between the parties, and the provisions of the Ohio Alcoholic Beverage Franchise Act apply to that relationship.¹⁰

Section 1333.83 of the Ohio Revised Code prohibits certain conduct in a franchise relationship between a manufacturer of beer or wine and an Ohio distributor. Under that section, despite any contrary provision in a written franchise agreement, no manufacturer or distributor, nor any subsidiary of a manufacturer, may:

- (1) Fail to act in good faith, or without just cause, in the franchise relationship;
- (2) Award an additional franchise for the sale of the same brand of beer or wine within the same sales area or territory;
- (3) Require a distributor to submit profit and loss statements, balance sheets, or financial records as a requirement to retain its franchise;
- (4) Without reasonable cause, withhold delivery of beer or wine ordered by a distributor, or change or amend a distributor's quota of a manufacturer's product or brand;
- (5) Coerce a distributor to participate in or contribute to any local or national advertising fund controlled directly or indirectly by a manufacturer; or

⁵ Ohio Revised Code 1331.04.

⁶ Ohio Revised Code 1331.05.

⁷ Ohio Revised Code 1331.15.

⁸ Ohio Revised Code 1333.82.

⁹ Ohio Revised Code 1333.83.

¹⁰ Id.

- (6) Refuse to recognize the rights of surviving partners, shareholders, or heirs, and fail to act in good faith, under reasonable standards for fair dealing, with respect to a distributor's right to dispose of his or her business. A distributor, however, has no right to sell, assign, or transfer the franchise without the prior consent of the manufacturer, which consent cannot be unreasonably withheld.

Without just cause or the prior consent of the other party, no manufacturer or distributor may cancel or fail to renew a franchise, or substantially change a sales area or territory, unless the other party has received at least 60 days' prior notice, and the notice sets forth the reasons for the cancellation, non-renewal, or substantial change.¹¹ "Just cause" for the cancellation or non-renewal of a franchise, or a substantial change in sales area or territory of a party, includes that party's voluntary filing of a bankruptcy petition or assignment for the benefit of creditors, the filing of an involuntary bankruptcy petition against that party without a dismissal of the petition within 30 days from the filing date, and the cancellation or revocation, or suspension of more than 30 days, of a party's required permit, if any, to manufacture or distribute beer or wine in Ohio.¹²

Conversely, the following actions do not constitute "just cause" for the cancellation or non-renewal of the franchise, or a substantial change in sales area or territory, of a manufacturer or distributor: (1) the party's failure or refusal to engage in any act that would violate any federal law or regulation or any state law or rule; (2) the restructuring of the manufacturer's business organization (other than because of bankruptcy); (3) the manufacturer's unilateral alteration of the franchise for a reason unrelated to the distributor's breach of the franchise or violation of the Ohio Alcoholic Beverage Franchise Act; or (4) the manufacturer's transfer of a brand or product to another manufacturer over which the original manufacturer exercises control.¹³

If a manufacturer or distributor cancels or fails to renew a franchise, the distributor must sell to the manufacturer, and the manufacturer must buy from the distributor: (i) all of the manufacturer's product then in the distributor's inventory, and (ii) the manufacturer's sales aids then in the distributor's possession.¹⁴ The resale price is the original price paid by the distributor to the manufacturer for the inventory and sales aids.¹⁵

If a successor manufacturer (other than one controlled by the transferring manufacturer) acquires all or substantially all of the stock or assets of a manufacturer, or is the assignee of a beer or wine product or brand, the successor manufacturer may give written notice of the termination, non-renewal, or renewal of the franchise to any distributor of the acquired or assigned products or brands.¹⁶ "Just cause," or the distributor's consent, for any termination or non-renewal of a franchise by the successor manufacturer is not required if the distributor receives written notice of the acquisition or assignment within 90 days after the acquisition or assignment. On the other hand, a new franchise relationship between the successor manufacturer

¹¹ Ohio Revised Code 1333.85.

¹² Ohio Revised Code 1333.85(A).

¹³ Ohio Revised Code 1333.85(B).

¹⁴ Ohio Revised code 1333.85(C).

¹⁵ Id.

¹⁶ Ohio Revised Code 1333.85(D).

and the distributor, governed by the Ohio Alcoholic Beverages Franchise Act, is created if the distributor does not receive the notice within the 90-day period.¹⁷

Similar to an original manufacturer that cancels or fails to renew a franchise, a successor manufacturer that terminates or fails to renew a franchise must buy from the distributor, and the distributor must sell to the successor manufacturer, the distributor's inventory of the terminated or non-renewed products or brands.¹⁸ In addition, the successor manufacturer must compensate the distributor for the diminished value of the distributor's business that was directly related to the sale of the terminated or non-renewed products or brands. The calculation of diminished value must include, without limitation, the appraised market value of the distributor's assets that were devoted primarily to the sale of the terminated or non-renewed products or brands, and the goodwill associated with those products or brands.¹⁹

For its part, a distributor must maintain adequate physical facilities and personnel so that a manufacturer's products or brands are properly represented in the distributor's sales area, the manufacturer's reputation and trade name are protected, and the general public receives adequate servicing of the manufacturer's products or brands.²⁰

D. Ohio Pyramid Sales Act

Ohio prohibits the promotion or operation of a "pyramid sales plan or program" within the state.²¹ A pyramid sales plan or program is any scheme, whether or not for disposal or distribution of property, whereby a person pays "consideration" for the opportunity to receive "compensation": (1) for introducing one or more persons into participation in the plan or program, or (2) when another participant has introduced a person into the plan or program, (in other word, a "down the line" commission).²²

To exclude normal sales commissions, the Ohio Pyramid Sales Act provides that "compensation" does not include compensation paid as the result of a sale to a person not participating in the pyramid plan.²³ Similarly, "consideration" does not include a payment for sales demonstration equipment and materials at cost, or a payment for promotional and administrative fees not exceeding \$25.00 when computed on an annual basis.²⁴

Depending on the value of the compensation paid, any violator of the Ohio Pyramid Sales Act could be found guilty of a crime ranging from a misdemeanor of the first degree to a felony of the third degree.²⁵ In addition, any person who paid consideration to participate, or for the chance to participate, in a pyramid sales or program can recover that consideration, plus attorney fees, from any participant who received compensation: (1) for introducing the victim into the

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

²⁰ Ohio Revised Code 1333.86.

²¹ Ohio Revised Code 1333.92.

²² Ohio Revised Code 1333.91(A).

²³ Ohio Revised code 1333.91(B).

²⁴ Ohio Revised Code 1333.91(C).

²⁵ Ohio Revised code 1333.99(G).

plan or program; or (2) when another participant introduced the victim into the plan or program.²⁶

E. Ohio Business Opportunity Plans Act

The general Ohio franchising statute for small or medium-sized businesses is the Ohio Business Opportunity Plans Act (the “Business Plans Act”). Similar statutes exist in other states, including Indiana, Michigan, Kentucky, and Illinois.

1. Coverage

The Business Plans Act contains many specific requirements to be followed by sellers of business opportunity plans. Moreover, the scope of the Business Plans Act is broad, defining a “business opportunity plan” (a “Plan”) as an agreement in which a purchaser obtains the right to offer, sell, or distribute goods or services under all of the following conditions:

- (1) the goods or services are supplied by the seller, a person from whom the seller requires or advises the purchaser to do business, or an affiliated person;
- (2) to begin or maintain the Plan, the purchaser must make an initial payment of greater than \$500.00, but less than \$50,000.00, to the seller or an affiliated person; and
- (3) the seller makes *any* of the following *representations*:
 - (a) the purchaser will be provided with retail outlets or accounts, or assistance in establishing retail outlets or accounts, for the sale or distribution of the goods or services;
 - (b) the purchaser will be provided locations, or assistance in finding locations, for vending machines, electronic games, rack displays, or any other equipment, to sell or distribute the goods or services;
 - (c) the purchaser can earn a profit in excess of his or her initial payment;
 - (d) there is a market for the goods or services; or
 - (e) there is a buy-back arrangement.²⁷

The Business Plans Act defines “initial payment” as the total amount that a purchaser is obligated to pay, or the amount of the promissory note that the purchaser is obligated to pay, before or during the first six months after commencing operation of the Plan. If an agreement between the parties sets forth a specific total sales price for the purchase of the Plan, to be paid partially as a down payment followed by specific monthly payments, “initial payment” means the total sale price.²⁸

The Business Plans Act exempts from its provisions certain persons and certain transactions, including, among others, the transfer of securities considered registered by the Ohio

²⁶ Ohio Revised Code 1333.93.

²⁷ Ohio Revised Code 1334.01(D).

²⁸ Ohio Revised Code 1334.01(G).

Department of Commerce, the sale or lease of goods to a purchaser who sells or leases other goods not connected to the seller in question, a seller with a consolidated net worth of at least \$5,000,000.00 that has conducted the business under the Plan for at least five years prior to the execution of the agreement in question, and a purchaser who has been engaged in the business of selling or distributing the goods that are the subject of the Plan in question for at least one year.²⁹

A Plan is exempt from the Business Plans Act, other than the bond and trust account requirements related to buy-back arrangements, if applicable (see below), if either of the following conditions applies: (1) the Plan complies with the franchise and business opportunity venture requirements of the Federal Trade Commission, or (2) at least ten days before his or her execution of an agreement establishing participation in the Plan, the prospective purchaser has received a document containing truthful, accurate, and complete disclosures that comply with certain requirements of the North American Securities Administrators Association, formerly known as the Midwest Securities Commissioners Association.³⁰

2. Regulation

The Business Plans Act requires sellers of a Plan to provide each prospective purchaser with a written prospectus at least ten business days before the execution of an agreement selling or leasing the Plan. The cover sheet of the prospectus must contain a specific warning containing language set forth in the Business Plans Act. The Business Plans Act provides that, immediately following the cover sheet, the prospectus must set forth certain specific information, for example:

- (1) the amount of the purchaser's initial payment and any other fees or charges that the purchase must pay to begin or continue business under the Plan,
- (2) whether and under what conditions the initial payment is refundable,
- (3) the material terms and conditions of any financing arrangement offered by the seller to the purchaser,
- (4) the material terms and conditions of any buy-back arrangement offered by the seller to the purchaser,
- (5) any restrictions on the purchaser's ability to conduct other business,
- (6) whether the purchaser is receiving an exclusive sales territory,
- (7) the conditions, if any, under which the purchaser may transfer the Plan,
- (8) the conditions under which the purchaser may terminate the Plan;
- (9) the name and address of each affiliated person with whom the purchaser is required or advised to do business;
- (10) the name and address of the seller's officers and managers;
- (11) a listing of any civil or criminal actions alleging fraud or other dishonest acts against the seller, or any of its officers or managers; and
- (12) a copy of the seller's financial statement dated no more than twelve months before the date of the prospectus.³¹

²⁹ Ohio Revised Code 1334.12.

³⁰ Ohio Revised Code 1334.13.

³¹ Ohio Revised Code 1334.02.

The Business Plans Act imposes several conditions on a seller that intends to make any representation to a potential purchaser regarding potential sales, or gross or net income, under the Plan. For example, the seller must provide the potential purchaser with (i) written support for those financial projections at least ten business days before the purchaser's execution of an agreement to participate in the Plan, (ii) a statement of the number of years that the seller has been offering the Plan, and (iii) a specific warning, containing specific language set forth in the Business Plans Act, that the purchaser is accepting the risk of not doing as well as the projections.³²

Moreover, the Business Plans Act sets forth certain provisions that must be included in each agreement to establish a purchaser's participation in a Plan. For example, the agreement must contain specific language informing the purchaser of his or her right to cancel the agreement within five days after execution, and a detachable notice of cancellation that the purchaser may use to cancel the agreement. The purchaser's five-day period to cancel the agreement does not begin to run until the seller provides the notice of cancellation form to the purchaser.³³ In addition, when the purchaser signs the agreement, the seller must inform him or her orally of the purchaser's right to cancel the agreement within the five-day period.³⁴ It follows that, upon a purchaser's cancellation of an agreement, the seller must return any initial payment or promissory note furnished by the purchaser.³⁵

A seller must maintain a complete set of books and records with respect to each Plan sold or leased, for a five-year period from the date that the purchaser entered into the Plan.³⁶ Moreover, a seller cannot accept more than 20% of an initial payment before the first shipment of goods to the purchaser, unless the seller deposits the excess portion of the initial payment into an escrow account.³⁷ The Business Plans Act also requires, among other things, a seller who has accepted money or a promissory from a purchaser, in advance, for goods to furnish those goods no later than two weeks from the promised delivery date, unless certain conditions specified in the Business Plans Act are satisfied.³⁸

3. Buy-back Arrangement

The Business Plans Act places certain restrictions and conditions on a Seller's offering of a buy-back arrangement. A seller has offered a buy-back arrangement within the meaning of the Business Plans Act if the seller has represented to a potential purchaser that the seller will either (1) upon termination or non-renewal of the Plan, refund the initial payment or return the promissory note given by the purchaser to participate in the Plan, or (2) purchase any finished goods that the purchaser has produced, utilizing the goods supplied by the seller, a person from whom the seller has required or advised the purchaser to buy the goods, or an affiliated person.³⁹ If the seller has offered a buy-back arrangement to any potential purchaser, or represented to a

³² Ohio Revised Code 1334.03(A).

³³ Ohio Revised Code 1334.06.

³⁴ Ohio Revised Code 1334.06(E)(3).

³⁵ Ohio Revised Code 1334.06(E).

³⁶ Ohio Revised Code 1334.03(D).

³⁷ Ohio Revised Code 1334.03(E).

³⁸ Ohio Revised Code 1334.03(F).

³⁹ Ohio Revised Code 1334.01(I).

potential purchaser that repayment of the initial payment is secured by collateral, the seller must post a surety bond or establish a trust account, in favor of the State of Ohio, for the benefit of Plan purchasers.⁴⁰

The purpose of the bond or trust account is to compensate purchasers for any seller violation of the Business Plans Act or the agreement between the seller and a purchaser establishing the purchaser's participation in the Plan.⁴¹ The minimum amount of the bond or trust account for the seller's first six months of operation is \$50,000.00. By the tenth day of the seventh month, the amount of the bond or trust must be at least the sum of all initial payments or promissory notes furnished by purchasers in Ohio to whom the seller has offered a buy-back arrangement or represented that repayment of their initial payment is secured. Thereafter, the amount of the bond or trust agreement will be adjusted semi-annually, in the same manner as the seventh month adjustment.⁴²

4. *Penalties and Violations*

The Ohio Attorney General has the authority to investigate alleged violations of the Business Plans Act and to seek penalties for a seller's violation of the Business Plans Act or failure to abide by a temporary restraining order, a preliminary injunction, or a permanent injunction.⁴³ The Ohio Attorney General may also file a class action lawsuit on behalf of purchasers who have been damaged by violations of the Business Plans Act, or seek the appointment of a receiver to collect assets from a violator and distribute those assets to aggrieved purchasers.⁴⁴ Whoever violates the Business Plans Act is guilty of a first degree misdemeanor.⁴⁵

If a court determines that the seller will reimburse purchasers for losses caused by violations of the Business Plans Act, or will take other corrective action, the Ohio Attorney General, with court approval, may terminate the enforcement proceedings. The seller, however, must furnish an "assurance" that the seller will voluntarily comply with the Business Plans Act and any order already entered by the court. The assurance is actually a consent judgment against the seller that is signed by the seller and the Ohio Attorney General, and entered by the court.⁴⁶

A purchaser damaged by the seller's violation of the Business Plans Act also has a private right of action against the seller. In such a case, the purchaser may rescind the agreement and recover three times his or her actual damages or \$10,000.00, whichever is greater, and attorney fees. If the court finds that the purchaser's case is groundless and that the purchaser brought or maintained the case in bad faith, the seller may recover its attorney fees from the purchaser.⁴⁷

F. Ohio Motor Vehicle Franchise Act

⁴⁰ Ohio Revised code 1334.03(H), 1334.04(A).

⁴¹ Ohio Revised Code 1334.04(A).

⁴² Ohio Revised Code 1334.04(B).

⁴³ Ohio Revised Code 1334.07, 1334.08.

⁴⁴ Ohio Revised Code 1334.08.

⁴⁵ Ohio Revised Code 1334.99.

⁴⁶ Ohio Revised Code 1334.08(E).

⁴⁷ Ohio Revised Code 1334.09.

The Ohio Motor Vehicle Franchise Act (the “New Vehicle Dealers Act”) governs the franchise relationship between motor vehicle manufacturers (franchisors) and their Ohio dealers (franchisees). For example, the New Vehicle Dealers Act sets forth rules for the establishment of additional dealers for the franchisor’s line, and the relocation and termination of dealerships.

1. Prohibited Conduct

The following are examples of manufacturer conduct prohibited by the New Vehicle Dealers Act:

- (1) Refusing to renew a lease with a franchisee for the dealership property because the franchisee failed to adhere to the manufacturer’s demand to expand the franchisee’s facilities, increase its sales personnel, purchase more parts, or accept programs for sales and operations of the franchisee’s business, if the manufacturer’s demand was not reasonable, fair, and equitable, or tended to depreciate the franchisee’s business;
- (2) Unfairly competing with any franchisee in the sale of goods or motor vehicles, or in the furnishing of any service normally performed and required of franchisees in the franchise agreement;
- (3) Coercing a franchisee into contributing to or participating in any local or national advertising fund;
- (4) Coercing a franchisee into increase its sales of the manufacturer’s products by threatening to establish another dealership in the franchisee’s area of influence; and
- (5) Failing to approve or disapprove any warranty or recall claim by a franchisee within 45 days after receipt of the claim.⁴⁸

The New Vehicle Dealers Acts also places certain duties on franchisees, including the maintenance of adequate physical facilities and personnel to properly present and service the manufacturer’s products.⁴⁹

2. Establishment of Additional Dealership

When a manufacturer seeks to establish an additional dealer, or relocate an existing dealer, in a relevant market area where a dealer for the same line or make is already present, the manufacturer must first give written notice, by certified mail, to the Ohio Motor Vehicle Board (the “Board”) and to each franchisee selling that line or brand in the same relevant market area. The notice must set forth the specific grounds for the establishment of an additional dealer or the relocation of an existing dealer, as applicable. Existing franchisees of the same line or make may file a protest with the Board within fifteen days after the franchisee’s receipt of the notice or any longer appeal period offered by the manufacturer. The Board will then schedule a hearing for

⁴⁸ Ohio Revised Code 4517.59.

⁴⁹ Ohio Revised Code 4527.62.

each protest, with the option to conduct a consolidated hearing if more than one existing dealer has lodged a protest with the Board.⁵⁰

Exceptions to the notification requirement include the relocation of the dealer to a site one mile or less from the dealer's existing location, the additional dealer will sell the line or make at the same location as the existing dealer, and the relocation results in greater geographic distance separating dealers in the relevant market area.⁵¹

A manufacturer must demonstrate good cause to the Board to establish an additional new vehicle dealer, or to relocate a new motor vehicle dealer, within a relevant market area. When determining whether a manufacturer has demonstrated good cause, the Board takes into consideration the existing circumstances, including, without limitation, the effect of the additional dealer or relocated dealer on other dealers of the same line or make in the relevant market area, whether the establishment of the additional dealer, or the relocation of an existing dealer, as applicable, will be injurious or beneficial to the general public, whether the existing franchisees of the same line or make in the relevant market area are providing adequate competition and convenient consumer care, and providing adequate market penetration and representation, and whether the manufacturer is otherwise complying with the New Vehicle Dealers Act.⁵²

If the Board finds that the manufacturer did not have good cause to establish an additional dealer or relocate an existing dealer, the protesting franchisee may recover its reasonable attorney fees, witness, fees, and other costs incurred by the franchisee in filing the protest.⁵³

3. Manufacturer's Obligations

Each manufacturer is obligated to reimburse its dealers for service and parts, covered by that manufacturer's warranty or a recall, at the rates charged by the dealer to its retail customers for similar service and parts for non-warranty work.⁵⁴

In addition, the New Vehicle Dealers Act provides that the only liability of a dealer to its manufacturer for product liability claims involving the manufacturer's vehicles is related to the dealer's preparation and delivery of the vehicle to the vehicle buyer.⁵⁵ The manufacturer must provide each dealer with a list of the dealer's preparation obligations, which the dealer must perform before the delivery of a new motor vehicle to a buyer. In turn, the manufacturer must reimburse the dealer for the cost of the dealer's preparation, at the dealer's customary retail labor rate. The dealer must provide each new vehicle buyer with a list of the dealer's new vehicle

⁵⁰ Ohio Revised Code 4517.50(A).

⁵¹ Ohio Revised Code 4517.50(C).

⁵² Ohio Revised Code 4517.51.

⁵³ Ohio Revised code 4517.5(C).

⁵⁴ Ohio Revised Code 4517.52.

⁵⁵ Ohio Revised Code 4517.53; see also Ohio Revised Code 4517.60, which obligates a manufacturer to indemnify a franchisee for any claim under Ohio's lemon law, which is set forth in Ohio Revised Code 1345.72.

preparation obligations, and a written certification that the dealer has fulfilled those obligations.⁵⁶

⁵⁶ Ohio Revised Code 4517.53.

4. Termination of Franchise

The New Vehicle Dealers Acts requires a manufacturer to demonstrate good cause, and sets forth other conditions precedent, for the manufacturer to terminate, or fail to continue or renew, a franchise for the sale of that manufacturer's new vehicles in Ohio.⁵⁷ The manufacturer must send written notice of the proposed action, by certified mail, to the franchisee, and the notice must set forth the specific grounds for the termination, or failure to continue or renew the franchise. The franchisee must receive the notice no later than the 90th day before the effective date of the termination or failure to continue or renew, or the 15th day if the proposed action is based on: (1) the bankruptcy, insolvency, or receivership of the franchisee, (2) any unlawful business practice of the franchisee, after a warning from the manufacturer, or (3) the franchisee has ceased business operations.⁵⁸

The franchisee may file a protest with the Board at any time before the effective date of the termination, or failure to continue or renew.⁵⁹ The Board will then notify the manufacturer of the protest and schedule a hearing to determine whether the manufacturer has good cause for the proposed action.⁶⁰ If the franchisee prevails at the hearing, the manufacturer is liable to the franchisee for the franchisee's reasonable attorneys' fees, witness fees, and other costs incurred by the franchisee in pursuing the protest.⁶¹

The New Vehicle Dealers Act sets forth a non-exhaustive list of factors that the Board may consider when determining whether the manufacturer has demonstrated good cause, including, among others, the amount of retail sales transacted by the franchisee during the preceding five years as compared to the business available to the franchisee, the franchisee's investment in the business, whether the general public will benefit or suffer if the franchise is modified or replaced, or the business of the franchisee is disrupted, the extent and materiality of the franchisee's failure to perform under the franchise agreement, and whether the franchisee failed to perform its warranty obligations for the manufacturer's new vehicles.⁶²

Conversely, the New Vehicle Dealers Act sets forth certain actions that do not constitute good cause for terminating, or failing to continue or renew, a new vehicle franchise, including, among others, that the franchisee has any interest in a franchise for the sale of new vehicles made by another manufacturer, a change in the administrative or executive management of the dealership, or the failure of the franchisee to achieve any unreasonable or discriminatory performance criteria.⁶³

5. Sale of Franchise

The New Vehicle Dealers Acts also sets forth the process for the sale of the assets or capital stock of the franchisee, where the sale is contingent upon the effective transfer of a new

⁵⁷ Ohio Revised Code 4517.54(A).

⁵⁸ Ohio Revised Code 4517.54(B).

⁵⁹ In the alternative, the franchisee can bring an action for double damages under Ohio Revised code 4517.65(B).

⁶⁰ Ohio Revised Code 4517.54(C).

⁶¹ Ohio Revised Code 4517.65(C).

⁶² Ohio Revised Code 4517.55(A).

⁶³ Ohio Revised Code 4317.55(B).

vehicle dealership franchise to the purchaser. The franchisee must supply the manufacturer with the name and address of the proposed transferee of the franchise, and describe the proposed transferee's character, business experience, and financial stability. In addition, the franchisee must provide the manufacturer with the names and addresses of the proposed transferee's management personnel and other information about the proposed transferee that will enable the manufacturer to determine whether the proposed transferee can perform under the current franchise agreement. When evaluating the proposed transferee, the manufacturer must use reasonable and objective criteria fairly and objectively applied.⁶⁴

If the manufacturer rejects the proposed transferee, the manufacturer must so notify the franchisee by certified mail within thirty days of the manufacturer's receipt of the transfer notice. The rejection notice must include the objective criteria used by the manufacturer to evaluate the proposed transferee and the criteria that the proposed transferee failed to meet.⁶⁵ The franchisee then has ninety days from its receipt of the manufacturer's refusal notice to file a protest with the Board.⁶⁶

The New Vehicle Dealers Act sets forth certain reasons that do not constitute sufficient good cause for a manufacturer's failure to approve a sale or transfer of a franchise, or the continuance of a franchise with a proposed transferee, including, among others, that the proposed transferee does not intend to work full time in the dealership operation, or that the proposed transferee operates a dealership for another line or make.⁶⁷

The Board will notify the manufacturer of the franchisee's protest, and schedule a hearing to be held within 180 days of the of that notice, which date can be continued by agreement of the parties. The parties can conduct discovery prior to the hearing. The hearing officer is an attorney appointed by the Board. The hearing officer must report his or her findings and recommendations to the Board within thirty days after the hearing.⁶⁸ Those findings and recommendations are deemed approved by the Board, unless the Board acts within thirty days after receiving the findings and recommendations, or the parties agree on a longer period.⁶⁹ If the decision is in favor of the franchisee, the manufacturer is liable to the franchisee for its reasonable attorneys' fees, witness fees, and all other costs incurred by the franchisee in pursuing the protest.⁷⁰ Any party adversely affected by the decision can appeal to the Franklin County, Ohio, Court of Common Pleas.⁷¹

6. Violations

If a manufacturer violates the New Vehicle Dealers Act, resulting in damage to a franchisee, that manufacturer is liable to the franchisee for double the amount of actual damages

⁶⁴ Ohio Revised Code 4517.56(A).

⁶⁵ Ohio Revised Code 4527.56(B).

⁶⁶ Ohio Revised Code 4517.56(C).

⁶⁷ Ohio Revised code 4517.56(E).

⁶⁸ Ohio Revised Code 4517.57.

⁶⁹ Ohio Revised code 4517.58.

⁷⁰ Ohio Revised Code 4517.65(C).

⁷¹ Id.; see Ohio Revised Code 119.12.

suffered by the franchisee, court costs, and the franchisee's reasonable attorneys' fees.⁷² In addition, whoever violates a section of the Ohio New Vehicle Dealers Act that does not contain a penalty for that violation is guilty of a fourth degree misdemeanor.⁷³

II. NON-COMPETE COVENANTS EMPLOYMENT AGREEMENTS

It is well-settled law in Ohio that courts will enforce a reasonable covenant not to compete in an employment agreement, but only to the extent necessary to protect the employer's legitimate business interests. In particular, courts have held that a covenant restraining an employee from competing with his former employer upon termination of employment is reasonable if the employer proves, by clear and convincing evidence, that the covenant: (1) is no greater than is required for the protection of the employer; (2) does not impose undue hardship on the employee; and (3) is not injurious to the public (for example, by creating a monopoly for the former employer).⁷⁴

The foregoing requirements are referred to as the *Raimonde* test, named after an Ohio Supreme Court case that established the requirements. Ohio courts have the authority to modify An employment contract to ensure that any covenant not to compete in that contract complies with the *Raimonde* test.⁷⁵

Each case involving the enforceability of a covenant not to compete in an employment agreement is fact specific. Factors that an Ohio court may consider when determining whether a covenant not to compete meets the *Raimonde* test include (i) the scope and duration of the covenant's geographic and time limits, respectively, (ii) whether the employee is the employer's sole contact with customers, (iii) whether the employee possesses confidential information (for example, customer lists) or trade secrets of the employer, (iv) whether the covenant seeks to restrain ordinary, rather than unfair, competition, (v) whether the covenant stifles the pre-existing skills of the employee rather than merely the skills he or she developed while employed with the employer, (vi) the balance of the covenant's detriment to employer and employee, (vii) whether the covenant restricts the employee's sole means of support, and (viii) whether the restricted employment is merely incidental to the main employment.⁷⁶

III. CHOICE OF LAW PROVISIONS

Ohio courts will uphold a choice of law provision in a contract unless either (1) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (2) application of the law of the chosen state would be contrary to the fundamental policy of a state having a greater material interest in the issue than the chosen state and such state would be the state of the applicable law in the absence of the

⁷² Ohio Revised Code 4517.65(A).

⁷³ Ohio Revised Code 4517.99.

⁷⁴ *Raimonde v. Van Vlerah* (1975), 42 Ohio St.2d 21, 25-26, 325 N.E.2d 544.

⁷⁵ *Id.*

⁷⁶ *Brentlinger Enterprises v. Curran* (2001), 141 Ohio App.3d 640, 646, 752 N.E.2d 994 (a company that seeks to enjoin a former employee under a non-compete covenant must prove that the company will suffer irreparable harm as a result of the former employee's breach of the non-compete clause).

choice of law provision.⁷⁷ Ohio courts will utilize the law of the state where the employment agreement or distributorship contract was performed, in the absence of a choice of law provision in the parties' contract.⁷⁸

Under the first exception above, an Ohio court may refuse to honor the parties' choice of Minnesota law, for example, when one party is a corporation organized under Ohio law with no place of business in Minnesota, the other party is a corporation organized under Delaware law with no place of business in Minnesota, the contract was signed and performed in Ohio, and there is no other reasonable basis for utilizing Minnesota law.

Under the second exception above, an Ohio court may refuse to honor the parties' choice of Michigan law, for example, even if the plaintiff is a corporation organized under Michigan law, when the contract was signed and performed in Ohio by the defendant, an Ohio corporation with no place of business in Michigan, and application of Michigan law would be contrary to a fundamental policy of Ohio. Ohio would have a greater material interest in the case than Michigan would, and Ohio would be the state of the applicable law in the absence of the choice of law provision because the contract was signed and performed in Ohio.

IV. FORUM SELECTION CLAUSES

When determining whether a contract clause specifying a certain forum state or court, such as the Cuyahoga County, Ohio, Court of Common Pleas, is enforceable, Ohio courts utilize the three-part *Kennecorp.* test: (1) Is any signer of the contract an unsophisticated individual? (2) Is there evidence of fraud or overreaching? (3) Would enforcement of the clause be unreasonable or unjust?⁷⁹ An affirmative answer to any of the three questions could lead a court to refuse to enforce a forum selection clause.

Ohio courts utilize a different test if the contract contains a "floating forum" cause. A typical floating forum clause provides that the parties agree to litigate all issues under the contract in the state where one party's principal place of business is located, without naming the state. When determining the enforceability of a floating forum clause, Ohio courts will first determine whether the clause passes the *Kennecorp.* test. If so, the clause is enforceable unless one party intends to assign the contract almost immediately after execution but has not disclosed that intent to the other party. In that instance, the floating forum selection clause is unreasonable

⁷⁷ *Schulke Radio Productions, Ltd. v. Midwestern Broadcasting Co.* (1983), 6 Ohio St.3d 436, 438-439, 453 N.E.2d 683, adopting the rule set forth in the Restatement 2d (1971), 561, Conflict of Laws, Section 187. Although workers' compensation matters are not within the scope of this summary, in *Am. Interstate Ins. Co. v. G & H Serv. Ctr.*, 112 Ohio St.3d 521, 2007-Ohio-608, at ¶¶10, 14, the Ohio Supreme Court held that, with respect to a claim for subrogation brought by a workers' compensation insurer, Section 185 of the Restatement 2d, and the laws of the state in which the workers' compensation benefits were paid, are controlling, unless the enforcement of those laws would be contrary to the strong public policy of Ohio.

⁷⁸ *Schulke*, 6 Ohio St.3d at 438.

⁷⁹ *Natl. City Commercial Capital Corp. v. All About Limousines Corp.*, 12th Dist.No. CA2005-08-219, 2009-Ohio-1159, citing *Kennecorp. Mtg. Brokers, Inc. v. Country Club Convalescent Hosp., Inc.* (1993), 66 Ohio St.3d 173, 610 N.E.2d 987.

and against public policy absent a clear showing that the party burdened by the clause knowingly waived personal jurisdiction and agreed to litigate in any forum.⁸⁰

Thus, if a party intends to include a floating forum clause in a contract, and intends to assign the contract shortly after execution, that party should include language in the contract stating that the other party acknowledges and agrees that the forum state could be anywhere in the United States, if such is the case.

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⁸⁰ Id.