Lercara Provisions, Inc. v Boar's Head Provisions Co., Inc.
2020 NY Slip Op 31501(U)
May 18, 2020
Supreme Court, Kings County
Docket Number: 503667/2019
Judge: Larry D. Martin
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At an IAS Term, Comm-12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18th day of May, 2020.

P R E S E N T:
HON. LARRY D. MARTIN,
Justice.

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LERCARA PROVISIONS, INC. and SARO ANTHONY LERCARA,

Plaintiff(s),

- against -

BOAR'S HEAD PROVISIONS CO., INC. and FRANK BRUNCKHORST CO., LLC,

Defendant(s).

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DECISION AND ORDER

Index # 503667/2019

Mot. Seq. 3 & 4

The following e-filed papers numbered 37 to 75 read herein:	Papers Numbered
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Defendants, BOAR'S HEAD PROVISIONS CO., INC. (Boar's Head) and FRANK BRUNCKHORST CO., LLC (Brunckhorst and together with Boar's Head, Defendants), move, separately, to dismiss Plaintiffs' amended complaint. Unless otherwise noted, the following is taken from the allegations contained in the amended complaint, which, for purposes of a CPLR 3211 motion to dismiss, the Court deems as true.

Factual Allegations and Background

Boar's Head produces delicatessen meat products that are sold in supermarkets and other retail establishments nationwide under the "Boar's Head" brand. Boar's Head sells its meat and meat-complementary products exclusively to Brunckhorst, the national distributor of Boar's Head's products. Brunckhorst enters into agreements with authorized distributors who then sell Boar's Head's products to supermarkets, delicatessens, and other retailers, all of which are referred to as "accounts." Accounts then sell Boar's Head's products to the public for consumption.

During the relevant time, Plaintiff LERCARA PROVISIONS, INC. (LPI) was an authorized distributor. Plaintiff, SARO ANTHONY LERCARA (Lercara and together with LPI, Plaintiffs) created LPI in February 2011 for the express purpose of becoming an authorized distributor. Specifically, on February 11, 2011, LPI purchased accounts on a Connecticut distribution route (Connecticut Route) from an authorized distributor, nonparty Valley Provisions, for $913,520. At the time of purchase, the Connecticut Route serviced 32 accounts and generated sales of $60,000 per week.

Approximately three years later, in June 2014, LPI was "forced" to forfeit one of its accounts on the Connecticut Route, a Norwalk Stop & Shop, without payment. The reason for the forfeiture was that one of the deli associates at the Norwalk Stop & Shop did not know the relevant "campaign" item when Bobby Martin, Sr., a Brunckhorst owner, visited the store. Earlier, in May 2014, Lercara had been warned by Carmine Durante (Durante) and Leo Hafner

(Hafner), who are both managers for Defendants,[1] that Brunckhorst owners would be visiting various Stop & Shop stores to ensure that all sales associates knew the relevant "campaign" items. Since the deli associate at the Norwalk Stop & Shop did not know the "campaign" item, Hafner and Durante informed Lercara that he must forfeit the Norwalk Stop & Shop as punishment.

Then, in December 2015, LPI was "forced" to sell the Connecticut Route in its entirety. Prior to the forced sale, in June 2015, Michael Gambino (Gambino), Defendants' Senior Zone Manager, asked Lercara if he wanted to purchase a New York route that was owned by nonparty Shields Provisions. Shields Provisions was being "thrown out" because its owner did not live within 50 miles of his route. Lercara learned that Defendants were going to start enforcing their rule that all distributors live within 50 miles of their routes. Gambino and Joseph Pizzurro (Pizzurro), President for Defendants' Northeast Division, suggested to Lercara that he take advantage of the New York opportunity since Lercara lived in New York. Gambino and Pizzurro also provided Lercara with a list of purchasers that Defendants had approved for Lercara to sell his Connecticut Route to. In October 2015, Pizzurro told Lercara that he had to sell his Connecticut Route else Defendants would terminate Plaintiffs' access to Boar's Head's products.

Thereafter, Plaintiffs agreed to purchase Shields Provisions' route for $1,650,000. However, on November 19, 2015, Tim Marko, Defendants' Director of Purveyor Acquisition, Route Sales and New Distribution, instructed Lercara to tell Shields Provisions that Defendants

[1] With regards to all of their substantive allegations, Plaintiffs' amended complaint groups both Boar's Head and Brunckhorst together. Thus, it is unclear whether the named individuals work solely for Brunckhorst or for both companies.

wanted the sale price to be reduced by $360,000 to $1,290,000 and that the deal could not go through without the lower purchase price. Shields Provisions refused to sell its route at the lower price. As a result, on December 17, 2015, at Defendants' request, Lercara terminated negotiations to purchase the route. Within the same month however, Plaintiffs sold the Connecticut Route to six different authorized distributors, leaving Plaintiffs without an account.

Approximately two months later, on or around February 22, 2016, LPI purchased a ShopRite account in New York with Defendants' approval. By October 2016, Defendants approved the purchase of a second account. LPI thus owned two ShopRite accounts in New York, one in Commack and the other in New Hyde Park. However, on October 3, 2016, Lercara was called into a meeting with management whereby Hafner, Gambino and Joseph Picuccio, a Zone Manager, told Lercara that he had to sell his Commack account and forfeit his New Hyde Park account as punishment because one of LPI's employees had stolen a candy bar at one of the ShopRite stores on September 26, 2016. By contrast, Plaintiffs allege that Defendants did nothing to punish Valley Provisions when Defendants discovered that one of Valley Provisions' employees stole Plaintiffs' "Boar's Head" products, worth hundreds of thousands of dollars, from a shared warehouse space in Connecticut.

On November 3, 2016, LPI was "forced" to sell its last account. Thereafter, by letter dated January 12, 2017, Defendants terminated their relationship with Plaintiffs for lack of activity in purchasing Boar's Head's products.

On February 19, 2019, Plaintiffs commenced this action against Defendants alleging New York Labor Law (NYLL) violations including unpaid overtime (first cause of action), failure to provide wage notices and wage statements (second and third causes of action), failure

to provide spread-of-hours pay (fourth cause of action), as well as claims for tortious interference with contract (fifth cause of action), breach of contract (sixth and seventh causes of action), fraudulent inducement (eighth cause of action), economic duress (ninth cause of action), unfair competition and misappropriation (tenth cause of action), and violation of New York General Business Law (GBL) involving disclosures and sales of franchises (eleventh and twelfth causes of action). While the amended complaint alleges that Defendants were Plaintiffs' employer for purposes of the NYLL, in the alternative, Plaintiffs allege that the parties had a franchisor/franchisee relationship.

On July 26, 2019, Defendants filed separate motions to dismiss the amended complaint. Brunckhorst moves to dismiss based on a general release signed by Plaintiffs, expiration of the statute of limitations, and failure to state a claim as to each cause of action. Boar's Head moves to dismiss based on lack of personal jurisdiction in addition to the grounds as set forth by Brunckhorst. Each motion, as well as Plaintiffs' opposition, is summarized below.

Brunckhorst's Motion to Dismiss and Plaintiffs' Opposition

General Release

In connection with the December 2015 transfer/sale of the Connecticut Route to other authorized distributors, Lercara signed, on behalf of LPI, a general release dated November 17, 2015, releasing Defendants from "any and all claims." As such, Brunckhorst argues that Plaintiffs' claims must be dismissed to the extent that they arise from conduct occurring on or before the Connecticut Route transfers as the general release was signed in connection therewith. In addition, Brunckhorst argues that Lercara's attempt to void the release by claiming that he was fraudulently induced to sign the general release, or under economic duress

to do so, must fail because (1) the amended complaint shows that LPI did in fact obtain New York accounts in exchange for selling the Connecticut Route; (2) Plaintiffs fail to allege a fraud that is separate from the subject of the release; and (3) the alleged economic threats cannot be "wrongful" or "improper" because Defendants acted within the bounds of the parties' agreement.[2]

In opposition, Plaintiffs argue that their allegation that the release was obtained under duress is in itself sufficient to support a denial of a motion to dismiss. Specifically, that the amended complaint alleges that if Lercara did not do exactly what the Defendants wanted, i.e. sell the Connecticut Route and sign the general release, Defendants would stop selling him provisions, resulting in the loss of his business yet having continued responsibility to pay the loan. Moreover, that although Defendants told him that he would transition to a route in New York, that this consideration was illusory because Defendants terminated the New York accounts under the pretense that LPI's employee stole a candy bar from one of the accounts. It is Plaintiffs' position that Defendants demanded a release because whatever their status is determined to be by the court, whether employer, franchisor, contract vendor or tortfeasor, their conduct was improper.

NYLL Claims

Brunckhorst argues that Lercara's NYLL claims must be dismissed because Lercara was not an employee of either Boar's Head or Brunckhorst at any time, and that, in any case, Lercara would not be eligible for overtime or spread-of-hours pay because his alleged income, through LPI, exceeds the maximum amount to be qualified for such relief.

[2] Although Brunckhorst relies on the parties' "agreement," Brunckhorst fails to provide said agreement.

In support of their argument that Lercara was not an employee, Brunckhorst contends that Lercara, through LPI, was a *customer* of Brunckhorst who paid Brunckhorst to purchase Boar's Head's provisions. Brunckhorst did not ever pay Plaintiffs. That in fact, Lercara signed a personal guaranty making him personally liable for any debts due to Brunckhorst as a result of LPI's purchase of goods from Brunckhorst. Brunckhorst additionally contends that it did not control Plaintiffs' work in a manner that supports an employment relationship because Plaintiffs concede, in their amended complaint, that they hired their own employees and obtained their own insurance. Moreover, that Plaintiffs do not even allege that Defendants provided Lercara with any benefits, controlled Lercara's schedule, or treated Lercara as an employee for tax purposes.

With regards to Plaintiffs' compensation, Brunckhorst states that spread-of-hours pay is only available for individuals earning minimum wage but that Lercara's own allegations reveal that the Connecticut Route "netted him an income of approximately $728,000 per year" (Amended Verified Complaint, Paragraph 228). Brunckhorst further contends that Plaintiffs' income precludes the overtime claim because employees earning $100,000 or more are not entitled to overtime pay if they regularly perform the responsibilities of an executive, administrator or professional employee and have a primary duty that includes performing office or non-manual work. Brunckhorst argues that Plaintiffs' own allegations reveal that Lercara negotiated transactions to transfer accounts, conducted marketing and advertising campaigns, and hosted events.

Finally, Brunckhorst argues that Lercara is exempt from receiving overtime as an "outside salesman" pursuant to 12 NYCRR §142-2.14[c][5] and NYLL §651[5][d] because Lercara was "customarily and predominantly engaged away from the premises of the employer

and not at any fixed site and location for the purpose of (i) making sales; (ii) selling and delivering articles or goods; or (iii) obtaining orders or contracts for service or for the use of facilities."

In opposition, Plaintiffs argue that they have alleged facts indicating direction and control by Defendants over every aspect of an authorized distributor's business such that authorized distributors should be considered employees. Among other things, Plaintiffs allege that Defendants require authorized distributors to form corporate entities, secure a Federal Employer Identification Number, and obtain worker's compensation and liability insurance in order to "work" for Defendants. Defendants also require distributors' trucks to be painted by approved vendors in accordance with certain specifications and with the "Boar's Head" logo and that the trucks must be repainted upon Defendants' demand. Defendants also require distributors to wear "Boar's Head" apparel at the distributors' expense, pay travel costs to attend training, pay for customer promotional events, and spend thousands of dollars a year on purchasing point-of-sale advertising displays to be used at the distributors' accounts. Distributors cannot engage in any other food-related business and cannot carry competing products on their routes other than Defendants' products. Defendants also determine the prices for which any account must pay to purchase Boar's Head's products, when products will be accepted for return, and what products any given account is allowed to purchase. Defendants provide authorized distributors with a handbook containing rules for distribution, marketing, merchandising, and mandatory product sampling event instructions. Further, that Defendants employ Zone Managers who distributors report to and who conduct "spot checks" on accounts and generate reports on distributor and account performance for Defendants. Finally, that as demonstrated by Plaintiffs' attempted purchase of Shields Provisions' route, Defendants also

determine the price at which authorized distributors can sell their routes to other distributors, who must first be approved by Defendants.

With regards to whether Lercara qualifies as a "highly compensated employee" earning more than $100,000 per year, Plaintiffs contend that because Lercara's duties were primarily manual labor, consisting of driving and delivering goods every day of the week from 3:00 a.m. to 7:00 or 8:00 p.m., he does not qualify as a "highly compensated" employee. Plaintiffs also argue that Lercara is not exempt as an "outside salesman" because Lercara called on customers established by the Defendants and was engaged exclusively in delivering Defendants' goods to their customers.

Tortious Interference

Though collapsed into a single count, Plaintiffs' tortious interference claim alleges interference with two separate contracts, the "Sales Agreement," which refers to Plaintiffs' 2011 contract with Valley Provisions to obtain the Connecticut Route, and Plaintiffs' prospective agreement to buy the Shields Provisions' route.

Brunckhorst argues that both claims are time-barred because the alleged tortious acts occurred in 2015 or before, more than three years before Plaintiffs commenced this action. In addition, Brunckhorst contends that the claims fail because the "Sales Agreement" was a completed transaction and the allegation that Defendants required Plaintiffs to sell the Connecticut Route in 2015 cannot constitute a breach of that Sales Agreement. Moreover, Brunckhorst argues that its "Sales Policy" permits it to enforce the requirement that distributors reside near their accounts so the enforcement of said rule cannot constitute tortious interference. Similarly, because Brunckhorst's pre-approval is required with any route sales,

Brunckhorst argues that it was within their right to disapprove of the Shields Provisions' route transfer and their disapproval cannot, therefore, support a claim for tortious interference.

In opposition, Plaintiffs argue that their tortious interference claims are not time-barred insofar as Plaintiffs purchased the New York route in 2016 and was not forced to forfeit it until November 2016. Plaintiffs also argue that the doctrine of "continuing wrongs" applies to toll the statute of limitations for claims that accrued prior to February 2016 because Plaintiffs have suffered continuing wrongs due to Defendants' conduct.

Plaintiffs also assert that tortious interference may lie without a breach of contract where a defendant interferes with contractual relations by improper means or acts to inflict harm on a plaintiff. Plaintiffs submit that a wide array of conduct can qualify as wrongful or improper, such as withholding consent for wrongful reasons and engaging in conduct amounting to extreme and unfair economic pressure. Plaintiffs point out that they have alleged, in the amended complaint, that Defendants interfered with Plaintiffs' purchase of Shields Provisions' route by demanding that Shield Provisions reduce the sale price by $360,000, causing Shield Provisions to threaten to sue Plaintiffs and resulting in termination of the deal. In addition, Plaintiffs contend that Defendants approved Plaintiffs' purchase of certain ShopRite accounts in Commack, New Hyde Park, and Greenfield, only to force Plaintiffs later on to forfeit all of these accounts for no reason. Plaintiffs further contend that Defendants acted wrongfully by taking no action when Plaintiffs provided Defendants with video surveillance proof that an individual who is a relative of a principal of Boar's Head stole products from Plaintiffs. That in contrast, Defendants forced Plaintiffs to forfeit two ShopRite accounts when learning that one of Plaintiffs' employees stole a candy bar from one of the ShopRite accounts.

Breach of Contract

Plaintiffs allege that Defendants breached the "Distribution Agreement" and breached the duty of good faith and fair dealing when they confiscated the Norwalk Stop & Shop account without payment, divested Plaintiffs of the Connecticut Route, and then divested Plaintiffs of the two New York accounts.

Brunckhorst argues that Plaintiffs fail to state a claim for breach of contract because the "Distribution Agreement" that Plaintiffs rely on is, in fact, Defendants' Sales Policy which Plaintiffs previously acknowledged was not "a contract or distribution agreement."[3] Brunckhorst also argues that Plaintiffs fail to state a claim for breach of contract because the complaint fails to allege any contractual provision upon which the claim is based.

In opposition, Plaintiffs contend that Brunckhorst's motion asks the court to assume that Plaintiffs' breach of contract claim rests on the Sales Policy without attaching or identifying the contents of said Sales Policy and then goes on to assert that the Sales Policy cannot be a contract because Defendants required Lercara to sign a document stating that the Sales Policy is not a contract. It is Plaintiffs' position that a breach of contract claim has been adequately plead and cannot be utterly refuted by an out-of-context, conclusory statement signed by Lercara that the contract is not a contract.

[3] Brunckhorst attaches, as an exhibit, a one-page form entitled "Acknowledgement" signed by Lercara which provides: "The foregoing Sales Policy is not a contract or distribution agreement. Your signature on this page does not create a contractual relationship but simply confirms that you have read and understand the Sales Policy. Failure to sign this Acknowledgement may result in the termination of your business relationship with the Company. This Sales Policy may not be copied or otherwise reproduced."

Fraudulent Inducement

According to Brunckhorst, Plaintiffs' fraudulent inducement claim is premised on the allegation that Defendants selectively enforce portions of their Sales Policy, which induced Plaintiffs to transfer the Connecticut Route and to lose the New York ShopRite accounts. Brunckhorst argues that the fact that Defendants had not previously enforced their policy, even if true, does not transform a truthful description of company policy into a misrepresentation. Moreover, because Lercara signed an acknowledgment confirming that he read and understood the Sales Policy, Plaintiffs were on notice of the Sales Policy's contents and therefore cannot bring a fraud claim arising out of an alleged misrepresentation about it. Finally, Brunckhorst argues that if Plaintiffs' breach of contract claims survive dismissal, the instant fraud claim must be dismissed as duplicative.

In opposition, Plaintiffs maintain that Defendants made numerous, materially false representations upon which Lercara relied when purchasing and selling accounts and signing a release. Specifically, that Defendants misrepresented the reason for forcing Lercara out of his Connecticut Route, telling him that it was because he did not reside in Connecticut, a fact that was known to Defendants when Lercara first became a distributor. Plaintiffs allege that Defendants were in fact downsizing Lercara's route and securing a general release, only to later force him out altogether. That Defendants further represented that Lercara could purchase a route in New York if he abided by the terms that they established for selling his Connecticut Route. But that a short time thereafter, Defendants took away the New York accounts on the basis that one of Lercara's employee failed to pay for a candy bar.

Economic Duress

Plaintiffs allege that "Defendants committed wrongful threats and acts, which were sufficiently coercive to cause Plaintiffs, faced with no reasonable or economically feasible alternative, to agree to the unfair and unfavorable conditions of the sale of all their routes" (Amended Verified Complaint, Paragraph 231), including a reduced sales price for the Connecticut Route.

Brunckhorst argues that Plaintiffs' economic duress claim must be dismissed because Defendants are not parties to the sales contracts that Plaintiffs seek to void and, to the extent that Plaintiffs' claim is comprehensible, acts such as withholding approval of a route's sale or ceasing the sale of products to any distributor, are within Defendants' rights to do. Brunckhorst also argues that Plaintiffs' three-year delay in bringing this claim precludes the application of the economic duress doctrine.

In opposition, Plaintiffs argue that if Lercara were not under economic duress, he would have continued to service the Connecticut Route but that he had no choice but to sell the route because Defendants would have refused to sell him their product unless he complied with their demand to sell. Plaintiffs argue that Defendants control all of their distributors as franchisees but without reducing their relationship to writing. Plaintiffs contend that if the parties' relationship is properly construed as that of franchisor/franchisee, the general release relied upon by Defendants is prohibited by law.

Unfair Competition and Misappropriation

Plaintiffs allege that "[t]hrough great personal effort, work, expense and sacrifice, LERCARA researched, devised, and tested techniques and systems to become an effective distributor of Boar's Head products and built successful and lucrative routes" (Amended

Verified Complaint, Paragraph 238). But that Defendants advised Lercara "that he must sell his route and the price at which he must sell it" which "was substantially less than fair market value" (Id. at Paragraphs 240-41).

Brunckhorst argues that Plaintiffs fail to state a claim for unfair competition involving misappropriation because Plaintiffs fail to allege that Defendants "took" or "used" their property. Further, that Brunckhorst is Plaintiffs' supplier, not a competitor. Moreover, as asserted previously, Brunckhorst contends that it had discretion to approve or disapprove of any route transfer and therefore, such disapprovals cannot be grounds for an unfair competition claim.

In opposition, Plaintiffs argue that unfair competition is a flexible claim encompassing an almost limitless set of facts. That they have sufficiently stated a claim for unfair competition and misappropriation because (1) Plaintiffs had a property interest in the Connecticut Route that Lercara paid nearly one million dollars to purchase and spent countless hours to service; (2) Defendants forced Plaintiffs to sell the Connecticut Route thus preventing Plaintiffs from profiting from the route; and (3) under New York law, a party need not be a direct competitor to institute an unfair competition claim.

Franchise Act Claims

Plaintiffs allege that Defendants violated the New York State Franchise Act, GBL §687, by making misrepresentations in connection with Plaintiffs' "purchase [of] franchises to distribute BOAR'S HEAD products in New York" and by not providing the required prospectus and franchise agreement (Amended Verified Complaint, Paragraph 248-71).

Brunckhorst argues that Plaintiffs fail to state a claim under the Franchise Act because there are no allegations of a franchise and that, in fact, none exists. Brunckhorst contends that

there is no franchise agreement and Plaintiffs do not even allege that they paid a franchise fee. Nor could Plaintiffs allege payment of a franchise fee since their payments to "buy" routes or accounts were made to other distributors, not Defendants. Further, Brunckhorst argues that even if Plaintiffs had sufficiently alleged a franchise, their claims are time-barred because the applicable three years limitations period begins to run when the parties enter into a franchise agreement, i.e., when the distributor purchases the franchise from the franchisor. According to Defendants, Plaintiffs purchased the Connecticut Route more than eight years ago in 2011 and, with regards to the New York ShopRite accounts, Brunckhorst approved LPI as a distributor no later than January 26, 2016, which is more than three years before this action's filing, which occurred on February 19, 2019.

In opposition, Plaintiffs argue that their allegations are more than sufficient to meet New York's flexible definition of a "franchise." Further, that a franchise fee can be express or implied and direct or indirect and that the amended complaint is full of factual allegations demonstrating that Plaintiffs were consistently forced to make payments, forgo payments or other business benefits, give up routes and otherwise capitulate to Defendants' demands in exchange for the right to serve as an authorized distributor. With regards to whether these claims are time-barred, Plaintiffs state that they purchased the New York ShopRite accounts from another distributor on February 22, 2016 and Brunckhorst's contention that Defendants "approved" the purchase earlier, in January 2016, is of no moment.

Punitive Damages

Brunckhorst argues that Plaintiffs' request for punitive damages must be dismissed because Plaintiffs' NYLL and the Franchise Act claims do not support punitive damages, Plaintiffs' breach of contract claims are unique to Plaintiffs and do not allege conduct of public

concern or significance, and Plaintiffs' tort-based claims are run-of-the-mill business grievances that fail to allege misconduct evincing a high degree of moral turpitude.

In opposition, Plaintiffs argue that Defendants' tortious actions are not isolated occurrences but have been repeated against numerous distributors. Plaintiffs contend that an award of punitive damages will be the only mechanism that will curb Defendants' conduct.

BOAR'S HEAD MOTION TO DISMISS AND PLAINTIFFS' OPPOSITION

Boar's Head incorporates Brunckhorst's arguments for dismissal of Plaintiffs' amended complaint.

In addition, Boar's Head moves to dismiss the amended complaint as against it on the basis of lack of personal jurisdiction. It is undisputed that Boar's Head is a Delaware corporation with its principal place of business in Florida. Boar's Head maintains that it is solely a manufacturer and that none of its factories are based in New York. According to the affidavit of Steven Kourelakos (Kourelakos), Boar's Head's Chief Financial Officer, Boar's Head has not maintained an office in Brooklyn, or anywhere else in New York State, for more than a decade. Kourelakos also avers that Boar's Head owns no property in New York, is not authorized to do business in New York, and has no employees in New York. Boar's Head confirms that Brunckhorst is the exclusive national distributor for its product and that it is Brunckhorst who contracts with entities like LPI to sell Boar's Head's products through a distribution network.

Boar's Head also argues that there is no basis for long-arm jurisdiction because Plaintiffs' allegations do not concern Boar's Head's manufacturing activities. Rather, they concern LPI's distribution relationship with Brunckhorst. Boar's Head argues that Plaintiffs'

collectively pleaded allegations, which refer to both defendants as "Boar's Head," is an attempt to bootstrap Boar's Head to Brunckhorst for purposes of establishing personal jurisdiction which the court should not allow.

Lastly, Boar's Head argues that Plaintiffs' amended complaint fails to state a basis for alter ego liability because it fails to allege facts that Boar's Head exercised "complete domination" of Brunckhorst or that the Defendants misused the corporate form to injure Plaintiffs. According to Boar's Head, Plaintiffs rely on conclusory allegations that are alleged only upon "information and belief," which are insufficient for pleading alter ego liability.

In opposition, Plaintiffs contend that Boar's Head has a New York presence as reflected by the fact that (1) Boar's Head was listed as a "2016 Member" of the North Brooklyn Business Exchange in its 2016 annual report; (2) in a 2015 report for food protection for the Listeria Retail Guidelines Committee, Eric Hernandez is listed as an employee of Boar's Head in Brooklyn, New York; (3) Boar's Head's online employment opportunity listings identify an office in Brooklyn, New York; and (4) Boar's Head has been a plaintiff in New York courts or has otherwise participated in New York judicial proceedings.

Plaintiffs also contend that New York has long-arm jurisdiction over Boar's Head because Boar's Head's "agents" communicated with Lercara in New York, recommending that Plaintiffs purchase New York routes only to force Plaintiffs to relinquish them thereafter, and that as such, Boar's Head committed a tort that occurred in New York. Further, that Boar's Head must be deemed to reasonably expect consequences in New York as it cannot be disputed that Boar's Head derives substantial revenue from interstate commerce insofar as it manufactures products for sale across the nation.

Finally, Plaintiffs argue that they have plead specific allegations with regards to alter ego liability against Boar's Head. Specifically, that the amended complaint alleges that Defendants are owned by the same family, are governed by many of the same individuals, and conduct business exclusively with one another. That managers for Boar's Head give direction to distributors in memoranda issued on Brunckhorst stationary and vice versa. And that Defendants regularly commingle resources and personnel and share an office space. Also, that it would be inappropriate and premature to deny Plaintiffs an opportunity to prove their claim of alter ego liability in light of the foregoing specific allegations.

By way of reply, Boar's Head argues that Plaintiffs' evidence, most of which is unauthenticated and inadmissible material found on the internet, fails to establish that Boar's Head has an office in New York and that, in any case, same would not be sufficient to assert general jurisdiction under *Daimler*. As to the specific examples found on the internet by Plaintiffs, Boar's Head submits that the employee of "Boar's Head Provisions" reflected on the membership list of the "Listeria Retail Guidelines Committee," is shown as working in Petersburg, Virginia, a manufacturing location. And that the employment opportunity listing is a "Boar's Head Brand" employment listing which expressly states that the term "Boar's Head" may include Boar's Head Provisions Co., Inc., Frank Brunckhorst Co. LLC, or one of the affiliated companies.

Discussion

BRUNCKHORST'S MOTION TO DISMISS

General Release

As an initial matter, the court finds that Brunckhorst's motion to dismiss Plaintiffs' amended complaint based on the general release must be denied. "Generally, a valid release that is clear and unambiguous on its face constitutes a complete bar to an action on a claim which is the subject of the release absent fraudulent concealment, misrepresentation, mutual

mistake or duress" (*Powell v Adler*, 128 AD3d 1039, 1040 [2d Dept 2015] [*internal citations and quotation marks omitted*]). "A signed release shifts the burden of going forward . . . to the [plaintiff] to show that there has been fraud, duress or some other fact which will be sufficient to void the release" (*Id.* [*internal citations and internal quotations omitted*]). A general release, like any contract, may be voided on the ground of economic duress where the complaining party was compelled to agree to its terms by means of a wrongful threat which precluded the exercise of its free will (*see Austin Instrument v Loral Corp.*, 29 NY2d 124, 130 [1971]).

Here, the allegations in the amended complaint are sufficient to raise an issue of fact as to whether the release is void because Lercara signed the subject release under economic duress. As such, the motion to dismiss on this basis must be denied.

NYLL Claims

Next, the Court turns to whether Brunckhorst has established that Lercara cannot be deemed an "employee." NYLL Article 6 defines "employee" as "any person employed for hire by an employer in any employment" (NYLL §190[2]). However, "employee" excludes independent contractors (*see Hernandez v Chefs Diet Delivery*, LLC, 81 AD3d 596, 597 [2d Dept 2011]), anyone employed in an "executive, administrative or professional capacity" (see 12 NYCRR §142-2.14[c][4]) and "outside salespersons" (see 12 NYCRR §142-2.14[c][5]).

The determination of whether an employee-employer relationship exists depends on evidence that the employer exercises either control over the results produced or over the means used to achieve the results (*see 12 Cornelia St., Inc. v Ross*, 56 NY2d 895, 897 [1982]). "Factors relevant to assessing control include whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule" (*Bynog v Cipriani Group*, 1 NY3d

193, 198 [2003]). "Where the proof on the issue of control presents no conflict in evidence or is undisputed, the matter may properly be determined as a matter of law" (*Barak v Chen*, 87 AD3d 955, 957 [2d Dept 2011]).

Here, based on the undisputed facts, the Court finds that Lercara cannot be deemed an employee of Defendants as a matter of law. Significantly, Lercara does not receive any pay, salary, or fringe benefits from Defendants. Rather, Lercara earns his pay through sales from his accounts. Moreover, Lercara's substantial earnings during the time that he serviced the Connecticut Route, purportedly in the realm of $780,000 per year, also indicate that he is not an "employee" entitled to overtime and spread-of-hours pay. In addition, Defendants do not control the timing of Plaintiffs' deliveries or otherwise dictate Plaintiffs' work schedule. Moreover, Plaintiffs have the discretion to hire their own employees to service their route, allowing Lercara to work as little or as much as he desires. The elements of control relied upon by Plaintiffs, such as Defendants requiring their distributors to wear logo-bearing uniforms, drive logo-bearing trucks, and the control by Defendants of all merchandise pricing, do not exclusively indicate an employee-employer relationship since these elements support other arrangements such as that of independent contractor and franchisor-franchisee.

With regards to whether Lercara is exempt because he is employed in an "executive, administrative or professional capacity" under 12 NYCRR §142-2.14[c][4], the Court finds that this provision is inapplicable because Lercara's duties do not fit the definition of what an "executive," "administrative," or "professional" does (see 12 NYCRR §142-2.14[c][4][i-iii]). However, Lercara may qualify as an "outside salesperson" although the Court declines to find as such as a matter of law. An "outside salesperson" is "an individual who is customarily and predominantly engaged away from the premises of the employer and not at any fixed site and

location for the purpose of: (i) making sales; (ii) selling and delivering articles or goods; or (iii) obtaining orders or contracts for service or for the use of facilities" (12 NYCRR §142-2.14[c][5]). Here, according to the amended complaint, Lercara was only engaged at Defendants' premises for occasional meetings. It is undisputed that much of Lercara's work involved selling and delivering Boar's Head's goods to each of Plaintiffs' accounts. The only issue is whether Lercara can be considered to be "not at any fixed site" since the accounts on a distributor's route were, more or less, fixed.

Based on the foregoing, Lercara cannot be considered an "employee" for purposes of the NYLL. Thus, Brunckhorst's motion to dismiss Plaintiffs' NYLL causes of action must be granted.

Tortious Interference

Next, the Court turns to whether Plaintiffs have stated a cause of action for tortious interference. "The elements of tortious interference with contractual relations are (1) the existence of a contract between the plaintiff and a third party, (2) the defendant's knowledge of the contract, (3) the defendant's intentional inducement of the third party to breach or otherwise render performance impossible, and (4) damages to the plaintiff" (*Anesthesia Assoc. of Mount Kisco, LLP v Northern Westchester Hosp. Ctr.*, 59 AD3d 473, [2d Dept 2009][*citations omitted*]).

Here, Plaintiffs fail to state a claim for tortious interference with contractual relations because there is no allegation that any third party breached its contract with Plaintiffs or did not otherwise perform, let alone that Defendants induced such a breach.

In addition, Plaintiffs' claim for tortious interference, to the extent premised on the loss of the Connecticut Route and the loss of the ability to purchase the route from Shields

Provisions, would be time-barred. A tortious interference claim has a three-year statute of limitations (*see* CPLR 214 [4]; *Pursnani v Stylish Move Sportswear, Inc.*, 92 AD3d 663, 664 [2d Dept 2012]). "The statute of limitations begins to run on the date of injury or when all of the elements of the tort could be truthfully alleged" (*Sapienza v Notaro*, 172 AD3d 1418, 1420 [2d Dept 2019]). "The cause of action for tortious interference is not enforceable until damages are sustained and that point, rather than the wrongful act of the defendant or discovery of the injury by plaintiff, is the relevant date for marking accrual" (*Id. citing Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 92 [1993]]).

Here, based upon the allegations in the amended complaint, Plaintiffs sustained damages in December 2015, when the Connecticut Route was sold and negotiations with Shields Provisions terminated due to Defendants' alleged interference. However, the instant action was not commenced until February 19, 2019, which is more than three years from the date of accrual. Contrary to Plaintiffs' assertion, the continuing wrong doctrine does not operate to toll the limitations period. "The continuing wrong doctrine is usually employed where there is a series of continuing wrongs and serves to toll the running of a period of limitations to the date of the commission of the last wrongful act" (*Affordable Hous. Assoc., Inc. v Town of Brookhaven*, 150 AD3d 800, 802 [2d Dept 2017]). Here, all of the acts alleged by Plaintiffs–forcing the sale of the Connecticut Route and the termination of the Shields Provision route transfer--constitute single and distinct events.

Based on the foregoing, Brunckhorst's motion to dismiss Plaintiffs' claims for tortious interference must be granted.

Breach of Contract

That part of Brunckhorst's motion to dismiss Plaintiffs' claims for breach of contract must be denied. Regardless of whether the document is referred to as a "sales policy" or an "agreement," Brunckhorst fails to attach said document to its motion. Brunckhorst cannot obtain dismissal of Plaintiffs' breach of contract claim by asserting that what Plaintiffs claim to be a contract is not a contract without providing said document to the Court.

Fraudulent Inducement

That part of Brunckhorst's motion to dismiss Plaintiffs' claim for fraudulent inducement is also denied. The elements of a cause of action sounding in fraudulent inducement are "representation of a material existing fact, falsity, scienter, deception and injury" (*Dalessio v Kressler*, 6 AD3d 57, 61 [2d Dept 2004]).

Here, Plaintiffs have sufficiently stated a claim for fraudulent inducement insofar as Plaintiffs allege that they forfeited a more lucrative route on the representation that Plaintiffs would be able to purchase a route in New York, which thereafter proved to be illusory because Defendants forced Plaintiffs to forfeit the New York route for specious reasons. While Brunckhorst relies on the "Acknowledgment" signed by Lercara as proof that Plaintiffs cannot establish reasonable reliance on any alleged misrepresentation, the Court cannot analyze the strength of the "Acknowledgment" because Brunckhorst fails to provide the "Sales Policy" that the "Acknowledgment" refers to. In addition, at this juncture, the Court finds it premature to dismiss this claim as duplicative of the breach of contract claim. As such, Brunckhorst's motion to dismiss Plaintiffs' claim for fraudulent inducement is denied.

Economic Duress

That part of Brunckhorst's motion to dismiss Plaintiffs' cause of action for economic duress must be granted. Under New York law, economic duress can become a cause of action asserted against an opposing party to a contract where:

> [t]he theory on which the Plaintiff seeks recovery permits a complaining party to void a contract and recover damages when it establishes that it was compelled to agree to the contract terms because of a wrongful threat by the other party which precluded the exercise of its free will. The existence of economic duress is demonstrated by proof that one party to a contract has threatened to breach the agreement by withholding performance unless the other party agrees to do some further demand (*805 Third Avenue Co. v M.W. Realty Associates*, 58 NY2d 447, 448 [1983]).

Here, Plaintiffs seek to recover damages against Defendants for compelling Plaintiffs to sell their routes and agree to unfavorable sales terms, however, Defendants are not parties to these contracts. Thus, there is no contract to void vis-à-vis Defendants. Plaintiffs may, however, assert economic duress to void the general release since the general release was executed by LPI in favor of Defendants.

Unfair Competition and Misappropriation

That part of Brunckhorst's motion to dismiss Plaintiffs' cause of action for unfair competition and misappropriation must also be granted. The claim of unfair competition requires bad faith misappropriation of the skills, expenditures and labor of another (*LoPresti v Mass. Mut. Life Ins. Co.*, 30 AD3d 474, 476 [2d Dept 2006]). "Under New York law, "[a]n unfair competition claim involving misappropriation usually concerns the taking and use of

the plaintiff's property to compete against the plaintiff's own use of the same property"" (*ITC Ltd. v Punchgini, Inc.*, 9 NY3d 467, 478 [2007]; see also *Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 56 [1st Dept 2015]). "The term "commercial advantage" has been used interchangeably with "property" within the meaning of the misappropriation theory" (*ITC Ltd. v Punchgini, Inc., supra*).

Here, Plaintiffs' allegations do not state a claim for unfair competition. Plaintiffs fail to allege a misappropriation of their property or any commercial advantage. Moreover, there is no competition between the parties nor do Plaintiffs even allege as much. Accordingly, this claim must be dismissed.

Franchise Act Claims

That part of Brunckhorst's motion to dismiss Plaintiffs' Franchise Act claims is denied. Brunckhorst fails to establish as a matter of law that a "franchise" does not exist or that a "franchise fee" was not paid by Plaintiffs.

Under GBL §681[3], a "franchise" is defined as "a contract or agreement, either expressed or implied, whether oral or written, between two or more persons by which:

> (a) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor, and the franchisee is required to pay, directly or indirectly, a franchise fee, or
> (b) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate, and the franchisee is required to pay, directly or indirectly, a franchise fee."

Under GBL §681[7], a "franchise fee" "means any fee or charge that a franchisee or subfranchisor is required to pay or agrees to pay directly or indirectly for the right to enter into a business under a franchise agreement or otherwise sell, resell or distribute goods, services, or franchises under such an agreement, including, but not limited to, any such payment for goods or services."

Here, based upon the foregoing definitions and a review of Plaintiffs' allegations, Brunckhorst fails to establish that a franchise does not exist or that a franchise fee was not paid, indirectly, by Plaintiffs.

With regards to whether these claims are untimely, the statute of limitations to bring a claim under the Franchise Act is "three years after the act or transaction constituting the violation" (GBL §691[4]; *see Leung v Lotus Ride, Inc.*, 198 AD2d 155, 156 [1st Dept 1993]).

Here, to the extent that Plaintiffs allege violations of the Franchise Act on or after February 19, 2016, such claims are not time-barred. Thus, dismissal of this cause of action based on statute of limitations grounds must be denied with respect to those violations occurring on or after February 19, 2016.

Punitive Damages

That part of Brunckhorst's motion to dismiss Plaintiffs' request for punitive damages is granted. "It is well settled that punitive damages may not be awarded to redress a private wrong, and, accordingly, that such damages are not available "in the 'ordinary' fraud and deceit case" (*Kelly v Defoe Corp.*, 223 AD2d 529, 529 [2d Dept 1996][*citing Walker v Sheldon*, 10 NY2d 401, 404 [1961]). "Punitive damages may only be recovered in a fraud action where the fraud is aimed at the public generally, is gross, and involves high moral culpability" (*Id.*). A defendant's wrongdoing must be, not only intentional, but must evince a high degree of

moral turpitude and demonstrate such wanton dishonesty as to imply a criminal indifference to civil obligations (*Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457, 458 [1st Dept 2011]). Here, the only remaining cause of action supporting a claim for punitive damages is Plaintiffs' fraudulent inducement claim. Taking all of Plaintiffs' allegations as true, the misconduct alleged here is not aimed at the public generally and does not resemble the egregious wrongdoing required for a punitive damages claim. As such, the request for punitive damages is dismissed.

BOAR'S HEAD'S MOTION TO DISMISS

The Court now turns to Boar's Head's separate motion to dismiss the amended complaint as against it based on lack of personal jurisdiction.

"Under modern jurisprudence, a court may assert general all-purpose jurisdiction or specific conduct-linked jurisdiction over a particular defendant" (*Aybar v Aybar*, 169 AD3d 137, 142-43 [2d Dept 2019][*citing Daimler AG v Bauman*, 571 US 117, 122 [2014]]). "A court with general jurisdiction may hear any claim against that defendant, even if all the incidents underlying the claim occurred in a different State" (*Id.* at 143). In *Daimler*, the Supreme Court rejected a standard, used prior to *Daimler*, that would allow the exercise of general jurisdiction in every state in which a corporation is engaged in a substantial, continuous, and systematic course of business (*Id.* at 144). Instead, the Supreme Court instructed that, with respect to corporations, the paradigm bases for general jurisdiction are the place of incorporation and principal place of business (*Daimler AG v Bauman*, 571 US at 137). Although the Court did not limit the exercise of general jurisdiction to those two forums, it left open only the possibility of an "exceptional case" where a corporate defendant's operations in another state

were "so substantial and of such a nature as to render the corporation at home in that State" (*Id.* at 139 n 19).

Here, it is undisputed that Boar's Head is incorporated in Delaware and that its principal place of business is in Florida. There is nothing to suggest, either in Plaintiffs' amended complaint or in their opposition to the instant motion, that Boar's Head's operations in New York are "so substantial and of such a nature as to render the corporation at home" in New York. Thus, there is no basis for general jurisdiction here.

With regards to whether there is specific conduct-linked jurisdiction or jurisdiction under an alter ego theory, the Court finds that further discovery is warranted. Under CPLR §302[a], a New York court has specific jurisdiction over a non-domiciliary who: (1) transacts any business within the state or contracts anywhere to supply goods or services in the state; (2) commits a tortious act within the state; or (3) commits a tortious act without the state causing injury to person or property within the state if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state; or (ii) expects or should reasonably expect the act to have consequences in the state, and derives substantial revenue from interstate or international commerce.

"Where personal jurisdiction exists over a defendant, jurisdiction over his alter-ego is proper as well" (*Transasia Commodities Ltd. v Newlead JMEG, LLC*, 45 Misc.3d 1217(A), 2014 NY Slip Op 51612(U) [Sup Ct, NY County 2014][*citing So. New Eng. Tel. Co. v Global NAPs Inc.*, 624 F3d 123, 138 [2d Cir 2010][finding that the allegation that each of the appellants was an "alter ego," if established, "would clearly support a finding of personal jurisdiction."]]). To state a claim for alter-ego liability, a plaintiff is generally required to allege

"complete domination of the corporation" and "that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiffs injury" (*Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 407 [1st Dept 2014]). Because a decision to pierce the corporate veil in a given instance will necessarily depend on the attendant facts and equities, New York cases may not be reduced to definitive rules governing the varying circumstances when the power may be exercised (*Morris v State Dep't of Taxation & Fin.*, 82 NY2d 135, 141 [1993]).

Here, Plaintiffs have alleged sufficient facts indicating that a basis to exercise personal jurisdiction over Boar's Head may exist (*see Shore Pharm. Providers, Inc. v Oakwood Care Ctr., Inc.*, 65 AD3d 623, 624 [2d Dept 2009]["...plaintiffs need not make a prima facie showing of jurisdiction, but instead must only set forth 'a sufficient start, and show [] their position not to be frivolous'"][*citations omitted*]). For example, Plaintiffs allege that managers with titles under the Boar's Head company give direction in memoranda issued on Brunckhorst stationary and that managers with titles under the Brunckhorst company give direction in memoranda issued on Boar's Head stationary (Amended Verified Complaint, Paragraphs 14-15). Plaintiffs also allege that both companies "regularly comingle[sic] resources and personnel, share office space in the same location, 400 Sarasota Quay, Sarasota, Florida, are influenced and governed by many of the same individuals, and operate with a common mission and goal" (*Id.* at Paragraph 16).

In addition, Boar's Head is silent as to whether the management individuals named in Plaintiffs' amended complaint are solely employees of Brunckhorst and whether they take direction from any person working for Boar's Head. Despite Plaintiffs' numerous allegations that Boar's Head and Brunckhorst operate as one company, the Court notes that Boar's Head

fails to enumerate the ways in which the two companies are distinct. There are numerous factors relevant to an inquiry regarding whether one company can be deemed an alter ego of another, of which some are enumerated in *Wm. Passalacqua Builders, Inc. v Resnick Developers South, Inc.*, 933 F2d 131 [2d Cir. 1991].[4] However, Boar's Head fails to touch on any of the factors or otherwise establish the absence of alter ego liability. As such, Boar's Head's motion to dismiss Plaintiffs' amended complaint for lack of personal jurisdiction is denied without prejudice to renew after discovery.

Conclusion

It is hereby

ORDERED that Brunckhorst's motion to dismiss Plaintiffs' amended complaint is granted to the extent that Plaintiffs' NYLL claims, tortious interference, economic duress, unfair competition and punitive damages claim are dismissed but that the motion is otherwise denied; and it is further

[4] "[T]he triers of fact are entitled to consider factors that would tend to show that defendant was a dominated corporation, such as: (1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, i.e., issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated corporation at arm's length, (8) whether the corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own" (*Wm. Passalacqua Builders, Inc. v Resnick Developers South, Inc.*, 933 F2d 131, 139 [2d Cir. 1991].).

ORDERED that Boar's Head's motion to dismiss Plaintiffs' amended complaint is denied.

This constitutes the decision and order of the Court.

E N T E R,

LARRY D. MARTIN, J.S.C.