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BLOGS
State Franchise and Dealer Laws

Ninth Circuit Holds That Gap Is Not a Franchisor Under California Franchise Relations Act

In *Gabana Gulf Dist., Ltd. v. Gap Int'l Sales, Inc.*, 2009 WL 2585678 (9th Cir. Aug. 24, 2009), Gap prevailed over Gabana, a United Kingdom distributor. Gap had terminated Gabana's distribution agreement for the Middle East. Gabana sued, claiming that its arrangement with Gap constituted a franchise under the California Franchise Relations Act and, therefore, that Gap needed good cause to terminate the distribution agreement. The Ninth Circuit disagreed, finding that the trademark element of a franchise under California law was not present. While Gabana was a distributor or wholesaler of Gap products, it was not "substantially associated" with Gap's trademarks. Indeed, the court noted that Gabana was "expressly prohibited from associating itself with Gap's trademarks beyond selling its merchandise." The court also concluded that the franchise fee element had not been satisfied because Gabana merely purchased Gap's products at fair market value.

In an interesting dissenting opinion, focusing on non-California cases from the Third Circuit, one judge argued that in determining whether the trademark element of a franchise was present, the appropriate question to ask was whether Gabana's customers "associated" Gabana's business operation with Gap's reputation and goodwill. Such a connection was perceived by Gabana's direct customers because the retailers had to be approved by Gap and were required to sell Gap products in specified "store-within-store" displays. The dissenting judge also noted that the retailers' stores were inspected by Gap personnel and received instructions on how they were to achieve the "Gap look." The dissent therefore did not understand how Gabana could be viewed merely as a "source of products." The dissenting judge also pointed out that Gabana's purchase of excessive amounts of inventory could be a franchise fee.