

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL CRAWFORD, STEVEN BELLI, : CIVIL ACTION  
DIRK FLOTE AND RAECO INVESTMENT :  
PARTNERSHIP :  
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 :  
 v. :  
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SAP AMERICA, INC., SAP AG and :  
HASSO PLATTNER : NO. 00-2779

MEMORANDUM AND ORDER

Fullam, Sr. J.

March , 2004

Plaintiffs are RAECO Investment Partnership, Michael Crawford, Steven Belli and Dirk Flote, who owned Data Dynamics, Inc., and its successor-in-interest, Titan Technologies Group, LLC ("Titan"). Defendants are SAP AG, a large German software concern, its wholly-owned subsidiary SAP America, Inc., and Hasso Plattner, a German citizen who is co-Chairman and CEO of SAP AG and Chairman of SAP America.

In March 1997, Data Dynamics entered into a "Provider Agreement" with SAP America to act as SAP's exclusive sales agent for computer software in a specified territory. A couple of months later, before any significant sales had occurred, plaintiffs decided to form a new company, Titan, to carry out the contract, independently from Data Dynamics' other activities, and SAP thereupon consented to the assignment of the Provider Agreement to Titan.

SAP had previously been very successful in marketing its software program to large companies ("Fortune 500 companies"); its Provider Agreement was part of an effort by SAP America to market its software program to smaller end-users, (i.e., those having less than \$200 million in annual revenues). Titan enjoyed considerable success in marketing SAP's program, and the "Provider Agreement" was proving quite profitable to both Titan and SAP. In late 1998, however, plaintiffs sought to sell their ownership interests in Titan to another company, Modis. Defendants objected to the proposed sale, and Modis decided not to go through with the purchase. A few months later, in mid-1999, plaintiffs did sell their ownership interests in Titan to another firm, Condor. Plaintiffs then brought this action, asserting numerous claims arising out of their former relationship with SAP.

In its final form plaintiffs' (fourth) amended complaint asserts claims for negligent misrepresentation, fraud and misrepresentation, interference with contract, interference with prospective advantage, violation of the New Jersey Franchise Practices Act, breach of contract, breach of contract - implied covenant of faith and fair dealing, promissory estoppel, equitable estoppel and breach of fiduciary duty. Defendants have moved for summary judgment on all counts.

Most of plaintiffs' claims require little discussion.

Since the plaintiffs were not parties to the Provider Agreement, they cannot successfully assert claims for breach of that contract. Neither can they successfully contend that they were fraudulently induced to enter into the Provider Agreement.

Moreover, the summary judgment record is conspicuously lacking in any evidence to support any claim of fraud or misrepresentation by anyone in connection with the Provider Agreement.

If anyone was induced to enter into the Provider Agreement, it was Titan. If there was a breach of the Provider Agreement, only Titan has standing to complain. It is reasonably well settled that a corporate shareholder does not have "standing to maintain an action in his own right, as a shareholder, when the alleged injury is inflicted upon the corporation and the only injury to the shareholder is the indirect harm which consists in the diminution of value of his corporate shares resulting from the impairment of corporate assets." *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 732 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971). *See also eds Adjusters, Inc. v. Computer Sciences Corp.*, 818 F.Supp. 120 (E.D. Pa. 1993).

If, however, the Provider Agreement constituted a franchise within the ambit of the New Jersey Franchise Practices Act, NJSA 56:10-1 *et seq.*, plaintiffs would, at least under some circumstances, have standing to complain about violations of that statute, since it protects not only corporate franchisees, but

"the individual officers, directors and other persons in active control of the activities of each such entity," NJSA 56:10-3(b). And plaintiffs undoubtedly have standing to pursue claims that their individual rights were infringed because defendants tortiously interfered with their contacts -- actual or prospective -- to sell their shares in Titan to the Modis firm. These two sets of potential claims will now be discussed.

**I. Claims under the New Jersey Franchise Practices Act**

A. Does the Act apply?

Read literally, it would seem that the statute is sufficiently broad to encompass the Provider Agreement arrangements. The statute defines "franchise" as follows:

"A written arrangement for a definite or indefinite period, in which a person grants to another person a license to use a trade name, trade mark, service mark, or related characteristics, and in which there is a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise." (§10-3).

The statute applies to any such arrangement where it is contemplated that the franchisee will establish or maintain a place of business in the State of New Jersey, and where the gross sales exceed \$35,000 per year and more than 20 percent of revenues are generated by the franchise.

The Provider Agreement with Titan may very well not have been the type of arrangement contemplated by the Legislature

in enacting the franchise statute: Although Titan maintained a place of business in New Jersey, most of its sales and other activities took place at its customers' establishments; and the computer software industry differs markedly from the kinds of businesses which typically involve franchises, such as fast-food chains or automobile dealerships.

The Provider Agreement between Titan and SAP included the following provision:

"¶ 18.9 Relationship. This Agreement shall not be construed as creating a partnership, joint venture, agency relationship, or granting a franchise under any applicable laws."

For reasons not immediately apparent, the parties' briefs do not focus upon the import of this language. The contract provision may have been viewed as running afoul of a provision in the New Jersey Franchise Practices Act which makes it a violation of the statute for any franchisor:

"(a) To require a franchisee at the time of entering into a franchise arrangement to assent to a release, assignment, novation, waiver or estoppel which would relieve any person from liability imposed by this act."

An argument can be made that when sophisticated businessmen, after prolonged negotiations, agree that they are not entering into a franchise, the Act simply has no application. There is also room for argument that an agreement not to enter into franchise arrangement cannot plausibly be regarded as "a release,

assignment, novation, waiver or estoppel which would relieve any person from liability imposed by [the act]."

For present purposes, I will assume that plaintiffs may be able to demonstrate at trial that they were "required" to accept that provision in the contract, and that they were pressured into surrendering their rights under the franchise statute.

Since the Provider Agreement can be regarded as fitting the definition of a franchise, I shall assume that the Act does apply, notwithstanding the reservations discussed above.

B. Did defendants violate the statute?

It is undisputed that plaintiffs wished to sell their interests in Titan to Modis, and that the defendants objected to the proposed transaction. Viewing the evidence in a light most favorable to the plaintiffs, defendants informed Modis that, if Modis acquired Titan, defendants would not renew the license to Titan, which was scheduled to expire on December 31, 2000 (the initial term of the Provider Agreement was for three years, ending December 31, 2000, but subject to automatic renewals thereafter unless either side gave the other 90 days' notice of termination). (¶ 16.2).

Plaintiffs assert that defendants violated § 10-7(d) of the franchise statute, which makes it a violation of the statute for any franchisor:

"(d) To restrict the sale of any equity or debenture issue or the transfer of any securities of a franchise

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requirements of the franchisor are complied with, and provided any such sale, transfer or issuance does not have the effect of accomplishing a sale or transfer of control, including, but not limited to, change in the perso

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The statute further provides, § 10-6:

"It shall be a violation of this act for any franchisee to transfer, assign or sell a franchise or interest therein to another person unless the franchisee shall first notify the franchisor of such intention by written notice setting forth in the notice of intent the prospective transferee's name, address, statement of financial qualifications and business experience during the previous five years. The franchisor shall within 60 days after receipt of such notice either approve in writing to the franchisee such sale to proposed transferee or by written notice advise the franchisee of the unacceptability of the proposed transferee setting forth material reasons relating to the character, financial ability or business experience of the proposed transferee. If the franchisor does not reply within the specified 60 days, his approval is deemed granted. No such transfer, assignment or sale hereunder shall be valid unless the transferee agrees in writing to comply with a of the franchise then in effect."

It is undisputed that plaintiffs did not comply with § 10-6.

Their failure to do so, however, would not necessarily relieve defendants of responsibility for violating § 10-7(d), if in fact they did so.

The question is whether § 10-7 precludes a franchisor from objecting to a sale of the entire interest in the franchise,

or merely precludes such interference if the proposed sale is to "employees, personnel of the franchisee, or spouse, child or heir of an owner." At an earlier stage of this litigation, in denying defendants' motion to dismiss the complaint, I opined that the statute was ambiguous, and noted that plaintiffs had adequately alleged a violation of the statute. The case is now before me on a motion for summary judgment, and plaintiffs cannot rely upon the allegations of their pleadings alone. Reading the statute as a whole, I am convinced that the defendants did not in fact violate § 10-7 of the statute, because plaintiffs were free to sell their interests only "provided any such sale, transfer or issuance does not have the effect of accomplishing a sale or transfer of control, including, but not limited to, change in the persons holding the majority voting power of the franchise." Plainly, the proposed sale to Modis would have amounted to the transfer of control, change in persons holding majority voting power, etc. The statute does severely restrict the franchisor's freedom of action, but still permits the franchisor to have some voice in choosing the persons or entities with whom it wishes to deal. And the summary judgment record contains extensive evidence justifying defendants' objections to the Modis transaction. I do not believe a reasonable jury could possibly find that defendants' actions in opposing the Modis transaction were tortious, or anything other than legitimate protection of

defendants' own perceived business interests.

**II. Tortious interference with plaintiffs' individual contractual rights to sell their shares**

In the preceding section, I have dealt with claims under the New Jersey Franchise Practices Act, on the assumption (a) that the Act is applicable, and (b) that plaintiffs have standing to pursue claims under that statute, because it purports to protect not only an entity which holds a franchise, but also the officers and directors of any such entity. I confess to a great deal of uncertainty about the right of officers and directors of a franchisee to pursue claims which are at odds with the interests of the franchise entity itself, but find it unnecessary to pursue that complication, since I find no violation of the statute. But, irrespective of the franchise statute, plaintiffs are permitted to pursue their common-law claims that the defendants tortiously interfered with their prospective contractual advantage, when they took actions which discouraged Modis from carrying out the proposed transaction with plaintiffs.

For essentially the same reasons expressed in the preceding section, I conclude that defendants' actions were not tortious, but merely a legitimate attempt to protect their own valid interests. Even if that were not the case, however, I am satisfied that plaintiffs cannot prevail in this action, because

they sustained no provable damages as a result of defendants' actions. After the sale to Modis fell through, plaintiffs sold their interests to Condor, without objection from the defendants. Although the terms of the two transactions were not identical, it appears that, as a practical matter, plaintiffs fared better with Condor than they would have with Modis. The Modis transaction would have generated cash of about \$5,000,000, plus an opportunity for additional sums if Titan's revenues reached a certain level. Titan's revenues did not reach the specified level, primarily because the market for Titan products suffered an extensive downturn affecting the entire industry. The sale to Condor, on the other hand, produced benefits equivalent to about \$9,000,000.

Plaintiffs have produced an expert report to the effect that Modis would probably have been willing to invest additional sums in expanding Titan's operations, and that, had it done so, Titan's revenues would have exceeded the required level, and plaintiffs would have received additional payments. The expert who prepared the report made numerous assumptions having no basis in practical reality and, admittedly, did not consider the actual performance of Titan, or the general market conditions affecting Titan and its competitors. I do not believe the expert's opinion passes muster under *Daubert*, but in any event, it is clear that plaintiffs have no non-speculative evidence of damages. On this

record, a jury could not find that plaintiffs suffered damages unless the jury indulged in wildly speculative guesswork.

**III. Conclusion**

For all of the foregoing reasons, I conclude that defendants' motion for summary judgment should be granted.

An Order follows.

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