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December 27, 2016

By Hand

Honorable Heidi Brieger
Massachusetts Superior Court
Suffolk County Courthouse – 13th Floor
Three Pemberton Square
Boston, Massachusetts 02108

In re Civil Investigative Demand No. 2016-EPD-36,
Suffolk Superior Court Civil Action No.: 16-1888F

Dear Justice Brieger:

We write on behalf of Exxon Mobil Corporation ("ExxonMobil") in response to the letter submitted by the Office of the Massachusetts Attorney General (the "AGO") on December 19, 2016, purporting to identify provisions of ExxonMobil's Brand Fee Agreement ("BFA") that would support personal jurisdiction over the company. Contrary to the AGO's position, which is unsupported by even a single reference to legal precedent, none of the identified provisions (either individually or collectively) establish the requisite level of control necessary to attribute the conduct of a BFA holder to ExxonMobil. Without that level of control, Massachusetts precedent bars grounding personal jurisdiction over ExxonMobil based on the activities of those who make retail sales under the Exxon or Mobil brands pursuant to a BFA.

It is not contested that personal jurisdiction over ExxonMobil can arise only from ExxonMobil's suit-related contacts with the forum. *See Walden* v. *Fiore*, 134 S. Ct. 1115, 1121 (2014). For the conduct of ExxonMobil's BFA holders in Massachusetts to be attributed to ExxonMobil, ExxonMobil must "control[] or ha[ve] a right to control the specific policy or practice resulting in harm to the plaintiff." *Depianti* v. *Jan-Pro Franchising Int'l, Inc.*, 465 Mass. 607, 617 (2013). Whereas overseeing the day-to-day operation of a retail store can constitute the requisite "close supervisory control or right of control" necessary for personal jurisdiction, the control arising from licensing agreements pertaining to brand identity, proprietary marks, and product quality cannot. *Id.* at 615-16 (citation and internal quotation marks omitted). Because none of the provisions identified by the AGO suggest that ExxonMobil exercises the required amount of control over its BFA holders, the AGO has failed to meet its "burden of establishing sufficient facts on which to predicate jurisdiction." *Fern* v. *Immergut*, 55 Mass. App. Ct. 577, 579 (2002) (citation and internal quotation marks omitted).

1. **Provisions that Make No Mention of Control Are Insufficient to Establish Personal Jurisdiction.**

The first set of provisions identified by the AGO fails to even mention the amount of "control" that ExxonMobil exerts over its BFA holders and are therefore irrelevant to this Court's personal jurisdiction inquiry. For example, the AGO points to a provision acknowledging that ExxonMobil wishes "to build and maintain a lasting relationship with its customers" (AGO # 1[1] (emphasis omitted)), but that is aspirational language bearing no relation to the amount of control ExxonMobil exerts over its BFA holders. Similarly, the provision recognizing that a BFA holder's conduct may affect a customer's perception of ExxonMobil's products (AGO # 2) is merely a truism of every single licensing relationship. Lastly, the provision authorizing ExxonMobil to compete directly or indirectly with its BFA holders (AGO # 7) also says nothing about the amount of "control" ExxonMobil actually exercises over its BFA holders. If anything, that ExxonMobil may seek to compete with these independently owned and operated BFA holders only serves to demonstrate that ExxonMobil does not control their retail activities.

2. **General Provisions Common to All Licensing Agreements Are Insufficient to Establish Personal Jurisdiction.**

The next set of provisions identified by the AGO are standard licensing contract terms that courts routinely find insufficient to establish the control required for attributing conduct of a licensee to the licensor. For example, provisions that (i) require BFA holders to comply with the BFA (AGO # 3); (ii) require BFA holders to engage in certain promotional programs, such as ExxonMobil's credit card offerings (AGO # 9-10); (iii) permit ExxonMobil to terminate the BFA if a BFA holder engages in fraud (AGO # 15-16); (iv) allow ExxonMobil to decide whether to approve or not approve the branding

[1] "AGO #__" refers to the bullet point number in the AGO's letter.

of any outlet (AGO # 4-5); and (v) authorize ExxonMobil to provide plans, equipment, or décor to its BFA holders (AGO # 12) are standard provisions common to licensing contracts. *See, e.g.*, *Theos & Sons, Inc.* v. *Mack Trucks, Inc.*, No. 9542, 1999 WL 38393, at *4 & n.2 (Mass. App. Ct. Jan. 25, 1999) (identifying provisions which required a licensee to "render prompt and efficient service in accordance with [the licensor's] policies and standards" and to "purchase, use and maintain specific tools" to complete the licensee's work merely to be "general standards with which [the licensee] had to comply to remain an authorized" licensee), *aff'd*, 431 Mass. 736 (2000). If these basic, universal provisions of licensing agreements were sufficient to attribute the conduct of ExxonMobil's BFA holders to ExxonMobil, the conduct of *every* licensee would be attributable the licensor. The law is clear that this is not so. *Id.* at *4 (stating that "general standards" found in licensee contracts "d[o] not constitute evidence" of the amount of control required to attribute a licensee's conduct to a licensor); *see also Wu* v. *Dunkin' Donuts, Inc.*, 105 F. Supp. 2d 83, 88 (E.D.N.Y. 2000) ("Most courts have found that retaining a right to enforce standards or to terminate an agreement for failure to meet standards is not sufficient control."), *aff'd*, 4 F. App'x 82 (2d Cir. 2001).

3. Provisions Required by Federal Law to Maintain Control over ExxonMobil's Brand Are Insufficient to Establish Personal Jurisdiction.

The last set of provisions identified by the AGO also fail to establish personal jurisdiction because they merely concern the "control and supervision" that ExxonMobil "is required to maintain" over the "use of its mark" *in order to comply* with the Lanham Act. *Depianti*, 465 Mass. at 615. The Attorney General points to provisions permitting ExxonMobil to "preserv[e] the integrity of [its] Proprietary Marks" (AGO # 17); "insure the integrity of ExxonMobil trademarks, products and reputation" (AGO # 13)[2]; and prevent "harm to the value or reputation of Exxon[Mobil]'s proprietary marks" (AGO # 6). As the Supreme Judicial Court of Massachusetts has stated, however, these contract provisions are insufficient to attribute the conduct of BFA holders to ExxonMobil because doing so "could have the undesirable effect of penalizing [ExxonMobil] for complying with Federal law." *Depianti*, 465 Mass. at 615-16; *see also Lind* v. *Domino's Pizza LLC*, 87 Mass. App. Ct. 650, 654-55 (2015) ("The mere fact that franchisors set baseline standards and regulations that franchisees must follow in an effort to protect the franchisor's trademarks and comply with Federal law, does not mean that" franchisees' conduct should be attributed to a franchisor.).

Relatedly, provisions that (i) set "minimum facility/product/service requirements" of licensees (AGO # 11); (ii) authorize ExxonMobil to change the quality or specifications of the ExxonMobil-branded motor fuel sold by its licensees (AGO # 8); and (iii) require personnel to be "neatly dressed . . . in ExxonMobil approved uniforms" (AGO # 14) are "precisely the type of operational standards that courts have recognized for protection of a trademark and are insufficient to establish control over a [licensee]." *Lind*, 87 Mass. App. Ct. at 657. Courts have reached this conclusion because these types

[2] This portion of section 15(a) of the BFA was omitted from the passage excerpted in the AGO's letter.

of "marketing, quality, and operational standards commonly found in franchise agreements are insufficient to establish the close supervisory control or right of control" that is required to attribute a licensee's conduct to a licensor. *Depianti*, 465 Mass. at 616 (citation and internal quotation marks omitted); *see also Kerl* v. *Dennis Rasmussen, Inc.*, 273 Wis. 2d 106, 131 (2004) (same).

* * *

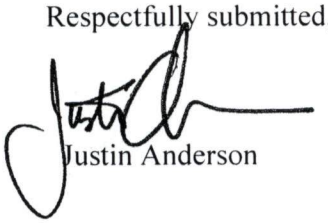
None of the provisions identified by the AGO detract from the "full responsibility" that the BFA holders have for the "sourcing of motor fuel products" (BFA at 1; *see also id.* §§ 2(c), 5(a)) and the control that BFA holders have over the marketing of the ExxonMobil-branded products (Affidavit of Geoffrey Grant Doescher ¶¶ 4-5, dated Aug. 31, 2016). (*See also* BFA §§ 2(e)(6), 3(a), (h)) (noting that BFA holders market under Exxon or Mobil brands either directly or through dealers or agents with whom they contract and that ExxonMobil has no direct dealings or contractual arrangements with those dealers or agents).) Under the terms of the BFA, ExxonMobil's BFA holders in Massachusetts remain "wholly responsible for the day-to-day operations of their stores," which bars attributing their conduct to ExxonMobil. *Lind*, 87 Mass. App. Ct. at 661; *see also Theos & Sons*, 1999 WL 38393, at *4 (conduct of licensee not attributed to licensor where "general standards with which [licensee] had to comply to remain" a licensee "were unrelated to . . . day-to-day operations and the specific manner in which they were conducted").

That conclusion is entirely consistent with the relationship contemplated by the BFA, which identifies ExxonMobil's BFA holders as independent contractors—not partners, fiduciaries or agents. (BFA § 42). Courts give considerable weight to the relationship the parties undertook to establish when considering whether conduct should be attributed from a licensee to a licensor. *See Lind*, 87 Mass. App. Ct. at 658 (franchisee's conduct not attributed to franchisor where "the franchise agreement clearly provided that no agency relationship existed" between the parties); *Theos & Sons*, 1999 WL 38393, at *4 (licensee's conduct not attributed to licensor where "the Agreement expressly and unequivocally states that [the licensee] is an independent contractor and not an agent for [the licensor]"). The independence of the BFA holders is clear under the terms of the agreement and should be respected.

Notwithstanding its multiple opportunities to do so, the AGO has identified no facts or law that would authorize attributing the conduct of the Massachusetts-based BFA holders to ExxonMobil. Absent any such support, the Court

should reject the AGO's arguments for personal jurisdiction premised on the BFA holders' activities.

Respectfully submitted,



Justin Anderson

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