UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GMAC REAL ESTATE, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL ACTION FILE**
	)	**NO. 1:09-CV-02838-JEC**
METRO BROKERS, INC., KEVIN R. LEVENT, and CLYDE W. CARVER,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Defendant Metro Brokers, Inc. ("Metro") files its brief opposing Plaintiff GMAC Real Estate, LLC's ("GMAC") Motion for Temporary Restraining Order and Preliminary Injunction ("Motion"), and respectfully show the Court as follows:

INTRODUCTION

The Motion is unfounded and unnecessary. The Motion seeks emergency judicial resolution of a concocted dispute which does not exist, in search of relief which Metro has repeatedly stated it does not oppose. In fact, the relief requested by GMAC is already its contractual right (GMAC has the right post-termination to

enter franchise agreements with third parties within the Licensed Territory), and Metro does not oppose it.

Since 2001, Metro has been a loyal and productive real estate brokerage franchisee of GMAC. The relationship is governed by the "GMAC Real Estate, LLC Real Estate Franchise Agreement" ("Agreement").[1] The Agreement, *inter alia,* gives Metro an exclusive right and license to use GMAC's trademarks and sales materials within the territory that generally encompasses north Georgia ("Licensed Territory"). Metro is the world's largest GMAC franchise and the only franchisee in north Georgia. Metro includes a network of approximately 2,100 real estate salespersons in 26 offices with approximately 5,000 exclusive real estate listings at any given time.

In September 2008, GMAC was acquired by Brookfield Residential Property Services, a division of Brookfield Asset Management, Inc. ("Brookfield"). Brookfield is a Canadian venture capital firm that has certain divisions dealing in residential real estate in Canada, and now with the acquisition of GMAC in the United States. Since purchasing GMAC, Brookfield has been

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[1] Process has not been served, and Defendants have not answered or moved against the Complaint. The facts set forth herein will be properly supported by affidavits, but, in the interest of time and because GMAC has sought emergency injunctive relief, Metro is filing the instant Brief before affidavits are finalized and filed with the Court.

planning to rebrand the company, including a new name, logo, and trademarks. Defendant Kevin Levent ("Levent"), owner and President of Metro, actually sits on GMAC's rebranding committee. Having been a franchisee of GMAC since 2001, and a member of Brookfield's rebranding committee, Levent concluded that Brookfield was not leading GMAC in a direction that suited the best business interests of Metro, and that Metro needed to dissociate itself from GMAC. Metro also believed that GMAC was in default of the Agreement.

Metro properly notified GMAC on October 1, 2009, of its intent to terminate the franchise relationship effective January 16, 2009 ("Notice of Termination"), pursuant to Sections 3(a), 18(a)(i) and 18(a)(ii) of the Agreement. Metro wanted to exit the relationship in a businesslike manner that would provide GMAC sufficient time and opportunity to replace its largest franchisee, and would similarly provide Metro sufficient opportunity to negotiate and finalize new franchise agreements, and complete the task of "de-branding" and replacing GMAC's trademarks. Among other things, this would include the modification or removal of four major electronic billboards around Atlanta, the manufacture and replacement of approximately 5,000 yard signs, the manufacture and replacement of signage on 26 offices and two additional service facilities, the manufacture and replacement of business cards and other paraphernalia for 2,100 agents, and the process of writing

to approximately 5,000 customers, explaining that Metro would be changing affiliations and possibly amending their contracts.

The Notice of Termination was effective three and one-half months in the future. On October 13, 2009, GMAC attempted to terminate the franchise relationship immediately based on a purported default by Metro. GMAC then filed this lawsuit and an arbitration demand ("Arbitration") with the American Arbitration Association ("AAA"), wrote to all its remaining franchisees to notify them that it was suing Metro, and removed Metro from its broker-to-broker authorized referral directory.

Now, GMAC seeks a temporary restraining order ("TRO") barring Metro from "attempting to prevent, in any way, [GMAC] from immediately entering franchise agreements with third parties, and licensing to third parties use of [GMAC's] service marks or trademarks, in the Licensed Territory . . . ." (*See* Proposed Temp. Restraining Ord. at 3 [Doc. # 4-2].) **Metro has never opposed GMAC from entering into any such franchise agreement**, and Metro has communicated this fact to GMAC. Because there is no actual dispute concerning GMAC's right to seek a third-party franchisee, the Motion appears to be nothing more than scorched-Earth litigation posturing.

The Motion should be denied because GMAC cannot establish three of the four mandatory prerequisites for a TRO. ***First***, GMAC cannot establish that it will suffer irreparable harm without the TRO because: (a) Paragraph 18(a)(i)(1) of the Agreement already grants GMAC the right to enter franchise agreements with third parties within the Licensed Territory; and (b) Metro has affirmatively stated that it does not oppose that right.

Second, the threat of injury to GMAC (of which there is none) is far outweighed by the potential harm of a TRO to Metro. The parties' dispute concerning alleged breaches of the Agreement has been submitted to arbitration. An unnecessary grant of emergency injunctive relief in GMAC's favor would likely prejudice the arbitral process in GMAC's favor.

Third, there is no public interest to be served by granting a TRO in this case. To the contrary, the public interest is harmed when the Court is unnecessarily burdened with emergency motions seeking resolution of fictional disputes between parties who have no real disagreement.

STATEMENT OF RELEVANT FACTS

GMAC's alleged need for a TRO is based on a false assumption that Metro objects to GMAC seeking new licensees in the Licensed Territory. On October 14, 2009, at 10:11 a.m., Richard Hines ("Hines"), counsel for GMAC, emailed a letter

("Hines Letter") to Gary S. Freed ("Freed"), counsel for Metro, asking Metro to acknowledge that its Notice of Termination triggers GMAC's right to solicit new franchisees in the Licensed Territory. (*See* Affidavit of Richard Hines ("Hines Aff.") ¶¶ 3-4 and Ex. A, filed Oct. 19, 2009.) The Hines Letter unreasonably demanded that Freed provide a response by 5:00 p.m. the same day, **less than seven hours later.** (*Id.*) If Freed failed to respond within a mere seven hours, the Hines Letter threatened that GMAC would "deem your failure to respond as an objection to [GMAC's] right to immediately undertake such action and [GMAC] will seek available legal remedies . . . ." (*Id.*) The seven-hour window of opportunity was so outrageously short that a reasonable, outside observer would have to conclude Hines preferred Freed to be unable to respond.

As a practical matter, Freed could not respond to the Hines Letter within seven hours. (*See* Affidavit of Gary S. Freed ("Freed Aff."), to be filed following this Brief.) Freed was on vacation in the north Georgia mountains from the morning of October 14, 2009, through October 18, 2009, where he had no computer and limited cell phone and e-mail service. (*Id.*) Freed did not have an opportunity to read the Hines Letter while on vacation. (*Id.*)

On Friday, October 16, 2009, Hines followed up with Freed by email asking for a response to the Hines Letter. (*Id.*, Ex. C (Hines email to Freed, Oct. 16, 2009,

at 5:39 p.m.).) Freed obtained that email and replied that he was on vacation, and that he could respond the following Monday unless there was an emergency issue that had to be addressed sooner. (*Id.*, Ex. C (Freed email to Hines, Oct. 16, 2009, at 5:51 p.m.).) Hines responded that the parties could confer on Monday. (*Id.*, Ex. C (Hines email to Freed, Oct. 16, 2009, at 5:39 p.m.).) **The sworn statement in the October 19, 2009 Affidavit of Richard Hines that "counsel for Metro has failed to respond in any manner as of the time of this filing" is patently and demonstrably false.** (Freed Aff.)

On Monday, counsel for both parties conferred by telephone, during which conversation counsel for GMAC never stated the relief it would be seeking in the threatened TRO. (Freed Aff.) If GMAC had simply stated it planned to seek a TRO entitling GMAC to contract with additional franchisees within the Licensed Territory, Metro would have advised GMAC that the effort was unnecessary. (*Id.*) **At no point did Metro ever object to GMAC seeking new licensees in the Licensed Territory.** (*Id.*)

On October 19, 2009, GMAC filed the Motion. After finally seeing in writing the relief requested by GMAC, Metro sent a letter stating, *inter alia,* that "Metro is willing, in a spirit of cooperation, to permit GMAC to immediately license others to use the Marks in the Licensed Territory," and that "[t]his should

come as no surprise as Metro has regularly *ad hoc* allowed intrusion into its exclusive territory upon request by GMAC." (*Id.*, Ex. D (Freed letter to Millwood, October 19, 2009).) Thereafter, counsel for Metro reiterated to counsel for GMAC by email:

> We don't see the need for the Lawsuit, the TRO Motion or an order. Your client is free to solicit other franchisees and Mark users in the Licensed Territory. There is no ripe issue or dispute to be adjudicated and we believe you are asking the Court for an advisory opinion.

(*Id.*, Ex. E (Email from Freed to Jeff Mapen, Oct. 19, 2009, at 9:00 p.m.).) Again thereafter, counsel for Metro reiterated:

> The Agreement already gives you **all** of what you seek in the Motion in Par 18A(i)(1). Metro Brokers does not consent to opening up its Sites, but it does not object to opening up the Licensed Territory. We do not object to GMAC proceeding accordingly. We do believe that the attorneys' fees you have incurred so far are not in accordance with Par. 19C. We ask that you dismiss the Motion. You have an agreement to which there is already agreement. We have NEVER said we oppose opening up the Licensed Territory. You could have saved your client a lot of money by allowing an opportunity to meet and engage in amiable dialogue before belligerent advocacy.

(*Id.*, Ex. F. (Email from Freed to Millwood, Oct. 19, 2009, at 9:37 p.m.).)

GMAC's position that it needs the requested TRO is based on a poor assumption, and is flatly disproved by the written communications of counsel for

Metro. Moreover, GMAC's position is undercut by the fact that Metro has agreed in the past to allow GMAC to create third-party franchisees within the Licensed Territory. (Affidavit of Kevin Levent ("Levent Aff."), to be filed following this Brief.) In each such circumstance, GMAC sent Metro a written amendment to the Agreement accounting for the intrusion into the Licensed Territory. (*Id.*) In this case, GMAC sent no such written amendment. (*Id.*)

ARGUMENT AND CITATION OF AUTHORITY

To warrant the grant of a TRO or preliminary injunctive relief, GMAC must show: (1) that GMAC has a substantial likelihood of ultimate success on the merits; (2) that GMAC will suffer irreparable injury unless the injunction is issued; (3) that the threatened injury to GMAC outweighs whatever damage the proposed injunction may cause Metro; and (4) that the injunction, if issued, would not be adverse to the public interest. *Nutritional Support Services, L.P. v. Miller*, 806 F. Supp. 977, 980 (N.D. Ga. 1992) (citing *Sofarelli v. Pinellas County*, 931 F.2d 718, 723-24 (11th Cir. 1991).)

"A preliminary injunction is an extraordinary remedy and should not be granted unless [GMAC] clearly carries the burden of persuasion on all four elements." *Nutritional Support Services*, 806 F. Supp. at 980; *see also Wall v. Ferrero*, 142 Fed. Appx. 405, 407 (11th Cir. 2005); *Burk v. Augusta-Richmond*

County, 365 F.3d 1247, 1262-63 (11th Cir. 2004); *Suntrust Bank v. Houghton Mifflin Co.*, 252 F.3d 1165, 1166 (11th Cir. 2001).

"Furthermore, if any element is not proven, there is no need to address the other elements." *Nutritional Support Services*, 806 F. Supp. at 980; *see also Dunkin' Donuts, Inc. v. Pleasant Hill Coffee & Donuts, Inc.*, No. 1:05-cv-1178J, 2006 WL 587616, *1 (N.D. Ga., March 8, 2006) (denying a preliminary injunction where the movant showed "a strong likelihood of success" but there was "no irreparable injury"); *Burk*, 365 F.3d at 1262-63 (declining to address three remaining elements after finding that the plaintiffs failed to establish a substantial likelihood of success on the merits).

A. The Motion Should Be Denied Because GMAC Cannot Show Real Threat Of Irreparable Harm If A TRO Is Not Issued.

Much of GMAC's argument concerning irreparable harm is confusing, difficult to read, and unsupported by specific fact. However, the crux of the argument seems to be GMAC's fear that it will be frozen out of the North Georgia market if it does not quickly find a new franchisee to replace Metro. Assuming this is correct, a TRO would not rectify the situation. Metro has not and does not oppose GMAC's right to find a new franchisee. Thus, GMAC cannot prove the essential element that it will "suffer irreparable injury ***unless the injunction is issued.***" *Nutritional Support Services*, 806 F. Supp. at 980 (emphasis added).

B. The Motion Should Be Denied Because The Potential Harm A TRO Might Cause Metro Outweighs Any Threatened Injury to GMAC.

There is no threatened harm to GMAC that will occur if the Court does not grant the requested TRO. On the other hand, Metro may be prejudiced if the Court unnecessarily grants the TRO to the extent the issuance of the injunction lends credibility to GMAC's litigation position. Because issuance of a TRO would necessarily require the Court to find that GMAC is substantially likely to prevail on the merits, there is a real possibility for confusion and prejudice in the pending arbitration, which is completely unnecessary given the lack of an actual dispute concerning GMAC's right to solicit new franchisees.

C. The Motion Should Be Denied Because The Public Interest Is Harmed By Frivolous Requests For Advisory Opinions In Moot Cases.

The instant Motion is not predicated upon any actual case or controversy. To the contrary, GMAC seeks emergency injunctive relief to prevent Metro from engaging in a course of conduct that it has never engaged in, and has conceded that it never intends to pursue.

"Article III of the Constitution limits the jurisdiction of federal courts to the consideration of 'Cases' or 'Controversies.' " *Christian Coalition of Alabama v. Cole*, 355 F.3d 1288, 1290-91 (11th Cir. 2004) (citing United States Const. art. III,

§ 2, cl. 1). "The 'case or controversy' requirement prevents federal courts from deciding a case on the merits if such a decision could no longer provide 'meaningful relief' to the parties." *Id.*, at 1291 (citing *Fla. Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1217 (11th Cir. 2000). "Such a case would be moot, and a federal court determination of a moot case would constitute an impermissible advisory opinion." *Id.* (citing *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir. 2001)).

Although a case may not be moot "only because a defendant voluntarily ceases the allegedly improper behavior," a federal court is nonetheless precluded from issuing an advisory opinion if the defendant can demonstrate "there is no reasonable expectation that the wrong will be repeated." *Id.* (citations omitted). In this case, there is no reasonable expectation that Metro will seek to prevent GMAC from licensing third-party franchisees in the Licensed Territory for the reasons stated above. Thus, GMAC's request for a TRO is purely symbolic, and any TRO granted would constitute an impermissible advisory opinion.

Advisory opinions are a waste of judicial resources, and do not advance the public's interest. *Paragon Mgmt., L.L.C. v. Slaughter*, 437 F. Supp. 2d 1267, 1273 (N.D. Ala. 2006) (seeking an advisory opinion "is a waste of judicial resources"); *Gulfstream Aerospace Corp. v. Camp Systems Intern., Inc.*, No. 405-cv-018, 2007

WL 2469577 *3 (S.D. Ga., Aug. 30, 2007) (holding that "[s]ymbolic acts, like advisory opinions, should play no part in the federal judicial process," and noting that advisory opinions which may "salve a wounded ego" do not "advance the public's interest").

CONCLUSION

For the reasons set forth above, Metro requests that the Court preserve the status quo pending arbitration and deny the unnecessary request for a TRO.

Additionally, because GMAC has unnecessarily expanded the litigation by pursuing the TRO despite Metro's clear statement that it does not oppose GMAC's right to solicit new third-party franchisees within the Licensed Territory, Metro asks to be compensated for the attorneys' fees reasonably incurred responding to the Motion pursuant to 28 U.S.C. § 1927.

Respectfully submitted this 20th day of October, 2009.

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CERTIFICATION OF FONT

Counsel for Defendants certifies that this document has been prepared in a Times New Roman, 14 point font and otherwise complies with Local Rule 5.1C.

This 20th day of October, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that I have, this date, filed electronically the foregoing **Memorandum of Law in Opposition to Motion for Temporary Restraining Order and Preliminary Injunction** with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification to the following attorneys of record:

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This 20th day of October, 2009.

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