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9 STATE OF CALIFORNIA

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.

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

19 **RESPONDENT CAPACITY OF
20 TEXAS, INC.'S REPLY TO
21 PROTESTANT'S POST-
22 HEARING
23 BRIEF**

24 The Protestant makes the following arguments in the Post Hearing Brief:

25 1. The Protestant claims that Capacity can not prove that Denise Rosen sent the
26 password to the Capacity Online System to an unauthorized Non-Capacity dealer and therefore
27 GFL did not disseminate a trade secret of Capacity.

28 2. The Protestant contends that the implied covenant of good faith and fair dealing that is
29 part and parcel of every contract does not require GFL to avoid purposely deceiving Capacity
30 and does not require GFL to avoid dissemination of valuable trade secrets owned by Capacity.

31 The Protestant contends that because the franchise agreement does have the expressly state

1 “Don’t lie to us” or something akin to “Don’t give away our trade secrets to a non-Capacity
2 dealers” that these actions are not a breach of the contract.

3 3. The Protestant lied to Capacity about the status of her former employee but she had a
4 good reason.
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6 This Reply brief will address each of these contentions.

7 **1. The Protestant claims that Capacity can not prove that Denise Rosen sent the password**
8 **to the Capacity Online System to an unauthorized Non-Capacity dealer and therefore GFL**
9 **did not disseminate a trade secret of Capacity.**
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11 Even if the Board were to believe every statement by Denise Rosen on this topic, the
12 Board must still conclude that an agent of GFL sent the password to Steve Mehrens. Ms. Rosen
13 tried to claim that three other people had access to the new password of “Darlene” and could
14 have had possession of her mobile telephone and texted the new password to Steven Mehrens.
15 (RT 39:24; 40:1-2; 61:18-25; 62:1-12) The people she pointed to were Artie Kendrick, Deanna
16 Rosen, and Carrie Jantzen. (RT 39:24; 40:1-2;) All of these people were agents of GFL and
17 performing tasks on behalf of GFL and would have gained access to the password only as a
18 result of “helping out at GFL”. (RT 38:6-17; 44:7-9; 62:7-12; 40:12-25; Resp. Ex. R115 21:22-
19 25; 22:1-4) Ms. Rosen then contradicted herself and specifically stated that Artie Kendrick did
20 not give the password to Steve Mehrens (RT 40:7-11) and Deanna Rosen did not give the
21 password to Steve Mehrens. (RT 41:10-12) So that leaves only Carrie Jantzen. Even if Ms.
22 Jantzen was the sender of the text with the confidential information, Carrie Jantzen was an agent
23 of GFL. (Resp. Ex. R116 33:2-9; Resp. Ex. R116 39:20-25;40:5-20;41:11-20; 93:4-25; Resp. Ex.
24 R115 90:20-25; 91:1-6; 31:2-10; 69:6-16). Her acts bind the corporation.
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1 Beyond this non-sequitur of blaming another agent of the corporation, the evidence
2 further points to the malice of the principal of GFL. In Ms. Rosen's attempt to point the finger at
3 Carrie Jantzen she ignored the fact that the text that included the password also included
4 verification that the sender was at the hospital with "Bill" which happens to be the name of Ms.
5 Rosen's grandmother's husband. (RT 44:13-18) In Ms. Rosen's attempt to point the finger at
6 Carrie Jantzen she also ignored the fact that Carrie Jantzen was working at GFL and was an
7 agent of GFL and therefore the dissemination of the Capacity trade secret is still on GFL.
8 Further evidence that Carrie Jantzen did not send the text with the password from Denise
9 Rosen's phone is that Ms. Rosen said she never gave the password to Carrie Jantzen (RT 42:15-
10 21) and she did not think Carrie Jantzen had ever accessed the Capacity online system. (RT
11 43:15-21)

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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)
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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 Respondent's Exhibit R102 clearly shows that the sender of the text to Steve Mehrens offering to
4 send the password to the COPOS system was with "Bill at the hospital" on November 21, 2012.
5 (RT 152:3-18; Resp. Ex. R102) Ms. Rosen admitted that on November 21, 2012 she was at the
6 hospital in Sonora because her Grandmother was a patient and her Grandmother's husband's
7 name is Bill. (RT 44:13-18)
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9 **2. The Protestant contends that the implied covenant of good faith and fair dealing**
10 **that is part and parcel of every contract does not require GFL to avoid purposely deceiving**
11 **Capacity and does not require GFL to avoid dissemination of valuable trade secrets owned**
12 **by Capacity. The Protestant contends that because the franchise agreement does expressly**
13 **state "Don't lie to us" or something akin to "Don't give away our trade secrets to a non-**
14 **Capacity dealers" that these actions are not a breach of the contract.**
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17 The only case cited by the Protestant, in fact, strongly supports the position of the
18 Capacity. The Court in *Agosta v. Astor* specifically states "It is well established that there is an
19 implied covenant of good faith and fair dealing in every contract that neither party will do
20 anything that will injure the right of the other to receive the benefits of the agreement. *Agosta v.*
21 *Astor*, (2004) 120 Cal. App. 4th 596 citing *Camp v. Jeffer, Mangels, Butler and Marmaro*,
22 (1995) 41 Cal. Rptr. 2d 329. This is exactly what Capacity argues, that there is an implied
23 covenant of good faith and fair dealing recognized under California law that prohibits
24 contracting parties from taking action that deprives the other party of the benefit of the
25 agreement. GFL admitted actions of deceiving Capacity about Steve Mehrens employment
26 status and disseminating the secure password to the Capacity Online Parts System to that former
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1 employer without authorization are clearly prohibited acts under the California law. California
2 courts have held that, "a franchise is a written agreement of the parties which is subject to the
3 normal rules relating to the interpretation of contracts." *Ri-Joyce, Inc. v. New Motor Vehicle Bd.*,
4 (1992) 2 Cal. App. 4th 445 [3 Cal.Rptr. 2d 546].

6 **3. The Protestant lied to Capacity about the status of her former employee but she had a**
7 **good reason.**

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

19 Protestant now says that she told this lie because she was afraid that Capacity would
20 attempt to terminate the franchise if Capacity was aware Steve Mehrens had left GFL. She
21 admitted that Capacity had not communicated that intention to her in any way and had never
22 hinted that Steve Mehrens employment at GFL mattered to Capacity at all. (RT 74:2-25; 75:1-
23 10) Ms. Rosen answered that specific question during the hearing as follows:

25 22 So did you have any communication, whether that
26 23 be electronically by e-mail, text, a letter, phone
27 24 call -- any communication from Capacity that said or
25 25 indicated, "If Steve leaves we're going to terminate
1 you"? Did anyone ever tell you that?

2 A. No. I don't believe so.

PROOF OF SERVICE

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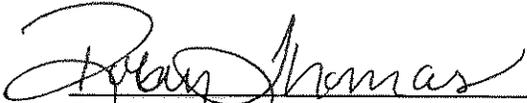
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Executed on this 24th day of February, 2014, at Kansas City, Missouri.


Robin Thomas