

**STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH**

**BEFORE THE
SECURITIES COMMISSIONER**

In the matter of)	
Furniture Medic Limited Partnership,)	INVESTIGATION
Kevin Schmitcke,)	DECISION AND
and their Officers, Directors,)	FINAL ORDER
Agents, and Employees,)	
Respondents.)	

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Dennis Wetzel, a resident of North Dakota, filed a complaint with the office of the North Dakota Securities Commissioner alleging that the respondents violated provisions of the North Dakota Franchise Investment Law (North Dakota Century Code Chapter 51-19). The Office of the Securities Commissioner conducted an investigation and the Commissioner gathered information and heard testimony from Dennis Wetzel and Kevin Schmitcke at an investigative hearing on November 25, 1996. Furniture Medic Limited Partnership ("Furniture Medic") did not attend the hearing. Matthew Bahrenburg, Jocelyn Smith-Whitney, and Harold Kocher also attended the hearing for the Office of the Securities Commissioner.

FINDINGS OF FACT

In March of 1995, Schmitcke was a franchisee of Furniture Medic, a properly registered North Dakota franchisor, in Bismarck, North Dakota. Schmitcke placed an advertisement in the Sunday, January 21, 1996 edition of the Bismarck Tribune newspaper offering his Furniture Medic franchise for sale. Wetzel answered the advertisement and he met with Schmitcke during that week to discuss the Furniture Medic franchise. Schmitcke told Wetzel his Furniture Medic franchise included the geographic areas of Bismarck and Minot. Schmitcke also told Wetzel that Furniture Medic charged an advertising fee of 1% of revenues and a franchise fee of 3% of revenues.

After his meeting with Schmitcke, Wetzel telephoned Wally Trudeau at the Furniture Medic corporate office in Georgia and Wetzel informed Trudeau that he wanted to buy the Furniture Medic franchise from Schmitcke. Trudeau confirmed Schmitcke's statements about the advertisement and franchise fees but Wetzel and Trudeau did not discuss minimum fees. Wetzel and Schmitcke had several other discussions after their first meeting and Schmitcke told Wetzel that two other people had expressed an interest in buying the franchise. In the following days, Wetzel had several conversations with Trudeau at the Furniture Medic corporate office.

On January 27, 1996, Wetzel and Schmitcke signed an earnest money agreement for Wetzel to buy the Furniture Medic franchise and Schmitcke gave Wetzel copies of the confidential Furniture Medic materials and manuals. In the earnest money agreement,

Wetzel paid Schmitcke \$1000 (in a post-dated check) to reserve the purchase option for the franchise. The parties did not specify in the written agreement whether or not Schmitcke would keep the \$1000 if Wetzel did not buy the franchise. Wetzel and Schmitcke both agreed at the hearing that the earnest money agreement concluded the negotiations between Wetzel and Schmitcke and that Furniture Medic had agreed to approve the sale of a franchise to Wetzel as soon as Wetzel returned the signed prospectus. The earnest money agreement did not specify the purchase price of the Furniture Medic franchise, but the parties agreed at the hearing that the total value discussed was approximately \$10,000 with a \$1000 credit for the earnest money payment. The earnest money agreement stated that the purchase would be completed "at the latest date" of February 15, 1996.

On February 6, 1996, Wetzel received a copy of the Furniture Medic prospectus from Trudeau of the Furniture Medic corporate office. Wetzel objected to the minimum charges on the Furniture Medic advertising fees and franchise fees described in the prospectus. Wetzel also realized that the franchise agreement did not include a provision for an exclusive territory and that Furniture Medic could sell additional franchises in the same area. Upon the recommendation of Trudeau at the corporate office, Wetzel telephoned other Furniture Medic franchisees in the United States to discuss the franchise business with them.

On February 9, 1996, Schmitcke cashed the \$1000 earnest money check, which was postdated February 15, 1996. Wetzel continued to discuss the franchise with Trudeau and other Furniture Medic employees beyond the February 15, 1996 purchase deadline in the earnest money agreement. Wetzel did not ask for an extension of the February 15, 1996 deadline to buy the franchise, and Wetzel did not tell Schmitcke about his concerns with the minimum charges and non-exclusive territory in the prospectus. Schmitcke attempted to contact Wetzel several times before and after the February 15, 1996 deadline but Wetzel did not accept Schmitcke's calls and Wetzel did not return the calls.

On March 5, 1996, Wetzel wrote a letter to Schmitcke stating that he would not buy the franchise and that he would return the confidential Furniture Medic manuals only if Schmitcke would refund the \$1000 earnest money. Schmitcke did not return the earnest money to Wetzel and the franchise reverted back to Furniture Medic. For all relevant time periods, Furniture Medic was registered to sell franchises in North Dakota. Schmitcke did not request written approval of the Securities Commissioner to sell the Furniture Medic franchise to Wetzel.

Wetzel claims a violation of NDCC 51-19-03 and a right to a refund of his \$1000 earnest money for the offer by Schmitcke and Trudeau to sell the Furniture Medic franchise because Schmitcke did not request written approval of the Securities Commissioner. According to NDCC 51-19-04(2),

"the offer or sale of a franchisee for his own account or the offer or sale of the entire area franchise owned by a subfranchisor for his own account is

exempted from the provisions of section 51-19-03 if the sale is not effected by or through a franchisor, provided, however, that no franchisee or subfranchisor may offer or sell a franchise under this subsection without first obtaining the written approval of the commissioner. . . . A sale is not effected by or through a franchisor merely because a franchisor has a right to approve or disapprove a different franchisee."

CONCLUSIONS OF LAW

Under the particular circumstances of this case, Schmitcke's failure to request written approval of the Securities Commissioner to sell his Furniture Medic franchise to Wetzel was not a violation of NDCC 51-19-04(2) because the sale was negotiated and offered through the corporate office of the registered Furniture Medic franchisor. Although the language of NDCC 51-19-04(2) might be interpreted in different ways, the intent of the statute appears to require written approval of the Securities Commissioner for the sale of a franchise only if the sale is not conducted through a registered franchisor. In this case, Furniture Medic was a registered franchisor and Wetzel received a copy of the prospectus from Furniture Medic. Although the parties might have specified in the earnest money agreement whether or not the earnest money would be refunded to Wetzel if he did not buy the franchise, it appears that the intent of the parties was to use the earnest money as a purchase option. Wetzel did not dispute Schmitcke's testimony at the hearing that he lost other prospective buyers while Wetzel refused to return his telephone calls and Wetzel delayed returning the signed prospectus to Trudeau at the corporate office. On the other hand, Wetzel deserved a fair opportunity to review the confidential manuals and to engage in further discussions with Trudeau and other Furniture Medic franchisees before he paid the full amount for a franchise and Wetzel should not be required to pay the full purchase price for a franchise if he made reasonable objections to the terms of the prospectus and he did not sign the prospectus or return it to Furniture Medic.

The respondents did not violate NDCC 51-19-04(2) in offering a franchise to Wetzel. The \$1000 earnest money was intended as a purchase option to prevent Schmitcke from selling to other prospective buyers while Wetzel continued to negotiate terms with the Furniture Medic corporate office. Schmitcke should not be required to refund the earnest money to Wetzel and Wetzel should not be required to pay the full price for a franchise that he has decided not to buy.

Dated this 14th Day of January, 1997 in Bismarck, North Dakota.



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