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10 NEW MOTOR VEHICLE BOARD

11 In the Matter of the Protest of
12 GUARANTEE FORKLIFT, INC.
13 DBA: GFL, INC.,

14 Protestant,

15 v.

16 CAPACITY OF TEXAS, INC.,

17 Respondent.

Protest No. PR-2361-13

**RESPONDENT CAPACITY OF
TEXAS, INC.'S POST-HEARING
BRIEF**

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19 **Protest No. PR-2361-13**

20 **RESPONDENT CAPACITY OF
21 TEXAS, INC.'S POST-HEARING
22 BRIEF**

23 **I. INTRODUCTION**

24 Capacity Trucks is a manufacturer of specialty vehicles, specifically yard tractors.
25 Guaranteed Fork Lift (GFL) has been a Capacity dealer since 1995. Denise Rosen is the
26 President and operator of GFL. COPOS is an acronym for Capacity Online Parts Ordering
27 System. COPOS is a web based program that allows authorized Capacity dealers to research and
order specific parts to service and repair Capacity vehicles. COPOS contains confidential and
proprietary information about Capacity trucks and parts. Access to COPOS is very restricted and

1 limited to authorized dealers with passwords granted to each specific Capacity dealer and their
2 employees.

3 In order to access the COPOS system, a dealer must enter into an authorized dealership
4 relationship, request a password for key employees and passwords are only granted by Capacity.
5 COPOS is a trade secret and is subject to confidentiality by GFL. The information in COPOS is
6 not known outside of the Capacity authorized dealer family. Capacity takes reasonable
7 precautions to guard the secrecy of the information through password access, notice of
8 confidentiality and required acceptance on each opening screen. COPOS is extremely valuable
9 to Capacity dealers because it grants to them a competitive advantage over non-authorized
10 service providers. Capacity made a significant investment in the development and maintenance
11 of the system. GFL purposely allowed and encouraged unauthorized access and use by an
12 employee of a company that competes with Capacity Dealers. GFL lied to Capacity about the
13 status of Steve Mehrens' employment at GFL in order to perpetuate the unauthorized access.
14 GFL's actions are a breach of the Dealer Agreement and the implied covenant of fair dealing
15 required under California law.
16
17
18

19 The parties agreed during the course of this litigation to allow the protest to proceed on a
20 very limited basis, specifically the California Vehicle Code section 3061 (g) the "extent of
21 franchisee's failure to comply with the terms of the franchise."
22

23 **II. FACTS**

24 25 **A. Who Are The Parties And Witnesses Involved In This Protest**

26
27 **Capacity Trucks, Inc.** is a corporation organized in Texas and is a manufacturer of yard
trucks with its corporate headquarters in Longview, Texas. (SoF #1 J-Exhibit #4). **Guaranteed**

1 **Fork Lift (GFL)** is a corporation organized in California and is dealer of Capacity yard trucks
2 and parts since 1995. (J-Exh #4) The principal, president and sole shareholder of GFL is **Denise**
3 **Rosen-Kendrick**. (J-Exh #4) **Stephen Mehrens** was an employee of GFL for approximately 13
4 years. (J- Exh#4) Steve Mehrens' employment at GFL was terminated on October 22, 2012. (J-
5 Exh #4) Steve Mehrens became employed by **Mid Pacific Industries (Mid-Pac)**. Mid-Pac is an
6 authorized dealer of Kalmar/Ottawa products which is Capacity Trucks' largest competitor. (RT
7 22:19-25; 23:1; 57:3-5; 81:13-25; 112:20-25; 113:5-10) Mid-Pac provides repair services for
8 Kalmar/Ottawa, Capacity, and other brands of terminal truck. (RT 156:19-21; RT 188:12-18;
9 Resp. Ex. R116 30:13-15; Resp. Ex. R116 53:6-9)

12 **B. What Is The Capacity Online System**

13 The COPOS online system is a website where Capacity dealers can log in, do research by
14 VIN number, and find the breakdown of each truck that their customer may have. (RT 197:15-
15 24; Resp. Ex. R117 5:11-16; Resp. Ex. R119 5:13-19) The Capacity dealer can drill down into a
16 bill of material that tells them what components were used on the truck and how many are
17 required. (RT 197:15-24) The dealer can place orders directly from those bills of material and
18 look up major component serial numbers. (Resp. Ex. R123 6:10-13) It is a huge database for
19 Capacity parts. (RT 197:15-24) The COPOS online system allows the user access to research
20 parts that are needed on the Capacity yard trucks. (Resp. Ex. R123 6:10-16) COPOS also allows
21 the user to get engine serial number and transmission serial number. (RT 35:7-14) The online
22 system allows Capacity dealers access to information independently as well as give them real-
23 time inventory and real-time pricing. (RT 88:18-20)

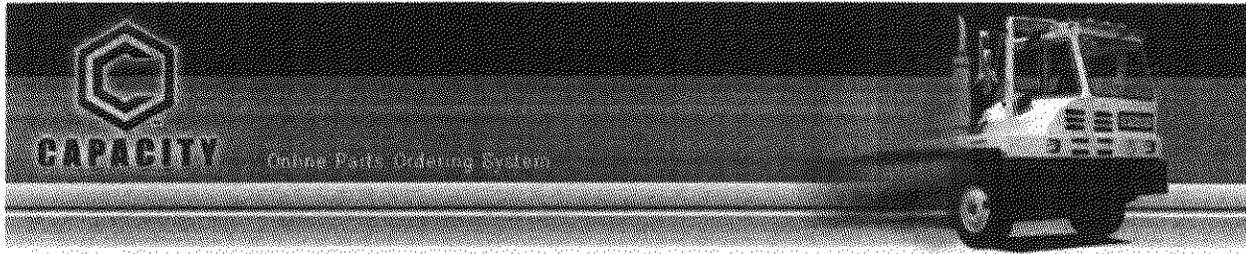
26 The COPOS system provides Capacity dealers access to information about every truck built by
27 Capacity in the last 15 years. (RT 88: 21; 89:1)

1 **C. The Information In COPOS Is Not Known Outside The Capacity Business**

2 Only authorized Capacity Dealers have access to COPOS. (RT 89:13-16; Resp. Ex.
3 R123 5:20-22) Before a user is given access they go through training which includes specific
4 instruction about responsibilities of the Dealer principal as to passwords and user IDs. (RT
5 89:15-22) The Protestant confirmed that Capacity wants to keep access to the COPOS online
6 system a secret when specifically asked "Would you agree with me that Capacity wants to keep
7 the access to that online system a secret? They don't want everybody to have access to it?"
8 Protestant responded "Oh, definitely." (RT 36:22-25) Capacity Dealers do not want non-
9 Capacity dealers to have access to the COPOS online system. (RT 37:7-10) When a dealer
10 wants access to the system they would call in and as long as they have an active account with
11 Capacity and they have gone through the credit application process we would assign them a user
12 profile with a password and provide training on the web site. (RT 200:16-22; Resp. Ex. R123
13 5:20-25)

14
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17 Capacity goes to extensive lengths to keep the content of the system confidential and
18 limit access to authorized users that have been granted a password by Capacity. (RT 87:7-11;
19 213:8-11) The system is not accessible to the general public or competitors. (RT 36:7-15; 92:10-
20 19; Resp. Ex. R123 6:5-9)

21
22 Each time an authorized user with a password accesses the system a confidentiality notice
23 appears and the user must agree to such. (Resp. Ex. R119 7:9-17 There is no other way to access
24 the system. (RT 46:19- 47:18; J-Exhibit 2) the opening screen confidentiality notice is as
25 follows:
26
27



TERMS AND CONDITIONS

The information and capabilities provided on this website are provided solely to assist Capacity of Texas, Inc. ("CAPACITY") and its AUTHORIZED DEALERS AND CUSTOMERS, in the process of identifying and ordering parts from CAPACITY. The information provided is the sole property of CAPACITY and is considered confidential by, and are trade secrets of, CAPACITY. By entering this web site, you agree that the information within this site will be used only to identify and order parts from CAPACITY and any use of the information provided, without the express written approval of CAPACITY, including but not limited to downloading, printing, re-producing, or reverse engineering, will be considered a breach of the terms and conditions of this web site and may constitute an infringement or violation of CAPACITY's intellectual property rights. Violation of this agreement could result in loss of the use of the web site.

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D. The Capacity Online System Gives Capacity Dealers A Competitive Edge

The Capacity Online Parts Ordering System (COPOS) gives Capacity Dealers a competitive edge. (Resp. Ex. R116 36:10-25; 37:1) The COPOS web site is a critical improvement to Capacity and a site such as this is not offered by any of Capacity competitors. (RT 101:6-17) The COPOS website gives Capacity dealers a step above the competitors in being able to service its trucks and easier access to servicing its trucks than ever before. (RT 101:6-17) It is important to Capacity as a manufacturer to be able to provide these types of values to Capacity dealers as it tries to build its dealer network. (RT 101:6-17)

1 Mid Pac is a competitor to GFL and all other Capacity dealers because owners of
2 Capacity trucks can get their trucks serviced at Mid Pac or a Capacity dealer. (R-EXH 116
3 30:13-15) Capacity dealers have a competitive advantage over non-Capacity dealers (i.e. Mid
4 Pac) because they have access to the COPOS. (RT 37:11-14) The online ordering and research
5 system allows a Capacity dealer to conduct research more efficiently, determine needs of
6 customers that own custom built vehicles, respond to customer requests more quickly, accurately
7 analyze and compare pricing, and place orders and conduct research 24 hours per day. (RT
8 197:15-24; RT 198: 2-14) Without access to the online ordering and research system, a purchaser
9 would have to contact a customer service representative at Capacity during working hours and
10 request that the CSR manually research the needs of the customer over the phone. (RT 198:2-7)
11 If a non-Capacity dealer gained unauthorized access to the online ordering and research system
12 that would diminish the competitive advantages belonging exclusively to Capacity dealers. (RT
13 36:16-25; R37:7-14) It is undisputed by the Protestant that the Capacity Online System gives
14 Capacity dealers a competitive edge, is valuable, and Capacity Dealers do not want their
15 competitors to have access. (RT 36:16-25, 37:7-14; 91:16-92:9; 113:20-114:1; Resp. Ex. R115
16 50:10-25)

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21 **E. Capacity Limits And Protects Access to the Online System**

22 In order to access the information on the COPOS system a dealer must enter a user ID
23 and a password. (RT 89:13-25; Resp. Ex. R117 6:1-3) The confidential nature of the information
24 on the website is emphasized and further protected by requiring authorized users to accept the
25 “Terms and Conditions” page each time they log into the system. (RT 47:4-12; 48:13-25; 51:21-
26 24; 87: 3-11; Resp. Ex. R119 7:9-17) The Terms and Conditions page requires the user to
27 acknowledge that “The information and capabilities provided on this website are provided solely

1 to assist Capacity of Texas, Inc. ("CAPACITY") and its AUTHORIZED DELAERS AND
2 CUSTOMERS, in the process of identifying and ordering parts from CAPACITY. The
3 information provided is the sole property of CAPACITY and is considered confidential by and
4 are trade secrets of, CAPACITY." (J-EXHIBIT #2)

6 **F. Capacity Spent Upwards Of \$500,000 In The Development Of COPOS**

7 Capacity launched the roll out of the COPOS online system in 2008 after an eighteen (18)
8 month to 2 year development process. (RT 87:12-13) The cost of develop was approximately one
9 half million dollars. (RT 87:15-25) Development costs were spent on software development,
10 converting Capacity's parts data to something that was easily used on the web and other outside
11 consultants.(RT 87: 24-25; 88:1-4) The software development and implementation was
12 performed by GGS and other third party consultants. (RT 87:12-88:4) GGS also provides
13 ongoing maintenance and service for the system. Capacity has spent an additional \$323,699.64
14 in maintenance and updating costs to GGS between April 30, 2009 (over the rollout) and August
15 31, 2013. Respondent's exhibit #113 shows payments made by Capacity to GGS related to the
16 COPOS system. (RT 94:20-95:4; Resp. Ex. R113)

19 **G. It Would Be Expensive And Difficult For An Outside Entity To Develop And Maintain**
20 **Current Product Information Given The Complexity And Uniqueness Of Each Capacity**

21 **Product**

22 Capacity trucks are custom built for each customer. (RT 35:15-18; R-EXH 115 52:5-9)
23 The parts for each custom built Capacity truck are specific to that Vehicle Identification Number.
24 (RT 35:19-25; 36:1-2; 79:8-11) When an order is placed by a user, the Online System is updated
25 immediately so all inventory and availability is current for authorized Capacity Dealers. (RT
26 198:22-25; 199:1-2)

1 Protestant admits that COPOS is a trade secret. (Resp. Ex. R115 50:20-25; 51:1-4; 90:18-
2 25) Protestant acknowledges that it is the Dealer's responsibility to protect the COPOS system as
3 a trade secret and to limit the use of passwords. (Resp. Ex. R115 99:11-16)

4
5 **H. Steve Mehrens Accessed The Capacity Online System After He Left GFL Without**
6 **Authorization.**

7 The Protestant acknowledges that Steve Mehrens accessed the Capacity Online System
8 when he worked at Mid Pacific using GFL's user ID and password. (RT 39:12-21) Steve
9 Mehrens admitted that he accessed the Capacity Online System while he worked at Mid Pacific.
10 He made this admission to Phillip Ford, former President of Capacity Trucks. (RT 173:1-3;
11 Resp. Ex. R116 69:23-25) He made this admission in a telephone conversation with Rita Hoop,
12 attorney for Capacity Trucks. (RT 173: 24-25; 174:1-2) He made this admission in his
13 deposition (RT 174:3-4; Resp. Ex. R116 96:18-20) and he made this same admission in the
14 Merits Hearing. (RT 174:5-6)

15
16
17 Steve Mehrens accessed the COPOS website while he worked for a non-Capacity dealer
18 for the purposes of helping Mid-Pac customer, GFL customers, and to conduct research. (Resp.
19 Ex. R116 31:5-20; 46:1-19) If Steve Mehrens would not have had unauthorized access to
20 COPOS to research Capacity parts while he worked at Mid-Pac, he would have gone through a
21 Capacity Dealer to get information and order parts, thereby giving the business to a Capacity
22 Dealer. (Resp. Ex. R116 32:11-22)

23
24 Respondent's Exhibit R103 is a log of each time the user IDs of SMehrens and smehren
25 logged in and what they researched. (RT 211: 21-25; 212:1; Resp. Ex. R103) The dates on
26 Respondent's Exhibit R103 span November 21, 2012 until January 21, 2013. (RT 163:25; 164:1-
27 10) The COPOS system was accessed 39 times during that time span. (Resp. Ex. R103) The

1 password associated with the SMehren and smehren account was changed to “Darlene” in
2 November 2012. (RT 137:5-25; 138:1-5; 211:1-20) Steve Mehrens worked at Mid Pacific from
3 November 1, 2012 until February 4, 2013. (RT 171:6-8) Steve Mehrens confirmed that he made
4 at least some of the logins listed on Respondent's Exhibit R103, all of which occurred during a
5 time when he worked at Mid Pacific. (RT 163:21-25; 164:1-23; Resp. Ex. R96:18-20)

7 The Protestant admits that Steve Mehrens definitely accessed the COPOS online system
8 while he was employed at Mid-Pac and no longer authorized to do so as an employee of GFL.
9 (RT 39:12-21) The only way that he could have gained access to the COPOS system would be
10 to use the “Darlene” password created by Denise Rosen in November 2012. (RT 39:12-24)

12 **J. Denise Rosen Gave The New Password To The Capacity Online System To Steve**
13 **Mehrens**

14 Steve Mehrens received the password to the COPOS website from Denise Rosen after he
15 left his employment at GFL and during a time that he worked for a non-Capacity truck parts
16 dealer. (Resp. Ex. R116 38:20-25;39:1-5) Steve Mehrens received a text from a telephone
17 identified as “Denise” on November 21, 2012 that gave him the new password of “Darlene”.
18 (Resp. Ex. R101; RT 152:4-25; 153:1-19) Steve Mehrens created the contact in his phone for
19 Denise Rosen and identified that contact as “Denise”. (RT 138:21-25; 139:1-11; 144:8-11) Steve
20 Mehrens had in the past talked to Denise Rosen and received texts from Denise Rosen and those
21 incoming communications were shown as “Denise” in his telephone contact identifier. (RT
22 138:21-25; 139:1-11) When Steven Mehrens would receive a text from Denise Rosen in the past
23 it would show up on his telephone that “Denise” was the sender. (RT 138:21-25; 139:1-11)
24 Steve Mehrens received the text that gave the new password of “Darlene” from Denise Rosen’s
25 telephone. (Resp. Ex. R101; Resp. Ex. R102; RT 140:17-24)
26
27

1 The password of "Darlene" was created by Denise Rosen in November 2012 and was the
2 password on all three GFL accounts that would allow access to COPOS. (RT 35:1-6; 32:16-22)
3 Steve Mehrens used the GFL user ID and new password of "Darlene" to access the COPOS
4 system while he was employed at Mid-Pac. Steve Mehrens accessed the Capacity Online
5 System while he worked at Mid Pacific for the purposes of helping Mid Pac customers (RT
6 188:12-18), Ottawa customers (RT 187:19-20), and Denise Rosen at GFL (RT 162:13-19).
7

8 Respondent's Exhibit R102 clearly shows that the sender of the text to Steve Mehrens
9 offering to send the password to the COPOS system was with "Bill at the hospital" on November
10 21, 2012. (RT 152:3-18; Resp. Ex. R102) Ms. Rosen admitted that on November 21, 2012 she
11 was at the hospital in Sonora because her Grandmother was a patient and her Grandmother's
12 husband's name is Bill. (RT 44:13-18)
13

14 Ms. Rosen tried to claim that three other people had access to the new password of
15 "Darlene" and could have had possession of her mobile telephone and texted the new password
16 to Steven Mehrens. (RT 39:24; 40:1-2; 61:18-25; 62:1-12) The people she pointed to were Artie
17 Kendrick, Deanna Rosen, and Carrie Jantzen. (RT 39:24; 40:1-2;) All of these people were
18 agents of GFL and performing tasks on behalf of GFL and would have gained access to the
19 password only as a result of "helping out at GFL". (RT 38:6-17; 44:7-9; 62:7-12; 40:12-25;
20 Resp. Ex. R115 21:22-25; 22:1-4) Ms. Rosen then contradicted herself and specifically stated
21 that Artie Kendrick did not give the password to Steve Mehrens (RT 40:7-11) and Deanna Rosen
22 did not give the password to Steve Mehrens. (RT 41:10-12) So that leaves only Carrie Jantzen.
23 Carrie Jantzen was an agent of GFL. (Resp. Ex. R116 33:2-9; Resp. Ex. R116 39:20-25;40:5-
24 20;41:11-20; 93:4-25; Resp. Ex. R115 90:20-25; 91:1-6; 31:2-10; 69:6-16) In Ms. Rosen's
25 attempt to point the finger at Carrie Jantzen she ignored the fact that the text that included the
26
27

1 password also included verification that the sender was at the hospital with “Bill” which happens
2 to be the name of Ms. Rosen’s grandmother’s husband. (RT 44:13-18) In Ms. Rosen’s attempt to
3 point the finger at Carrie Jantzen she also ignored the fact that Carrie Jantzen was working at
4 GFL and was an agent of GFL and therefore the dissemination of the Capacity trade secret is still
5 on GFL. Further evidence that Carrie Jantzen did not send the text with the password from
6 Denise Rosen’s phone is that Ms. Rosen said she never gave the password to Carrie Jantzen (RT
7 42:15-21)and she did not think Carrie Jantzen had ever accessed the Capacity online system.
8 (RT 43:15-21)
9

10
11 **K. Ongoing Deception by the Protestant/Principal of Dealership**

12 Denise Rosen, Principal of GFL, admitted that she lied to Capacity about Steve Mehrens
13 being on medical leave. (RT 19:15-21; 20:20-25; 21:1-9; 22:6-13) Steve Mehrens told Denise
14 Rosen when he gave notice of his resignation from GFL that he was going to work for Mid-Pac
15 at the end October 2012. (Resp. Ex. R116 25:17-25) Steve Mehrens lied to Capacity while he
16 was still employed at GFL by saying that he was going on medical leave rather than admit that
17 he was going to work for non-Capacity dealer. (Resp. Ex. R116 49:24-25; 50:1-14.) He told this
18 lie in order to help GFL (Resp. Ex. R116 50:5-14) Denise Rosen knew that she was deceiving
19 Capacity about Steve Mehrens being on medical leave for her own benefit and to the detriment
20 of Capacity. (RT 22:6-18; Resp. Ex. R116 99:13-25; 51:9-13)
21
22

23 Denise Rosen lied about not giving the new password of Darlene to Steve Mehrens so
24 that he could access COPOS while he worked for a competing entity. (See Section J above.)
25

26 **LEGAL ANALYSIS AND ARGUMENTS**

27 **III. DISSEMINATION OF CAPACITY'S TRADE SECRET BY GFL IS GOOD
CAUSE TO TERMINATE THE FRANCHISE AGREEMENT**

1 A detailed analysis of very similar case was explored by the Court of Appeals of Ohio in
2 *Mack Trucks, Inc., v. Motor Vehicles Dealers Bd.*, 2006-Ohio-2748. Although the Ohio Appeals
3 Court case is not precedent the detailed analysis applied to nearly identical facts is persuasive
4 and instructive.
5

6 **Facts of Mack Truck case:** The manufacturer was Mack Trucks (Mack), the Dealer was
7 Toledo Mack (Toledo). The third party competitor to Mack is PAI which manufactures and sells
8 imitation and genuine Mack parts. PAI (hereinafter "Competitor") was Toledo's largest
9 customer of Mack parts. Toledo would purchase the Mack parts from Mack at a discount and in
10 turn sell to Competitor at market price. Historically as a Mack dealer, Toledo received a Master
11 Price list with net costs of over 44, 000 parts listed. The master price list included a
12 confidentiality notice on each one. Over the years, Toledo gave the master price list to
13 Competitor despite the confidentiality notice. The master price list system was eventually
14 replaced with a computer software system for researching and ordering parts called MACSPEC.
15 Newer and updated versions of the MACSPEC system became available to Mack dealers from
16 time to time.
17
18

19 Each Mack truck is custom built. The MACSPEC system allowed service and repair
20 providers to access specific information about the each Mack truck and quickly and easily
21 determine the specific parts needed for repair. The MACSPEC system also gave authorized
22 dealers access to illustrations and information about how the specific parts fit together. The
23 value of the MACSPEC system is derived from the competitor's difficulty in servicing the Mack
24 products. The MACSPEC system also allowed authorized users access to updated compatible
25 part information. In the hands of a competitor the MACSPEC system would allow the maker of
26 imitation parts to determine which parts were most profitable to imitate by reverse engineering.
27

1 Mack Trucks made a substantial investment into the development of the MACSPEC
2 system and made reasonable efforts to protect the contents of the system.

3 Toledo deceptively facilitated Competitor in getting a MACSPEC system. Competitor
4 set up a new “company” called “Nancy’s Trucks” for the purpose of ordering the MACSPEC
5 system. An employee of Nancy’s Trucks called the Mack Truck help desk provided by GGS
6 Information Services, Inc. for help with the MACSPEC system. When the help desk provider for
7 Mack was placed on hold he heard the Competitor advertisement and as they say “the gig was
8 up”. Mack Trucks sought termination of the dealership relationship with Toledo as a result.
9 Toledo filed a protest with the Motor Vehicle Board.
10
11

12 Ohio has adopted the Uniform Trade Secret Act which is codified in R.C. 1333.61(D)
13 and defines “Trade Secret” as information, including the whole or any portion or phase of any
14 scientific or technical information, design, process, procedure, formula, pattern, compilation,
15 program, device, method, technique, or improvement, or any business information or plans,
16 financial information, or listing of names, addresses, or telephone numbers, that satisfies (1) It
17 derives independent economic value, actual or potential, from not being generally known to, and
18 not being readily ascertainable by proper means by, other persons who can obtain economic
19 value from its disclosure or use. (2) It is the subject of efforts that are reasonable under the
20 circumstances to maintain its secrecy.” For purposes of this Court’s analysis it is important to
21 note that California has also adopted the Uniform Trade Secret Act which is codified in Civil
22 Code Section 3426-3426.11 and it defines “Trade Secret” as “information, including a formula,
23 pattern, compilation, program, device, method, technique, or process, that: (1) Derives
24 independent economic value, actual or potential, from not being generally known to the public or
25
26
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1 to other person who can obtain economic value from its disclosure or use; and (2) Is the subject
2 of efforts that are reasonable under the circumstances to maintain its secrecy.”

3
4 In the Mack case, the Ohio Motor Vehicle Board found that the master price list and the
5 MACSPEC system were not trade secrets and the relationship did not require Toledo to keep
6 information confidential. Mack appealed to the Franklin County trial court. The trial court also
7 found no trade secrets because “Mack gave total authority to its dealers to provide information
8 and costs to other parties and failed to safeguard the information. Mack failed to protect the
9 information by written restriction whether by the dealership agreement or license agreement, and
10 it maintained no tracking system for computer systems shipped.” Mack appealed the trial court
11 decision to the Ohio Court of Appeals. **The Ohio Appeals Court found that the trial court**
12 **abused its discretion and reversed.**

13
14 The Ohio Court of Appeals found that Mack did have good cause to terminate the
15 franchise relationship. The Ohio statutes list nine factors to be considered to determine whether
16 there is good cause to terminate the franchise. Respondent only mentions the analysis of the
17 seventh element because it is substantially similar to the California statute 3060 provision that
18 the parties to this case are asking the Motor Vehicle Board to examine. The Ohio R.C. 4517.54
19 (c)(A) (7) states that “the extent and materiality of the franchisee’s failure to comply with the
20 terms of the franchise and the reasonableness and fairness of the franchise terms.” The
21 California Vehicle Code section 3061 (g) states that the “extent of franchisee’s failure to comply
22 with the terms of the franchise.” The Ohio Appeals Court found that the acts of Toledo were
23 tantamount to “dishonesty and fraud, which undermined the trust between Mack and Toledo
24 Mack.” The Appeals Court found that the MACSPEC system is a trade secret and disseminating
25 a trade secret to a competitor is a violation of trust and confidentiality.
26
27

1 The Appeals Court found that the MACSPEC system was a trade secret because “the
2 information in the MACSPEC 2001 system was not known outside of the Mack corporation;
3 Mack took reasonable precautions to guard the secrecy of the information through its unlock
4 procedure administered by GGS; it was extremely valuable for Mack to keep from competitors
5 because it gave Mack the advantage of being able to instantly find the assembly and parts details
6 for every unique Mack truck; Mack spent \$34 million developing the system; and the expense
7 and difficulty for others to duplicate the information would be immense, given the complexity
8 and specific uniqueness of every Mack truck sold.”
9

10
11 **Application of the Logic and Reasoning of the Mack Truck Case to the Protest at Hand:**

12 This Court in deciding this Protest must analyze and determine 1) whether the COPOS system is
13 a trademark and 2) whether the dissemination of the password and access to the COPOS system
14 is tantamount to dishonesty and fraud and thereby a breach of the dealer agreement given rise to
15 good cause for termination of the dealer relationship.
16

17 The same analysis related to whether COPOS is a trade secret should be applied to this
18 Protest 1) The information in COPOS is not known outside the Capacity business, 2) Capacity
19 takes reasonable precautions to protect the information contained in COPOS by requiring
20 passwords and requiring users to accept confidentiality notice each time they log in; 3) it is
21 extremely valuable to Capacity dealers to be able to instantly determine the parts and assembly
22 required for each custom built Capacity vehicle and grants to the Capacity dealer a valuable
23 advantage over competitors; 4) Capacity spent upwards of \$500,000 in the development of
24 COPOS and over \$300,000.00 in maintaining and updating the system for the benefit of their
25 dealers; 5) it would be immensely expensive and nearly impossible for an outside entity to
26
27

1 develop and maintain current product information given the complexity and uniqueness of each
2 Capacity product.

3 The purchase and sales of parts is profitable to both the manufacturer and dealers. Each
4 Capacity truck is custom built, therefore in order to service or repair the vehicle a service
5 provider needs to know what specific part will fit or work in that specific truck. The COPOS
6 system recognizes the VIN number from the Capacity vehicle and allows the COPOS user to
7 determine the specific part needed. The value of the COPOS system is derived from the
8 competitor's difficulty in servicing the Capacity trucks thereby granting a significant advantage
9 to Capacity dealers. The COPOS system allows the user to quickly identify the unique needs of
10 each Capacity customer.
11
12

13 Capacity goes to extensive lengths to keep the content of the system confidential and
14 limit access to authorized users that have been granted a password by Capacity. The system is
15 not accessible to the general public or competitors. Each time an authorized user with a password
16 accesses the system a confidentially notice appears and the user must agree to such. In order to
17 access the COPOS system, a dealer must enter into an authorized dealership relationship, request
18 a password for key employees and passwords are only granted by Capacity.
19
20

21 **III. BREACH OF CONTRACT**

22 Capacity enters into contracts with dealers around the country to sell and promote
23 Capacity products. The basic premise or promise of each dealer agreement is an implied
24 understanding that the Dealer and Capacity are motivated by the same goal: to sell as many
25 vehicles as possible and grow the market share in the dealers' area. All of the terms and
26 conditions in the agreement spring from that goal.
27

A. The Franchise Agreement is a Contract.

1 Capacity and GFL have entered into a written agreement regarding the sales, service and
2 marketing of Capacity products. Products include not only the Trailer Jockey vehicles, but
3 service parts for the Trailer Jockey. The contractual nature of the relationship is contained in the
4 definition of franchise under the motor vehicle code.
5

6 331(a) A “franchise” is a **written agreement** between two or more persons having all of
7 the following conditions...(emphasis added)

8 As with any contract the written terms of the contract are controlling. The obligations of
9 GFL in this case are clearly set out on the first page of the Authorized Representative
10 Agreement.
11

12 2. CAPACITY will sell to Authorized Representative “TRAILER JOCKEY” and
13 “YARDMASTER” product and service parts therefore in such quantities as Authorized
14 Representative may order and CAPACITY is reasonably able to supply at prices in effect from
15 time to time for resale by the Authorized Representative.
16

17 3.a) Authorized Representative shall use all reasonable endeavors to achieve
18 maximum sales of the products.
19

20 b) Authorized Representative shall maintain selling, administrative and product
21 service facilities (including an inventory of service parts).
22

23 The contract recognized the place and importance of parts as part of the products sold by
24 Capacity and purchased and used by GFL. This was further reflected in the testimony presented
25 at the Hearing on the Merits and in fact parts comprised almost all of the purchasing activity of
26 GFL. In exchange for the right to purchase and resell Capacity products GFL has promised to
27 “use all reasonable endeavors” to maximize product sales. Capacity is relying upon GFL to use

1 its knowledge, expertise and discretion in the running of its dealership and meeting the
2 requirements of the agreement.

3 **B. Contract Analysis**

4
5 A. Interpreting the Agreement. Although the Board’s jurisdiction is limited, finding
6 good cause requires an examination of the contract to determine whether GFL has breached or
7 violated and of the terms, conditions or obligations of the contract. California courts have held
8 that, “a franchise is a written agreement of the parties which is subject to the normal rules
9 relating to the interpretation of contracts.” *Ri-Joyce, Inc. v. New Motor Vehicle Bd.*, (1992) 2
10 Cal. App. 4th 445 [3 Cal.Rptr. 2d 546].

11
12 B. Implied Covenant of Good Faith and Fair Dealing. In examining the agreement and
13 determining whether there is a breach, in support of the explicit terms in the document the finder
14 of fact must look at the conduct of the party accused of the breach in relationship to the
15 obligations of that party under the same agreement. “In every contract there is an implied
16 covenant of good faith and fair dealing that neither party will do anything which injures the right
17 of the other to receive the benefits of the agreement.” *Bleecher v. Conte*, (1981) 29 Cal.3d 345
18 [698 P.2d 1154]. This doctrine was acknowledged in the *Ri-Joyce* decision as well. In much the
19 same manner as the responsibility of GFL in this case, the *Ri-Joyce* court plainly states, “A
20 contract that confers discretionary decision making authority upon one of the parties may be
21 construed to require an objective standard of reasonableness or may be construed to permit the
22 party to make a decision based upon subjective factors. In either case it will be implied that the
23 party must exercise its judgment in good faith.” *Ri-Joyce supra*, 2 Cal.App.4th 445 at 457.

24
25 GFL had an obligation under the contract “to use all reasonable endeavors to achieve
26 maximum sales of to products.” That obligation was further defined in the written agreement to
27

1 include the maintenance of facilities for “selling, administrative and product service” for the
2 sales and service of products. Service parts are a significant part of the dealership and as stated
3 above are included in the definition of products. GFL conceded that the Capacity Online Parts
4 Ordering System (COPOS) was a proprietary system for the use of dealers to research and order
5 parts for Capacity vehicles. Further, it was conceded to be a trade secret. The COPOS system
6 gives the user direct access to the parts listing, pricing and schematics beneficial to the service of
7 Capacity vehicles. It benefits both the dealer and Capacity to protect the integrity of this system
8 and is an integral part of the operation of dealers and Capacity with regard to parts orders.
9

10
11 This essential system was compromised by the acts of GFL and further, efforts were
12 made by GFL to conceal the misuse of the system. This abuse has threatened the
13 competitiveness of Capacity in the terminal tractor sales and service market as well as impacting
14 the operations of other Capacity dealers. This willful and conscious behavior on the part of the
15 principal of GFL is contrary to the duties and promises contained in the agreement of the parties,
16 in that is not a reasonable endeavor to achieve maximum sales of the products and is inconsistent
17 with the obligation of GFL to maintain facilities for the research, procurement and distribution of
18 Capacity parts. By passing login information to an unauthorized user, GFL has acted conversely
19 to those stated agreements and is in breach of the contract. This breach in and of itself is
20 sufficient for this tribunal to find that the contract has been violated and Capacity has good cause
21 for the termination of the dealership agreement.
22

23
24 GFL argues that there can be no breach because Capacity cannot point to a specific
25 provision of the agreement that has been violated. Such an argument is specious. GFL seems to
26 suggest that the agreement imposes no obligations upon it and that it is free to operate in any
27 manner it wishes. If that is the case, it would be logically easier for GFL to disclaim the contract

1 than to gerrymander an agreement that allows such actions on its part. The law is clear that the
2 absence of a specific term is not fatal to efforts to enforce an agreement and does not relieve
3 GFL from the reasonable and expected use of COPOS. It is just and reasonable for Capacity to
4 expect its dealer to operate in a manner that promotes the terms and objectives of the contract. To
5 suggest otherwise not only subverts the intent of the parties to the agreement, but promotes
6 subterfuge and manipulation in the manner that GFL has engaged hereto. The basis for the
7 implied covenant of good faith and fair dealing is to **promote** the expectation of the parties to the
8 contract. “The covenant of good faith and fair dealing, implied by law in every contract, exists
9 merely to prevent one contracting party from unfairly frustrating the other party's right to receive
10 the *benefits of the agreement actually made.*” *Guz v. Bechtel Nat. Inc.*, (2000). 24 Cal. 4th 317,
11 349 [8 P.3d 1089, 1110]. Exposing the COPOS application to competing dealers clearly subverts
12 and diminishes the rights of Capacity under the contract.

13
14
15 This court must imply the covenant of good faith and fair dealing to the terms of the
16 agreement and hold GFL to an obligation to perform its obligations in good faith.

17
18 **C. Violation of Statutes.**

19
20 Capacity asserts that the conduct of GFL and the impact on Capacity and other dealers is
21 sufficient grounds for a determination that there was a material and significant breach of the
22 dealer agreement. Beyond that, state and federal law specifically prescribes the actions of GFL
23 and its principal in the business world.

24
25 A. The California Uniform Trade Secret Act prohibits the transfer of a trade secret without the
26 consent of the owner. Civil Code §3426.1 defines the following:
27

1 (a) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a
2 breach of a duty to maintain secrecy, or espionage through electronic or other means. Reverse
3 engineering or independent derivation alone shall not be considered improper means.
4

5
6 (b) "Misappropriation" means:

7 (1) Acquisition of a trade secret of another by a person who knows or has reason to know that
8 the trade secret was acquired by improper means; or

9 (2) Disclosure or use of a trade secret of another without express or implied consent by a
10 person who:
11

12 (A) Used improper means to acquire knowledge of the trade secret or

13 (B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of
14 the trade secret was:

15 (i) Derived from or through a person who had utilized improper means to acquire it;

16 (ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use;

17 or
18

19 (iii) Derived from or through a person who owed a duty to the person seeking relief to maintain
20 its secrecy or limit its use; or

21 (C) Before a material change of his or her position, knew or had reason to know that it was a
22 trade secret and that knowledge of it had been acquired by accident or mistake.
23

24
25 (d) "Trade secret" means information, including a formula, pattern, compilation, program,
26 device, method, technique, or process, that:
27

1 (1) Derives independent economic value, actual or potential, from not being generally
2 known to the public or to other persons who can obtain economic value from its disclosure or
3 use; and

4
5 (2) Is the subject of efforts that are reasonable under the circumstances to maintain its
6 secrecy.

7 There is no dispute that the program at the center of the dispute was a trade secret.
8 Through GFL an unauthorized party obtained a password for access to the system and did in fact
9 access the system. There is no other conclusion than GFL participated in the theft of a trade
10 secret from Capacity. Violation of the California Trade Secret act is both a good cause violation
11 of the franchise agreement and good cause in general.
12

13 B. The Federal Economic Espionage Act. The United States has a federal law that is
14 nearly identical to the California Uniform Trade Secrets Act. 18 U.S.C. §1831. As set out above,
15 all forms of business and technical information including compilations, plans and programs are
16 protected if the owner of that information has taken reasonable steps to protect the same. It is a
17 violation to deliver or provide that information to another with out permission to do so. A
18 violation of the Federal Economic Espionage Act is good cause for termination as a violation of
19 the agreement and good cause in general for the termination of the franchise agreement.
20

21 **D. Good Cause exists for Termination of the Agreement.**
22

23 The basic contract between the parties, although short, contains all of the required terms
24 and conditions on the part of GFL with regard to the sale and marketing of the products of
25 Capacity. GFL has clearly violated those terms and Capacity has established good cause for the
26 termination of the agreement. Further, the acts of GFL in disclosing and misleading Capacity as
27 to access by an unauthorized third party are a breach of an implied covenant and good faith and

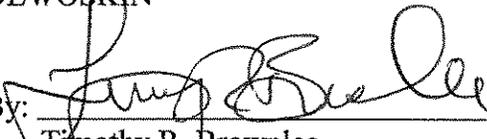
1 fair dealing that California courts hold as a requirement of any contract subject to interpretation
2 under California law. By misusing COPOS and providing access to an unauthorized party, GFL
3 has threatened the benefit of the bargain as to Capacity. The seriousness of the breach is
4 demonstrated by the violation of state and federal law protecting this very type of information.
5 Under any of the number of grounds set forth above, Capacity has established good cause for
6 termination of the agreement for breach of the contract.
7

8 **V. CONCLUSION**

9
10 Protestant has violated a material contractual responsibility to protect confidential and
11 proprietary trade secret information and has attempted to mislead or deceive Respondent
12 regarding the misuse of access to the online parts ordering system. For those reasons, Capacity
13 has good cause under Section 3061 to terminate Protestant's Agreement.
14

15
16 Dated: January 31, 2014

17 WAITS, BROWNLEE, BERGER AND
18 DEWOSKIN

19 By: 
20 Timothy R. Brownlee
21 Rita L. Hoop
22 Maurice Sanchez – BakerHostetler LLP

23 Attorneys for Respondent
24 CAPACITY OF TEXAS, INC.
25
26
27

PROOF OF SERVICE

1 I am employed in Jackson County, Missouri. I am over the age of eighteen years
2 and not a party to the within entitled action. My business address is 401 W. 89th Street,
3 Kansas City, MO 64114. I am readily familiar with this firm's practice for collection and
4 processing of correspondence for mailing with the United States Postal Service. On
5 January 31, 2014, I SERVED a true and correct copy of the within document(s):
6

7 **RESPONDENT CAPACITY OF TEXAS, INC.'S POST HEARING BRIEF**

- 8 by transmitting via facsimile the document(s) listed above to the fax
9 number(s) set forth below on this date before 5:00 p.m. and the
10 transmission was reported as complete and without error.
- 11 by placing the document(s) listed above in a sealed envelope with postage
12 thereon fully prepaid, in the United States mail at Kansas City, Missouri
13 addressed as set forth below.
- 14 by placing the document(s) listed above in a sealed _____ envelope
15 and affixing a pre-paid air bill, and causing the envelope to be delivered to
16 a _____ agent for delivery.
- 17 following ordinary business practices, the envelope was sealed and placed
18 for collection by Overnite Express on this date, and would, in the ordinary
19 course of business, be retrieved by Overnite Express for overnight delivery
20 on this date.
- 21 by personally delivering the document(s) listed above to the person(s) at
22 the address(es) set forth below.
- 23 by transmitting via electronic mail the document(s) listed above to the e-
24 mail address(es) set forth below on this date before 5:00 p.m. and the
25 transmission was reported as complete and without error.
26
27

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