

<b>Buttar v Elite Limousine Plus, Inc.</b>
2022 NY Slip Op 31035(U)
March 29, 2022
Supreme Court, New York County
Docket Number: Index No. 651088/2019
Judge: Melissa Crane
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. MELISSA A. CRANE **PART** **60M**

*Justice*

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SHAHID BUTTAR, HAROON RASHID, JOSE RODRIGUEZ,  
ARTHUR NACE, CHAUDHRY AHSAN, ZURAB  
ANUASHVILI, GAGANJOT ARORA, SHIMON ASOL,  
SIKANDER AWAN, SATWINDERJIT BAL, STEFAN  
BERNICZKY, VINCENTE DUARTE, HOSSAME GABER,  
KHIZAR HUSSAIN, MUHAMMAD IJAZ, SHAIR JAWAID,  
ERIC KIBANDA, VARINDER KUMAR, BIMAL KUNWAR,  
GREGORY LACHOWICZ, JAN LUKASEWICZ, TANWEER  
MUHAMMAD, ZAWAR SHAHID, RAVINDER SINGH,  
KULDIP SINGH, CHARANJEET SINGH, RATJWINDER  
SINGH, LAKHBIR SINGH, VIOREL SIRBU, SARABJEET  
SODHI, SUKHVINDER SODHI, ROMAN STASINTCHOUK,  
SALMAN TARAR, RABAH TEMZI, ITALO VERA, MILTON  
VILLAGOMEZ, AHMAD KHAN, MUHAMMAD YOUNIS  
MALIK, INDIVIDUALLY AND ON BEHALF OF ALL OTHER  
SIMILARLY SITUATED PLAINTIFFS,

Plaintiffs,

- v -

ELITE LIMOUSINE PLUS, INC., FIRST CORPORATE  
SEDANS, INC., GUY BEN ZION, AMIR BEN ZION,  
SHAFQUAT CHAUDHARY, and DOE 1-10,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 50, 51, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178

were read on this motion to/for ORDER MAINTAIN CLASS ACTION.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 163, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 179-1, 200

were read on this motion to/for DISMISSAL.

Motion sequence nos. 001 and 004 are consolidated for disposition.

This putative class action concerns franchise rights plaintiffs purchased from defendant First Corporate Sedans, Inc. (FSC), a black car company that a competitor, defendant Elite

Limousine Plus, Inc. (Elite) later acquired.<sup>1</sup> In motion sequence no. 001, plaintiffs move, pursuant to CPLR article 9, for class certification, to appoint plaintiffs Shahid Buttar (Buttar), Haroon Rashid (Rashid), Stefan Berniczky (Berniczky), Muhammad Tarar (Tarar)<sup>2</sup> and Jose Rodriguez (Rodriguez) (collectively, the Proposed Lead Plaintiffs) as lead plaintiffs and to appoint Slarskey LLC and Imbesi Law P.C. as class counsel. In motion sequence no. 004, Elite and defendant Shafquat Chaudhary (Chaudhary) (together, the Elite Defendants) move, pursuant to CPLR 3211 (a) (5) and (a) (7), to dismiss the claims brought by plaintiffs Shimon Asol (Asol), Viorel Sirbu (Sirbu), Arthur Nace (Nace), Shair Jawaid (Jawaid) and Roman Stasintchouk (Stasintchouk) and the first, second, third, fifth, sixth, seventh, eighth and tenth causes of action.

### **BACKGROUND**

Plaintiffs are professional drivers (NYSCEF Doc No. 130, ¶ 1). FCS, with its subsidiary OZOcar, maintains a fleet of more than 375 vehicles<sup>3</sup> (*id.*, ¶ 50). Defendant Amir Ben Zion (Amir) is a majority owner of FCS and is its former chief executive officer (*id.*, ¶ 51). His brother, defendant Guy Ben Zion (Guy) (together with Amir, the Ben Zions), is an owner of FCS and was a nominal executive officer and its president through 2017 (*id.*, ¶ 52). Elite is based in Long Island City, New York (*id.*, ¶ 53). Chaudhary is Elite's president (*id.*, ¶ 54).

Beginning in the 1990s through May 2017, plaintiffs purchased franchises from FCS with each plaintiff paying between \$25,000 to \$40,000, amortized over a 5- to 10-year period, for which they received the right to drive on FCS's network, a percentage of the revenues for each

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<sup>1</sup> A "black car" is "a for-hire vehicle dispatched from a central facility whose owner holds a franchise from the corporation or other business entity which operates such central facility, or who is a member of a cooperative that operates such central facility ..." (Administrative Code of the City of New York § 19-502 [u]).

<sup>2</sup> The court presumes "Muhammad Tarar" is "Salman Tarar" (NYSCEF Doc No. 130, NY St Cts Elec Filing [NYSCEF] Doc No. 130, Laurence I. Cohen [Cohen] affirmation, Ex 1, ¶ 43).

<sup>3</sup> The "fleet" consists of the drivers who purchased franchises (NYSCEF Doc No. 130, ¶ 56). Each driver owned their vehicles and paid for their own motor vehicle insurance (*id.*, ¶ 68).

completed journey, and the ability to transfer their franchise rights to a third-party either directly or through an “on the shelf” consignment process managed by FCS (*id.*, ¶¶ 1-2, 60 and 66).

Each plaintiff is an independent contractor to FCS (*id.*, ¶ 2).

To purchase a franchise, an existing FCS driver had to sponsor an incoming driver, and each incoming driver had to execute a written acknowledgement that he or she had reviewed a franchise disclosure document (*id.*, ¶ 59). An incoming driver also executed a transfer sales agreement (TSA) and an independent contractor agreement (ICA) (together, the FCS Agreements) (*id.*, ¶¶ 59 and 61; oral argument 7/28/21 tr at 38). Pursuant to the TSA, each driver purchased a “system,” or a four-digit dispatch radio number within the FCS network unique to that driver (NYSCEF Doc No. 130, ¶ 62), and made payments in installments on a set schedule (*id.*, ¶ 66). Plaintiffs believed they were entering into the TSAs with FCS (*id.*, ¶ 63). FCS managed and collected fees on the process, and the TSA contained numerous references to FCS (*id.*, ¶¶ 63-64). However, the TSAs stated that FCS was not a party (*id.*, ¶ 64). Instead, each plaintiff, as an incoming driver, and an existing FCS driver, as the outgoing driver selling a franchise, executed the TSA (*id.*, ¶ 63). Pursuant to the ICA, plaintiffs agreed to pay FCS a commission of approximately 18% of the billable fee for each completed journey (*id.*, ¶ 70). The FCS Agreements gave each driver, upon his or her resignation or termination, the right to sell his or her system to an incoming FCS Driver, to assign or delegate the system to a person of choice, to return the system to the outgoing driver, or to consign the system by placing it “on the shelf” with FCS (the Transfer Provision) (*id.*, ¶ 67).

After Amir left his position at FCS in the mid-2000s, he made numerous risky investments. This allegedly placed significant financial strain on the Ben Zions or FCS (*id.*, ¶¶ 3 and 73-75 and 78). According to a UCC financing statement dated July 18, 2016, Amir pledged

his majority shares in FCS to Doron Marom (*id.*, ¶ 79). Rosenthal & Rosenthal, Inc. (Rosenthal) became one of FCS's creditors (*id.*, ¶ 81). FCS or its principals allegedly made payments to support Amir or his businesses without regard to FCS's financial obligations (*id.*, ¶ 83). For instance, checks issued to plaintiffs and non-driver employees bounced (*id.*, ¶ 85). FCS refused to allow drivers to retire or transfer their franchises to third-parties and failed to resell systems placed on the shelf, instead choosing to sell new franchises (*id.*, ¶ 87). Meanwhile, FSC continued to collect franchise payments (*id.*, ¶ 86).

In May 2017, FCS announced it had entered into an asset purchase agreement (the Purchase Agreement) with Elite whereby Elite acquired FCS's assets for \$13.5 million (the Transaction) (*id.*, ¶ 5). FCS represented in the Purchase Agreement that it was current in its annual franchise filings and had at least 300 active drivers (*id.*, ¶ 96). Elite acquired FCS's base license and a list of all drivers under that license, its client accounts, "franchises for more than 300 drivers who serviced those accounts," and all "assets that underlie the company-driver relationship" (*id.*, ¶¶ 5, 7, 91, 94-95 and 103). Elite allegedly agreed to assume FCS's liabilities to plaintiffs, including \$1.24 million in unpaid vouchers for completed journeys, savings accounts and security deposits, because doing so was "necessary to ensure that Plaintiff franchises would transfer to Elite and to continue to service customers" (*id.*, ¶ 97). Otherwise, Elite did not exclude any liabilities, such as the FCS Agreements (*id.*, ¶ 99). Guy, FCS's then-chief executive officer, became Elite's vice president of client relations (*id.*, ¶ 102). The Transaction closed on May 25, 2017 (NYSCEF Doc No. 85, Slarskey affirmation, Ex B).

After the Transaction was announced, Elite and FCS met with FCS's franchisees (NYSCEF Doc No. 130, ¶ 106). FCS, claiming insolvency, refused to refund the franchise fees paid by its franchisees or offer them recourse (*id.*, ¶ 107). Elite explained it would not support or

honor the FCS franchises and offered to issue new Elite franchises (*id.*, ¶¶ 106 and 108-109). Elite promised to treat those plaintiffs who chose to work with it that they “would be treated just like existing Elite drivers, and receive the benefits of owning an Elite Franchise” (*id.*, ¶ 109). Plaintiffs claim their relationship with Elite bears the hallmarks of a franchisor/franchisee relationship because Elite referred to them as franchisees, charged monthly installment and radio fees, dispatched jobs on Elite’s network and insisted they use its name and brand<sup>4</sup> (*id.*, ¶ 110). Elite insisted plaintiffs pay transfer fees of \$2,500 to \$5,000, which plaintiffs claim resemble franchise down payments (*id.*, ¶ 111). Plaintiffs claim these fees duplicate those they had already paid to FCS and further claim they been charged arbitrary fees (*id.*, ¶ 115). Elite also refused to furnish them with a franchise disclosure document or a franchise contract (*id.*, ¶ 113).

Elite has allegedly refused to provide plaintiffs with information on its compensation structure, including the rates and method of compensation, timing of payments, and costs and deductions (*id.*, ¶¶ 116-117). Elite’s invoices contain alleged inaccuracies about rates, discounts and voucher values (*id.*, ¶ 118). As an example, Elite levies customer discounts on its drivers, which reduces the net share of the driver’s ride revenue (*id.*, ¶ 119). Plaintiffs, though, assert the discounts are applied arbitrarily and do not correspond to the actual discounts given to customers (*id.*). Elite allegedly retaliated against those plaintiffs who complained about the payment structure by threatening to discharge them, and in some cases, terminating or constructively discharging them, or by withholding payments (*id.*, ¶ 120).

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<sup>4</sup> Plaintiffs Khizar Hussain, Eric Kibanda, Tanweer Muhammad and Stasintchouk allege they never worked for Elite (NYSCEF Doc No. 130, ¶¶ 25, 28, 33 and 42). Plaintiffs Satwinderjit Bal, Kuldip Singh, Charanjeet Singh and Sukhvinder Sodhi have not pled that they had worked for Elite (*id.*, ¶¶ 21, 36, 37, 41). Although Rodriguez does not allege if he worked for Elite (*id.*, ¶ 14), he avers that he “worked for Elite for several months” (NYSCEF Doc No. 42, Rodriguez aff, ¶ 6).

Elite has allegedly given preferential treatment to drivers related to Chaudhary or other managers over former FCS drivers (*id.*, ¶ 124). Although Elite employs an automated system to assign jobs, Elite's managers manually override this system to assign jobs to favored drivers (*id.*, ¶ 123). This disparate treatment allegedly violates industry standards, FCS's dispatching practices and Elite's franchise agreement which states that jobs shall be distributed evenly among drivers and has caused significant losses of income to plaintiffs (*id.*, ¶¶ 126 and 130).

### PROCEDURAL HISTORY

Plaintiffs commenced this action by filing a summons with notice in February 2019. The amended complaint pleads 10 causes of action for: (1) breach of contract against Elite for its unfair dispatching practices; (2) violations of the Franchise Sales Act (the FSA), specifically General Business Law (GBL) §§ 683, 687, 691 (3), against the Elite Defendants; (3) violations of the Freedom Isn't Free Act (FIFA), specifically Administrative Code of the City of New York §§ 20-928, 20-929, 20-930 and 20-934, against Elite; (4) breach of implied contract against FCS; (5) breach of implied contract against Elite; (6) unjust enrichment against FCS and Elite; (7) violations of Debtor and Creditor Law (DCL) §§ 273, 274, 275, 278, 279 against Elite and FCS; (8) violations of DCL §§ 273, 274, 275, 277, 278, 279 against Elite, FCS, Guy and Amir; (9) violations of GBL §§ 683, 687 and 691 against FCS; and (10) a judgment declaring that Elite, a successor-in-interest to the FCS franchises, and/or FCS, violated their obligations under the FSA and breached their obligations to plaintiffs, and declaring that plaintiffs are entitled to rescission of the franchise Agreements and disgorgement of all fees paid thereunder. Defendants have interposed answers (NYSCEF Doc No. 23; NYSCEF Doc No. 131, Cohen affirmation, Ex 2).

Plaintiffs now move for class certification. FCS and the Ben Zions (together, the FCS Defendants) and the Elite Defendants oppose. By separate motion, the Elite Defendants move to

dismiss the claims asserted by Asol, Sirbu, Nace, Jawaid and Stasintchouk and the first, second, third, fifth, sixth, seventh, eighth and tenth causes of action against them.

Plaintiffs Zurab Anuashvili, Gaganjot Arora, Sarabjeet Sodhi, Sukhvinder Sodhi, Milton Villagomez and Rabah Temzi have discontinued their claims (NYSCEF Doc Nos. 225 and 231).

## DISCUSSION

### I. The Elite Defendants' Motion to Dismiss (Motion Sequence No. 004)

The court addresses the motion to dismiss first (*see Maddicks v Big City Props., LLC*, 34 NY3d 116, 119 [2019] [“Nothing in the CPLR prevents a defendant from moving to dismiss a class action claim pursuant to CPLR 3211”]). It is well settled that on a motion brought under CPLR 3211 (a) (7), the court must accept the facts pled in the complaint as true and accord the plaintiff every favorable inference to determine whether the facts alleged fit a cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, “bare legal conclusions, as well as factual claims that are inherently incredible or flatly contradicted by documentary evidence” will not suffice (*Simkin v Blank*, 19 NY3d 46, 52 [2012] [internal quotation marks and citation omitted]). Whether a plaintiff can prevail on a claim is not part of the court’s calculus (*see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

#### A. Dismissal of All Claims Brought by Stasintchouk

The Elite Defendants contend that Stasintchouk’s claims should be dismissed because he was never an FCS franchisee.<sup>5</sup> They rely on a list of FCS drivers dated December 31, 2015 which purports to show that his wife, Olga, was an FSC-affiliated driver (NYSCEF Doc No. 136, Cohen affirmation, Ex 7 at 1). The document, however, is not dispositive. The Elite Defendants have not shown that the list accurately identifies each FCS franchisee as of the date the

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<sup>5</sup> The Elite Defendants seek this relief in their memorandum of law (NYSCEF Doc No. 137, Elite Defendants’ mem of law at 5-6), not their notice of motion (NYSCEF Doc No. 127).

Transaction closed. There is no indication of who or which entity prepared the document or whether it was prepared and maintained in the ordinary course of FCS's or Elite's business. Counsel's affirmation is insufficient (*see Hill v New York City Health and Hosps. Corp.*, 147 AD3d 430, 432 [1st Dept 2017] [denying a motion to dismiss where counsel's affirmation which accompanied the document lacked probative value]). The document is also heavily redacted. The Elite Defendants' motion to dismiss Stasintchouk's claims is denied.<sup>6</sup>

### **B. Dismissal of All Claims Brought by Asol, Sirbu, Nace and Jawaid**

The Elite Defendants argue the notarized general releases Asol, Sirbu, Nace and Jawaid signed in 2017 and 2018 bar their claims. Asol, Sirbu, Nace and Jawaid posit the releases are invalid under GBL § 687 (5) and Administrative Code § 20-935 (a) and that their execution was under economic duress and the product of fraud.

“[A] valid release constitutes a complete bar to an action on a claim which is the subject of the release” (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011] [internal quotation marks omitted]), and CPLR 3211 (a) (5) allows the court to dismiss a complaint as barred by a release. That said, a release, like other written agreements, may be set aside for duress, illegality, fraud or mutual mistake (*id.*, quoting *Mangini v McClurg*, 24 NY2d 556, 563 [1969]). Whereas the defendant bears the burden of demonstrating that a release bars a plaintiff's claims, the plaintiff bears the burden of demonstrating that a release should be invalidated (*id.*, citing *Fleming v Ponziani*, 24 NY2d 105, 111 [1969]).

The four releases at issue identify Asol, Sirbu, Nace and Jawaid and the unique “ID” and “Car” numbers associated with them and read, in part:

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<sup>6</sup> At oral argument, Stasintchouk claimed he is pursuing his claims against Elite as an independent contractor and not as a franchisee (oral argument 7/28/21 tr at 10 and 13), even though the complaint alleges he paid FCS \$18,000 for a franchise and never worked for Elite (NYSCEF Doc No. 130, ¶ 42).

“ID# ... Car# (‘RELEASOR’), in consideration of the sum of Ten (\$10.00) Dollars and other good and valuable consideration received from ELITE LIMOUSINE PLUS, INC. (‘RELEASEE’), receipt whereof is hereby acknowledged, releases and discharges the RELEASE, RELEASEE’s heirs, executors, administrators, agents, employees, officers, directors, shareholders, affiliates, successors and assigns from all actions, causes of actions, suits, debts due, sum of money, accounts, reckoning, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands, whatsoever In law admiralty or equity, which against the RELEASEE, the RELEASOR, RELEASOR’s heirs, executors, administrators, successors and assigns ever had, now have or hereafter can, shall or may, have, for, upon, or by reason of any matter, cause or thing whatsoever from the begining [sic] of the world to the day of the date of this RELEASE”

(NYSCEF Doc No. 133, Cohen affirmation, Ex 4). The Elite Defendants have shown this broad language precludes the four plaintiffs from bringing the claims against them.

Asol, Sirbu, Nace and Jawaid have failed to establish the releases should be set aside. To begin, counsel’s statement that the releases were procured under fraud and economic duress lacks probative value. Sirbu is the only plaintiff who proffers an affidavit attesting to the circumstances surrounding the execution of his release, and he lacks authority to speak on behalf of Asol, Nace and Jawaid. Buttar’s affidavit, in which attests that counsel advised him against signing a release, is similarly unhelpful (NYSCEF Doc No. 185, Renee Bea [Bea] affirmation, Ex 5 [Buttar 9/15/20 aff], ¶ 9). Thus, Asol, Nace and Jawaid have not met their burden.

Sirbu avers that when he stopped working for Elite, he was told he would have to hand in his equipment to avoid paying further franchise and radio fees,<sup>7</sup> (NYSCEF Doc No. 198, Bea affirmation, Ex 18, ¶¶ 3-4). He was “forced” to sign the release “on the spot, without any advance warning” and was unable to speak to an attorney (*id.*, ¶¶ 5 and 7). He understood that

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<sup>7</sup> Sirbu’s affidavit, notarized in New Jersey, is not accompanied by a certificate of conformity (*see* CPLR 2309 [c]).

executing the release was “a condition to being done with Elite. If I didn’t sign the document, I would continue to be charged fees” (*id.*, ¶ 6). Sirbu further states that he did not understand the release could impact his ability to pursue this action (*id.*, ¶ 9). These averments fall far short of conduct constituting “a wrongful threat that effectively precluded plaintiff’s ability to exercise its free will” (*Philips S. Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 494 [1st Dept 2008], *lv denied* 12 NY3d 713 [2009]). Sirbu does not support his claim of economic duress with evidentiary facts (*see Ermco Erectors v Grand Iron Works*, 93 AD2d 878, 878 [2d Dept 1983], *affd* 60 NY2d 634 [1983], *rearg denied* 60 NY2d 861 [1983] [granting defendant summary judgment where the allegations of economic duress were conclusory]). Nor does Sirbu set forth specific facts showing that Elite fraudulently obtained the release through a false misrepresentation of fact (*see Gonzalez v 40 W. Burnside Ave., LLC*, 107 AD3d 542, 544 [1st Dept 2013] [denying dismissal where circumstances giving rise to the execution of the release and plaintiff’s explanation for signing it merited further investigation]) or that he had been misled as to the scope of the release (*see Aurateq Sys. Intl., Inc. v Marvisi*, 119 AD3d 402, 402 [1st Dept 2014] [finding that plaintiff failed to produce “objective evidence” the parties intended to limit the scope of the release]).

Nevertheless, Asol, Sirbu, Nace and Jawaid have shown that GBL § 687 (5) prohibits the release of claims brought under the FSA. GBL 687 § (5) states that “[i]t is unlawful to require a franchisee to assent to a release, assignment, novation, waiver or estoppel which would relieve a person from any duty or liability imposed by this article.” As discussed *infra*, the second cause of action pleads a franchise claim against the Elite Defendants.

Asol, Sirbu, Nace and Jawaid, though, have not shown that FIFA bars Elite from seeking dismissal of the third cause of action. Administrative Code § 20-935 (a) provides that, “[e]xcept

as otherwise provided by law, any provision of a contract purporting to waive rights under this chapter is void as against public policy.” For the reasons discussed below, FIFA is inapplicable because Elite is not a “hiring party” for purposes of FIFA. Accordingly, the Elite Defendants’ motion is granted to the extent of dismissing the first, third, fifth, sixth, seventh, eighth and tenth causes of action asserted by Asol, Sirbu, Nace and Jawaid against them.

### **C. The First Cause of Action for Breach of Contract**

The motion insofar as it seeks dismissal of the first cause of action is denied for the reasons set forth on the record on July 28, 2021 (oral argument 7/28/21 tr at 19).

### **D. The Second Cause of Action for Violations of the FSA**

The complaint alleges Elite violated GBL §§ 683 and 687 and 691 (3) by failing to give plaintiffs an offering prospectus or a franchise contract, failing to disclose its compensation structure, making false statements of material fact about the even distribution of jobs, and making false statements that the FCS franchises did not transfer to Elite (NYSCEF Doc No. 130, ¶ 153). Plaintiffs relied on Elite’s misrepresentations when they purchased franchises from it (*id.*, ¶ 155). Chaudhary provided material aid to Elite in violation of GBL § 691 (3) (*id.*, ¶ 157).

The Elite Defendants maintain plaintiffs purchased their franchises from FCS. After the Transaction closed, Elite offered FCS franchisees the opportunity to participate in its business as Elite franchisees provided each paid the balance of any purchase price agreed to with FCS and executed an Elite franchise agreement. The Elite Defendants submit the failure to plead these two key elements – purchase of a franchise and payment of a franchise fee – warrants dismissal.

Plaintiffs contend Elite offered them new franchises for which they paid fees. They refer to the affidavits on the motion for class certification from the Proposed Lead Plaintiffs, who uniformly aver they were told they would be issued Elite franchises and would have to pay

transfer fees, franchise fees, monthly fees, weekly dues or commissions to drive on Elite's platform<sup>8</sup> (NYSCEF Doc No. 38, Buttar 3/19/2019 aff, ¶¶ 9-10; NYSCEF Doc No. 39, Rashid aff, ¶¶ 7-9; NYSCEF Doc No. 40, Berniczky aff, ¶¶ 7-9; NYSCEF Doc No. 41, Tarar aff, ¶¶ 7-9; NYSCEF Doc No. 42, ¶¶ 6-7). They rely on statements Chaudhary made in three affidavits filed in this action, all of which contain variations of the following: "Elite offered each FCS franchisee an Elite franchise, conditioned upon the execution of a franchise agreement with Elite and the payment of any balance due on the purchase price for their FCS franchise" (NYSCEF Doc No. 54, Chaudhary 1/27/20 aff, ¶ 7; NYSCEF Doc No. 129, Chaudhary 7/13/20 aff, ¶ 6; NYSCEF Doc No. 145, Chaudhary 8/5/20 aff, ¶ 6). Elite also refers to plaintiffs as franchise owners in its franchise filings (NYSCEF Doc No. 36, David Slarskey [Slarskey] affirmation, Ex 8).

In reply, the Elite Defendants argue the "offer" was not an "offer for sale" under GBL § 683 (1). They reject the contention that Elite issued new franchises because passively issuing franchises is not the equivalent of purchasing a franchise by paying a franchise fee.

The purpose of the FSA is "to prevent, combat and protect the franchisee from rampant franchise sales fraud" (*A.J. Temple Marble & Tile v Union Carbide Marble Care*, 162 Misc 2d 941, 951 [Sup Ct, NY County 1994], *affd* 214 AD2d 473 [1st Dept 1995], *affd as mod* 87 NY2d 574 [1996]); *see also* GBL § 680 [2] [stating that "it is the intent of this law to prohibit the sale of franchises where such sale would lead to fraud or a likelihood that the franchisor's promises would not be fulfilled"]. Thus, the FSA must be liberally construed (*A.J. Temple Marble & Tile*, 162 Misc 2d at 951). Indeed, "New York's definition of a franchise is considered among the broadest in the country" (*Aristacar Corp. v Attorney-General of State of N.Y.*, 143 Misc 2d 551, 552 [Sup Ct, NY County 1989]). Under the FSA, a "franchise" is:

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<sup>8</sup> Rashid's affidavit, notarized in New Jersey, is not accompanied by a certificate of conformity.

“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”

(GBL § 681 [3]). A “franchisee” is any person who has been granted a franchise, and a “franchisor” is a person who grants a franchise (GBL § 681 [4], [5]). Importantly, a “franchise fee” is “any fee or charge that a franchisee ... 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 ...” (GBL § 681 [7]).

The complaint does not identify specific subsections of GBL §§ 683 and 687, but plaintiffs cite GBL § 683 (8) and (11) in their opposition. GBL § 683 states, in part:

“8. A franchise which is subject to registration under this article shall not be sold without first providing to the prospective franchisee, a copy of the offering prospectus, together with a copy of all proposed agreements relating to the sale of the franchise at the earlier of (a) the first personal meeting between the franchisor or its agent and the prospective franchisee, (b) at least ten business days prior to the execution of a binding franchise or other agreement, or (c) at least ten days prior to the receipt of any consideration in connection with the sale or proposed sale of a franchise.

...

11. No offer of a franchise shall be made except by the offering prospectus registered with the department of law pursuant to this section. Any advertisement in whatever form, including periodicals or on radio or television, shall contain a statement that no offer of such franchise is made except by such offering prospectus, and all such advertising shall be consistent with the representations and information required to be set forth in such prospectus as hereinbefore in this section provided.”

It also appears that plaintiffs are invoking GBL § 687 (2). GBL § 687 (2) provides:

“It is unlawful for a person, in connection with the offer, sale or purchase of any franchise, to directly or indirectly:

(a) Employ any device, scheme, or artifice to defraud.

(b) Make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. It is an affirmative defense to one accused of omitting to state such a material fact that said omission was not an intentional act.

(c) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.”

The purchaser of a franchise may sue for violations of GBL §§ 683 and 687 from the person who offers or sells a franchise, and “if such violation is willful and material, for rescission, with interest at six percent per year from the date of purchase, and reasonable attorney fees and court costs” (GBL § 691 [1]). GBL § 691 (3) imposes joint and several liability upon a corporation’s principal executive officer or director “who materially aids in the act of transaction constituting the violation [of the FSA].”

The complaint, supplemented by the submissions, adequately pleads that plaintiffs purchased a franchise from Elite and paid a franchise fee. The complaint alleges that once the Transaction was completed, Elite refused to honor the existing FCS franchises and issued new franchises to those plaintiffs who chose to work with it without furnishing them an offering prospectus or a franchise contract (NYSCEF Doc No. 130, ¶¶ 109 and 151). GBL § 683 (8) prohibits the sale of a franchise without providing the prospective franchisee with the requisite disclosures. The complaint further alleges that Elite required these plaintiffs to pay upfront transfer fees, monthly installments and radio fees to drive on Elite’s platform (*id.*, ¶¶ 110-112). Although denominated a transfer fee, a franchise fee is “any fee” a franchisee must pay for the right to enter into a business under a franchise agreement or otherwise distribute services under

such an agreement (GBL § 681 [7]). The payment of fees in connection with “the right to distribute the transportation services of another” implicates the FSA (*Aristacar Corp.*, 143 Misc 2d at 554 [declaring that the owner and operator of a radio dispatch transportation service who sold drivers a license for a fee and a service charge, provided them with radio equipment, customers and billing services and required them to display its logo on their vehicles was subject to the FSA]). Thus, counter to the Elite Defendants’ argument that plaintiffs did not pay a “price of admission to go into Elite” (oral argument 7/28/21 tr at 22), the transfer fee may qualify as a franchise fee since Elite refused to assume the FCS franchises (*see Arizona Family Florists LLC v. 1-800-Flowers.com, Inc.*, 2020 WL 12675944, \*26, 2020 US Dist LEXIS 31389, \*77 [ED NY, Feb. 21, 2020, CV 16-2638 (JMA)(AYS)], *report and recommended adopted*, 2021 WL 4959426, 2021 US Dist LEXIS 206449 [Oct. 26, 2021] [finding that the purchase of a starter kit for the right to sell bouquets constituted a franchise fee]; *Mon-Shore Mgt., Inc. v Family Media, Inc.*, 1984 WL 2867, \*2, 1984 US Dist LEXIS 23878, \*6 [SD NY, Sept. 5, 1984, No. 83 Civ. 2013-CLB] [finding that payments of production expenses, logo rental fees, distribution charges and circulation lease payments per the contract met the statutory requirement of a franchise fee]).

The Elite Defendants cite *Kroshnyi v U.S. Pack Courier Servs.* (771 F3d 93, 104 [2d Cir 2014]) for the proposition that the FSA does not regulate the ongoing operations of a franchise. In this instance, whether Elite offered to sell plaintiff a new franchise or whether the FCS franchises simply transferred to Elite involves factual issues that are not amenable to disposition on a motion to dismiss.

First, GBL § 681 (11) broadly defines an “offer” or an “offer to sell” as any attempt to offer to dispose of, or solicitation of an offer to buy, a franchise or interest in a franchise for value.” As stated earlier, Elite has maintained that it did not assume or purchase the FCS

franchises and offered plaintiffs Elite franchises. The complaint further alleges that Elite extracted transfer fees from plaintiffs which duplicated fees they had already paid to FCS. Chaudhary claims the transfer fee represents the balance of the purchase price agreed to between each plaintiff and FCS, and Guy, in an affidavit on the class certification motion, avers that Elite never charged a franchise fee to those drivers who had paid the fee in full to FCS (NYSCEF Doc No. 156, Guy aff, ¶ 70). Whether the transfer fee constitutes a franchise fee, though, cannot be determined at this time (*see Wallach Marine Corp. v Donzi Marine Corp.*, 675 F Supp 838, 841 [SD NY, 1987] [whether a payment for the right to do business as a dealer and franchisee constituted a franchise fee was a factual issue that could be determined on a motion to dismiss]).

Second, GBL § 681 (11) states that “[t]he terms ‘offer’ and ‘offer to sell’ do not include the renewal or extension of an existing franchise where there is no interruption in the operation of the franchised business by the franchisee.” While plaintiffs complain about Elite’s complex commission structure, the record is unclear whether the Transaction resulted in changes to the daily operations of their franchises (*see e.g. Bayit Care Corp. v Tender Loving Care Health Care Servs. of Nassau Suffolk, LLC*, 843 F Supp 2d 381, 385 [ED NY 2012] [granting dismissal on statute of limitations grounds where the complaint alleged that an amendment to a franchise agreement fundamentally altered the financial structure of that agreement but failed to allege that the amendment interrupted the franchisee’s operation so as to re-trigger the FSA’s disclosure requirements]). Elite required FCS drivers to execute an Elite franchise agreement, and while similar, the terms of Elite’s form franchise agreement (NYSCEF Doc No. 134, Cohen aff, Ex 5) appear to differ from FCS’s form franchise agreement (NYSCEF Doc No. 135, Cohen aff, Ex 7).

Moreover, *Kroshnyi* is distinguishable. The Court in *Kroshnyi* concluded there was no evidence the transfer of existing franchises from the original franchisor to its successor constituted

the beginning of new franchise agreements for statute of limitations purposes under GBL § 691 (4) (771 F3d at 103). The record showed that (1) plaintiffs, the original franchisor and the successor had signed a transfer agreement which stated, in relevant part, that it was not intended to alter the plaintiffs' subscription agreement with the original franchisor, and (2) testimony showed the franchisor's day-to-day operations and its relationship with plaintiffs remained unchanged (*id.* at 103-104). *Kroshnyi* was also decided after a jury trial whereas the present motion concerns dismissal under CPLR 3211. The record in this action is not as well developed.

The other cases cited by the Elite Defendants are unavailing. Two concern whether the purchase of goods was made at a bona fide wholesale price; a payment for goods at a bona fide wholesale price is not considered a franchise fee under GBL § 681 (7) (a) (*see In re Matterhorn Group, Inc.* (2000 WL 1174215, \*9, 2000 Bankr LEXIS 915, \*34 [SD NY, Aug. 17, 2000, Nos. 97 B 41274 through 97 B 41278 (SMB)] [granting dismissal of a franchise claim where the complaint did not allege that construction and other costs were paid to Swatch U.S. or that goods were not purchased at a bona fide wholesale price]; *Carlucci v Owens-Corning Fiberglas Corp.*, 646 F Supp 1486, 1495 [ED NY 1986] [granting dismissal where the plaintiff had alleged that a payment to the defendant was a wholesale payment of a shipment of waterproofing material]). In three others, the plaintiffs were never franchisees (*see Schieffelin & Co., LLC v Piaggio Group Am., Inc.*, 2013 NY Slip Op 33071[U], \*11 [Sup Ct, NY County 2013] [finding that the defendant did not sell franchises to prospective dealers]; *Olivieri v McDonald's Corp.*, 678 F Supp 996, 1000 [ED NY 1988] [dismissing a franchise claim where the plaintiff was terminated from McDonald's program for selecting future franchisees]; *Chu v Dunkin' Donuts, Inc.*, 27 F Supp 2d 171, 175 [ED NY 1998] [granting dismissal where the defendant refused to approve the

transfer of an existing franchise to the plaintiffs]). Accordingly, the Elite Defendants' motion to dismiss the second cause of action is denied.

### **E. The Third Cause of Action under FIFA**

The complaint alleges Elite failed to furnish plaintiffs with written contracts, failed to pay them, and engaged in retaliation in violation of Administrative Code §§ 20-928, 20-929, 20-930 and 20-934.

Elite contends the complaint fails to plead that plaintiffs were parties to a contract for services valued at \$800 or more as required under FIFA. Elite also asserts that it is not a hiring party because it acts as an intermediary for clients who use its platform to connect with drivers. Plaintiffs paid Elite fees in exchange for fare referrals and payment processing.

Plaintiffs counter that they are independent contractors hired by Elite. They reject the argument that Elite acted as an intermediary because Elite's form franchise agreement refers to customers as "Elite's customers" (NYSCEF Doc No. 186, Bea affirmation, Ex 6 at 1).

FIFA regulates the relationship between freelance workers and those who hire them. A freelance worker under FIFA is "any natural person ... hired or retained as an independent contractor by a hiring party to provide services in exchange for compensation" (Administrative Code § 20-927). Apart for exceptions not applicable here, a "hiring party" is "any person who retains a freelance worker to provide any service" (*id.*).

The purpose underlying FIFA is "to protect freelance workers who were denied compensation" (*Turner v Sheppard Grain Enters., LLC*, 68 Misc 3d 385, 387 [Sup Ct, NY County 2020, citing Caitlin M. Baranowski, *Freelance Isn't Free: The High Cost of New York City's Freelance Isn't Free Act on Hiring Parties*, 12 Brooklyn J Corp Fin & Com L 439, 443 [2018]). To that end, the act sets out certain protections for freelance workers. Administrative

Code § 20-928 (a) provides that all contracts with a value of \$800 or more, either as a single contract or an aggregate of all contracts in the preceding 120-day period, must be in writing. Each contract must include, at a minimum, the name and address of the parties, an itemization of services to be provided plus their value pursuant to the contract and the rate and method of compensation, and the date by which the hiring party must pay or the mechanism by which such date shall be determined (*see* Administrative Code § 20-928 [b]). Under Administrative Code § 20-929 (a), a hiring party must pay a freelance worker the contracted-for compensation on or before the due date in the contract, but no more than 30 days after all services under the contract have been completed. Administrative Code § 20-930 prohibits a hiring party from threatening, intimidating, disciplining, harassing, denying a work opportunity or discriminating against a freelance worker and from taking “any other action that penalizes a freelance worker for, or is reasonably likely to deter a freelancer worker from, exercising or attempting to exercise any right guaranteed under this chapter, or from obtaining future work opportunity because the freelance worker has done so.” An aggrieved freelance worker may bring a civil action for a violation of the act (*see* Administrative Code § 20-933). In addition, Corporation Counsel of the City of New York may bring a civil action against a hiring party who has engaged in a pattern or practice of violating the act (*see* Administrative Code § 20-934 [a]), although a person may bring a civil action based on the same facts (*see* Administrative Code § 20-934 [a] [3] [a]).

Here, the complaint fails to adequately plead that a FIFA violation since Elite is not a “hiring party” as that term is defined in Administrative Code § 20-927. First, the complaint alleges that plaintiffs paid Elite for the privilege of driving on its network (NYSCEF Doc No. 130, ¶¶ 6 and 110-114). By paying Elite fees, plaintiffs retained Elite’s services to secure them driving jobs. Second, the allegations show that Elite acted as an intermediary between customers

and drivers. Elite dispatched plaintiffs on driving jobs for clients who then paid Elite, albeit at discounted rates (*id.*, ¶¶ 110 and 119). For each completed journey, Elite deducted its commission and other fees, after which plaintiffs received the balance of the ride revenue (NYSCEF Doc No. 38, ¶ 11; NYSCEF Doc No. 39, ¶ 10; NYSCEF Doc No. 40, ¶ 9; NYSCEF Doc No. 41, ¶¶ 9-10; NYSCEF Doc No. 42, ¶ 7). These allegations fail to support the claim that Elite is a hiring party for purposes of pleading a FIFA violation (*see Iams v 10X Mgt. LLC*, 2020 NY Slip Op 31772[U], \*5 [Sup Ct, NY County 2020] [dismissing a FIFA claim where defendant acted as plaintiff's hiring agent and received a commission from plaintiff for its services]).

Plaintiffs' reliance on *Van Den Berg v Clinton Hall Holdings, LLC* (2019 NY Slip Op 32036[U] [Sup Ct, NY County 2019]) is misplaced. The court had denied summary judgment because defendant failed to establish that it was not a hiring party under FIFA. Defendant admitted its agent had contacted plaintiff to paint a mural, and the evidence failed to show that a different entity had retained him (*Van Den Berg*, 2019 NY Slip Op 32036[U], \*5-6). The plaintiff in *Van Den Berg* also did not allege that he paid the agent a fee whereas in this action, plaintiffs paid fees to Elite in exchange for driving jobs. The third cause of action is dismissed.

#### **F. The Fifth Cause of Action for Breach of Implied Contract**

The motion insofar as it seeks dismissal of the fifth cause of action is denied for the reasons set forth on the record on July 28, 2021 (oral argument 7/28/21 tr at 28).

#### **G. The Sixth Cause of Action for Unjust Enrichment**

The motion insofar as it seeks dismissal of the sixth cause of action is denied for the reasons set forth on the record on July 28, 2021 (oral argument 7/28/21 tr at 30).

#### **H. The Seventh Cause of Action under the DCL**

The seventh cause of action pleading violations of DCL §§ 273, 274, 275, 278 and 279 is dismissed as against Elite with leave to replead for the reasons set forth on the record on July 28, 2021 (oral argument 7/28/21 tr at 34-35).

#### **I. The Eighth Cause of Action Under the DCL**

Plaintiffs do not oppose dismissal of this cause of action alleging violations of DCL §§ 273, 274, 275, 277, 278 and 279 (NYSCEF Doc No. 179, plaintiffs' mem of law at 17 n 9; oral argument 7/28/21 tr at 30). The eighth cause of action is dismissed against the Elite Defendants.

#### **J. The Tenth Cause of Action for a Declaratory Judgment**

The tenth cause of action alleges there is a genuine dispute whether the FCS franchises transferred to Elite and whether Elite is the successor-in-interest to those franchises (NYSCEF Doc No. 130, ¶ 208). Plaintiffs seek a judgment declaring that, to the extent Elite and/or FCS violated the FSA and breached its obligations to plaintiffs, plaintiffs are entitled to rescission of the franchise agreements and disgorgement of all fees paid thereunder.

The Elite Defendants contend this cause of action should be dismissed because the breach of contract causes of action afford plaintiffs an adequate remedy.

Plaintiffs oppose on the ground that FCS's and Elite's "lack of paperwork" has left them uncertain as to their rights (NYSCEF Doc No. 179 at 22). They submit a declaration is necessary to resolve whether they own franchises in FCS, Elite or both, whether the franchises are transferable and whether they are independent contractors.

CPLR 3001 states, in pertinent part, that the court may render a declaratory judgment as to the parties' rights where there is a justiciable controversy. "What distinguishes declaratory judgment actions from other types of actions or proceedings is the nature of the primary relief sought – a judicial declaration rather than money damages or other coercive relief" (*Lang v*

*Hanover Ins. Co.*, 3 NY3d 350, 355 [2004]). A declaratory judgment will not lie where “the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract” (*Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50, 54 [1st Dept 1988]). The first and fifth causes of action plead claims for breach of express or implied contract and are predicated upon the same facts as the declaratory judgment claim. These contract causes of action afford plaintiffs an adequate remedy. A declaratory judgment is unnecessary as the complaint sufficiently pleads a cause of action under the FSA as against the Elite Defendants. Additionally, a declaratory judgment is unnecessary if plaintiffs successfully replead their Debtor and Creditor Law claim to allege successor liability (oral argument 7/28/21 tr at 34-35).

Plaintiffs fail to distinguish the declaratory judgment claim from the breach of contract claims. The argument that, due to FCS’s or Elite’s lack of paperwork and poor recordkeeping (NYSCEF Doc No. 179 at 7 and 22), plaintiffs do not know whether they are franchisees or independent contractors is not an adequate basis for a declaratory judgment, especially where, in support of class certification, plaintiffs admit they “did not enter into written ‘franchise agreements’ ... [and] are proceeding on quasi-contract theories, alleging identical terms to their franchises” (NYSCEF Doc No. 27, plaintiffs’ mem of law at 7). Further, under GBL § 681 (3), a franchise is “a contract or agreement, either expressed or implied, whether oral or written.” The tenth cause of action is dismissed.

## **II. The Motion to Certify the Class (Motion Sequence No. 001)**

Plaintiffs move to certify a single class defined as “all drivers who purchased FCS franchises through 2017 and who did not sell those franchises to third-parties” and a single subclass defined as “those ex-FCS drivers who worked for Elite following the transaction” (NYSCEF Doc No. 27 at 3). According to the complaint, the common questions of law and fact

include whether the Elite Defendants violated the FSA and FIFA; Elite frustrated the FCS franchise agreements; Elite engaged in uneven dispatching practices; FCS and Guy violated the FSA; FCS breached an express or implied agreement with plaintiffs; Elite and the Ben Zions were unjustly enriched; Elite should disclose its compensation structure; FCS fraudulently transferred assets to the Ben Zions (NYSCEF Doc No. 130, ¶ 137).

The five prerequisites for a class action set forth in CPLR 901 (a) are commonly referred to as “numerosity, commonality, typicality, adequacy of representation and superiority” (*City of New York v Maul*, 14 NY3d 499, 508 [2010]). CPLR 902 establishes the procedure by which an action may proceed as a class action. CPLR 906 allows for the division of a class into subclasses. A party moving for class certification bears the burden of satisfying the prerequisites in CPLR 901 and 902 (*Cupka v Remik Holdings, LLC*, — AD3d —, 2022 NY Slip Op 00812, \*1 [1st Dept 2022]), through the submission of evidentiary facts sufficient to support certification (*Kudinov v Kel-Tech Constr., Inc.*, 65 AD3d 481, 481 [1st Dept 2009] [stating there must be an “evidentiary basis” for certification]; *Feder v Staten Is. Hosp.*, 304 AD2d 470, 471 [1st Dept 2003] [stating the plaintiff must submit “competent evidence in admissible form”]). It is within the court’s discretion to grant certification (*City of New York*, 14 NY3d at 509). Because CPLR article 9 must be liberally construed, “any error, if there is to be one, should be in favor of allowing the class action” (*Pruitt v Rockefeller Ctr. Props., Inc.*, 167 AD2d 14, 21 [1st Dept 1991] [internal quotation marks and citation omitted]).

As a preliminary matter, “[c]lass action certification is ... appropriate if on the surface there appears to be a cause of action which is not a sham” (*Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 422 [1st Dept 2010]). In view of the denial of at least part of the Elite Defendants’ motion to dismiss, plaintiffs have met the “minimal threshold that their claim was

not a sham” (*Weinstein v Jenny Craig Operations, Inc.*, 138 AD3d 546, 547 [1st Dept 2016]; accord *Jim & Phil’s Family Pharm. v Aetna U.S. Healthcare*, 271 AD2d 281, 282 [1st Dept 2000]). The court turns next to the factors for certifying a class action.

## A. CPLR 901 (a)

### 1. Numerosity

CPLR 901 (a) (1) requires the plaintiff to show that “the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable.” Plaintiffs seek to certify a class of more than 300 drivers who purchased franchises from FCS and who did not sell their franchises to third parties before the Transaction, and a sub-class comprised of more than 100 drivers who subsequently drove for Elite after the Transaction.

Given the number of potential class members, above, plaintiffs have satisfied the numerosity element, and defendants have not challenged whether this element has been met (*see Roberts v Ocean Prime, LLC*, 148 AD3d 525, 525 [1st Dept 2017] [finding numerosity had been satisfied where it was “undisputed” plaintiffs numbered more than 400]; *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 96 [2d Dept 1980] [stating that a prospective class of at least 300 satisfied numerosity, especially where the defendant did not challenge the number and where knowledge of the exact class size was within the defendant’s control]).

### 2. Commonality

CPLR 901 (a) (2) requires that there be “questions of law or fact common to the class which predominate over any questions affecting only individual members.” “Commonality cannot be determined by any ‘mechanical test’” (*City of New York*, 14 NY3d at 514, quoting *Friar*, 78 AD2d at 97). “[I]t is ‘predominance, not identity or unanimity,’ that is the linchpin of

commonality” (*id.*, quoting *Friar*, 78 AD2d at 98), and “class certification is appropriate even when there are questions of law and fact not common to the class” (*Pludeman*, 74 AD3d at 423).

Plaintiffs have satisfied this element. The Proposed Lead Plaintiffs describe a common course of conduct by which they obtained their franchises and a common course of conduct as to how their franchises were treated after the Transaction. The Proposed Lead Plaintiffs uniformly aver that they signed “documents” to purchase a franchise (NYSCEF Doc Nos. 38-42, ¶ 2). They uniformly aver that FCS would not buy their franchises after the Transaction, Elite refused to recognize or honor the FCS franchises, and Elite demanded they pay a fee to work with it (NYSCEF Doc No. 38-39, ¶¶ 6-8; NYSCEF Doc No. 40, ¶ 6; NYSCEF Doc No. 41, ¶¶ 6-7; NYSCEF Doc No. 42, ¶ 5). Their earnings decreased significantly due to Elite’s uneven dispatching practices and complex commission structure (NYSCEF Doc No. 38, ¶¶ 11-12; NYSCEF Doc No. 39, ¶¶ 10-11; NYSCEF Doc No. 40, ¶¶ 9-10; NYSCEF Doc No. 41, ¶ 10; NYSCEF Doc No. 42, ¶ 7). These allegations hint at the “same types of subterfuges” (*Kudinov*, 65 AD3d at 482) that should be resolved in a class action (*Pludeman*, 74 AD3d at 423).

Defendants’ arguments in opposition center on the differences in how individual plaintiffs obtained their franchises and their individual experiences as a driver for FCS or Elite. They submit that plaintiffs readily admit they are proceeding solely on quasi-contract theories as FCS has not produced any franchise agreements (NYSCEF Doc No. 27 at 7; NYSCEF Doc No. 164, plaintiffs’ reply mem of law at 5). They contend this action is not amenable to class certification because inquiries into the nature of each plaintiff’s implied franchise agreement and damages require individualized proof.

These arguments are insufficient to show the lack of commonality. “[T]he possibility that individual damages determinations may become complicated to the extent the class

allegations survive a CPLR article 9 test does not suggest that the commonality element cannot be satisfied” (*Maddicks v Big City Props., LLC*, 34 NY3d 116, 127 [2019]; NYSCEF Doc No. 138, oral argument 7/16/20 tr at 28-29 [“Defendants claim that individual decisions, including what car companies plaintiffs decided to work with, may have affected plaintiffs’ earnings. The Court finds that these individual decisions go to individual damages. They do not undermine the commonality of the claim that Elite engaged in unfair dispatching and other practices”]). Additionally, the court is not precluded from “try[ing] the class aspects first and having the individual damage claims heard by a special master or create subclasses” (*Godwin Realty Assoc. v CATV Enters.*, 275 AD2d 269, 270 [1st Dept 2000]). Thus, the contention that any damages determination would require individualized inquiries fails.

Defendants also complain that the specific terms of the implied franchise agreement have not been pled. They rely on *Saleem v Corporate Transp. Group, Ltd.* (2013 WL 6061340, \*5, 2013 US Dist LEXIS 163934, \*20-21 [SD NY, Nov. 15, 2013, No 12 Civ 8450 (JMF)]) where the court declined to certify a class because the action involved six different franchisor defendants and different written agreements. *Saleem*, however, is distinguishable because that action concerned whether plaintiffs, who drove for various black car transportation companies, should have been classified as employees or independent contractors for purposes of the Fair Labor Standards Act (29 USC §§ 201 *et seq.*) and the Labor Law (§§ 650 *et seq.*). By contrast here, plaintiffs drove for the same franchisor and allege they signed the same or similar FCS Agreements. The Proposed Lead Plaintiffs uniformly aver they understood that purchasing a franchise gave them “the right to be dispatched jobs, to drive within the FCS system, to receive a percentage of revenue from rides I drove, and upon resignation or termination, to be able to transfer the franchise to a third-party or to the seller of the franchise (NYSCEF Doc Nos. 38-41,

¶ 3) or the right to “sell my franchise when I was done working for FCS” (NYSCEF Doc No. 42, ¶ 23). These averments are sufficient to set forth the basic terms of an alleged agreement for a class action based on a breach of implied contract (*see e.g. Becher v Long Is. Lighting Co.*, 164 FRD 144, 151 [ED NY, 1996] [granting certification where there were common questions of law and fact on a breach of implied contract claim]; *Gross v Ticketmaster*, 5 Misc 3d 1005[A], 2004 NY Slip Op 51199[U], \*2 [Sup Ct, NY County 2004] [certifying a class where the amended complaint can be “reasonably understood to allege an implied agreement between” the plaintiffs and defendant]). In sum, the same factual and legal issues pertaining to FCS’s and Elite’s post-Transaction treatment of the FCS franchises are common to the entire putative class and predominate over any individual issues (*see Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 389 [2014] [concluding that the predominant legal issue was whether the plaintiffs’ apartments were unlawfully deregulated]).

### 3. Typicality

CPLR 901 (a) (3) requires that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” Typicality is satisfied “[i]f it is shown that a plaintiff’s claims derive ‘from the same practice or course of conduct that gave rise to the remaining claims of other class members and is based upon the same legal theory’” (*Pludeman*, 74 AD3d at 423]; *Pruitt*, 167 AD2d at 22 [stating that typicality “relates to the nature of the claims and the underlying transaction, not the amount or measure of damages”]). Minor differences in each individual plaintiff’s claims will not defeat typicality (*Williams v Air Serv Corp.*, 121 AD3d 441, 442 [1st Dept 2014]).

Plaintiffs have satisfied this element (*see Pludeman*, 74 AD3d at 424). The complaint and the affidavits from the Proposed Lead Plaintiffs describe the same course of conduct

regarding how they acquired their franchises from FCS and their post-Transaction experiences with Elite (*see Roberts*, 148 AD3d at 525-526 [reasoning that the lead plaintiff's claims were typical because they each resided or leased space in the defendant's building, and their injuries derived from the same course of conduct]; *Pruitt*, 167 AD2d at 22 [concluding the claims arose out of the same course of conduct regarding the purchase of stock based on a misleading prospectus and were based on the same claims for Securities Act violations]).

Defendants' argument that typicality has not been met because of the individualized nature of each plaintiff's operations and the differences in their post-Transaction earnings is not supported (*see Button v Metropolitan Club, Inc.*, 187 AD3d 630, 631 [1st Dept 2020] [granting certification even though the calculation of damages would require "some individualized analysis"]).

#### **4. Adequacy of Representation**

Under CPLR 901 (a) (4), a class representative must "fairly and adequately protect the interests of the class." The court must consider the "potential conflicts of interest between the representative and the class members, personal characteristics of the proposed class representative (e.g. familiarity with the lawsuit and his or her financial resources), and the quality of the class counsel" (*Cooper v Sleepy's, LLC*, 120 AD3d 742, 743-744 [2d Dept 2014], quoting *Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 144 [2d Dept 2008]; *Ackerman v Price Waterhouse*, 252 AD2d 179, 202 [1st Dept 1998]).

The affidavits from the Proposed Lead Plaintiffs show they "possess more than the required 'general awareness of the claims' at issue" (*Stecko v RLI Ins. Co.*, 121 AD3d 542, 543 [1st Dept 2014]). The Proposed Lead Plaintiffs aver that each understands his rights and responsibilities as a class representative and understands that he owes a duty of loyalty to the

entire class (*see Rollin v Frankel, & Co.*, 290 AD2d 368, 369 [1st Dept 2002] [granting certification where the plaintiffs had an “adequate understanding of the case”]). The Proposed Lead Plaintiffs and the putative class also share a common background as franchisees and share a common goal of pursuing the same causes of action.

Nor are there any conflicts of interest between Buttar, Rashid and the potential class members, as the Elite Defendants have suggested. Chaudhary avers that Buttar’s dispute concerns alleged fraudulent conduct on Buttar’s part in which he submitted vouchers indicating that he transported two different customers in the same vehicle in two different geographic zones at the same time (NYSCEF Doc No. 145, ¶¶ 31-32). He states that Elite believes Buttar may have accepted multiple driving jobs and “farmed them out to other non-franchisee drivers in exchange for a cut of the fare” (*id.*, ¶ 35). Chaudhary asserts that Rashid’s dispute concerns Rashid’s request that Elite dispatch him on calls beginning at or near his New Jersey home that terminate in New York City or the reverse, so he could generate revenue during his commute (*id.*, ¶ 38). Chaudhary refused such requests for preferential treatment because it would be unfair to other drivers based in New Jersey (*id.*, ¶ 39). However, Chaudhary’s averments do not implicate conflicts between these two plaintiffs and the putative class or whether Buttar and Rashid would be unable to adequately represent the interests of the class members (*see Lamarca v Great Atl. & Pac. Tea Co., Inc.*, 55 AD3d 487, 488 [1st Dept 2008] [reasoning that “minor and collateral issues of impeachment that are insufficient to disqualify a class representative”]). That Buttar’s income increased after the Transaction (NYSCEF Doc No. 161, Cohen affirmation, Ex E) also addresses the extent of Buttar’s damages and is insufficient to show that he was not harmed by the practices described in the complaint.

Plaintiffs have also demonstrated that class counsel have experience prosecuting class actions (*see Pruitt*, 167 AD2d at 24), including one brought by drivers for employment-related claims against Uber Technologies (NYSCEF Doc No. 28, Slarskey affirmation, ¶ 13; NYSCEF Doc No. 43, Weiner affirmation, ¶¶ 6-7). Defendants have not challenged this point.

## 5. Superior Method

CPLR 901 (a) (5) provides that “a class action is superior to other available methods for the fair and efficient adjudication of the controversy.”

Plaintiffs have demonstrated that a class action is a superior method for fairly and efficiently adjudicating their disputes (*see Jim & Phil’s Family Pharm., Ltd.*, 271 AD2d at 282 [granting certification because of the large class, the similarity of claims, and the potentially small recovery by each plaintiff]). A class action will conserve judicial resources by avoiding multiple lawsuits brought by former FCS franchisees. Moreover, it would be impractical to require each driver to pursue his or her own action for the same claims, particularly where the potential damages to be recovered may be minimal (*see Sperry v Crompton Corp.*, 8 NY3d 204, 213 [2007] [stating that class actions “incentivize plaintiffs to sue when the economic benefit would otherwise be too small, particularly when taking into account the court costs and attorneys’ fees typically incurred”]; *Dabrowski v Abax inc.*, 84 AD3d 633, 635 [1st Dept 2011] [stating that a class action is preferred where the individual plaintiffs would have likely recovered “modest damages”]).

### B. CPLR 902

Under CPLR 902, a motion for class certification must be made within 60 days after the time to serve a responsive pleading has expired. In addition to the prerequisites in CPLR 901, the court shall consider the following five factors before a class action may proceed:

- “1. the interest of members of the class in individually controlling the prosecution or defense of separate actions;
2. the impracticability or inefficiency of prosecuting or defending separate actions;
3. the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
4. the desirability or undesirability of concentrating the litigation of the claim in the particular forum;
5. the difficulties likely to be encountered in the management of a class action”

(CPLR 902). The plaintiff seeking class certification bears the burden of satisfying CPLR 902 (*Cupka*, 2022 NY Slip Op 00812, \*1).

As an initial matter, the motion is timely pursuant to a so-ordered stipulation dated September 25, 2019 (NYSCEF Doc No. 21). Plaintiffs have also satisfied CPLR 902 (1) and (2) as explained in the discussions on commonality, typicality and superiority, above. Regarding CPLR 902 (3), it does not appear that other FCS franchisees have commenced litigation on these same issues (*see Fleming v Barnwell Nursing Home & Health Facilities*, 309 AD2d 1132, 1134 [3d Dept 2003] [granting certification, in part, where there was no other pending litigation]). No party has argued whether it is more desirable to litigate the action in another county for purposes of CPLR 902 (4), although Guy submits that the forum selection clause in FCS’s form franchise agreement states that a franchisee’s lawsuit against FCS should be filed in Queens County (NYSCEF Doc No. 156, ¶ 13; NYSCEF Doc No. 30, Slarskey affirmation, Ex 2 at 29 [¶ 28]). In any event, it is more efficient to resolve the claims in the same forum.

Further, although the putative class numbers more than 300, and the proposed sub-class at 179 (NYSCEF Doc No. 36, Slarskey aff, Ex 8; oral argument 7/28/21 tr at 24), plaintiffs have shown “the claims as set forth in the complaint can be efficiently and economically managed by the court on a classwide basis” (*Globe Surgical Supply*, 59 AD3d at 136). The claims involve similar issues, including whether plaintiffs were operating under a common franchise

arrangement for FCS or Elite, and the Proposed Lead Plaintiffs assert they can adequately represent all class members. Moreover, if the putative class members commenced separate actions, joinder would be impracticable (*Englade v HarperCollins Pubs.*, 289 AD2d 159, 160 [1st Dept 2001]).

Accordingly, it is

ORDERED that the motion brought by plaintiffs for class certification (motion sequence no. 001) is granted; and it is further

ORDERED that the certified class shall consist of all drivers alleged to have purchased franchises from defendant First Corporate Sedans, Inc. and who did not sell their franchises to third parties prior to May 25, 2017, the date the transaction between defendants First Corporate Sedans, Inc. and Elite Limousine Plus, Inc. closed; and it is further

ORDERED that the certified sub-class shall consist of all drivers alleged to have purchased franchises from defendant First Corporate Sedans, Inc. prior to May 25, 2017, the date the transaction between defendants First Corporate Sedans, Inc. and Elite Limousine Plus, Inc. closed, who subsequently drove for defendant Elite Limousine Plus, Inc. after that date; and it is further

ORDERED that the part of the motion seeking to appoint plaintiffs Shahid Buttar, Haroon Rashid, Stefan Berniczky, Muhammad Tarar and Jose Rodriguez as lead plaintiffs is granted, and said plaintiffs are appointed as lead plaintiffs in this action; and it is further

ORDERED that the part of the motion seeking to appoint lead counsel is granted, and the Court hereby appoints Slarskey LLC and Imbesi Law P.C. as class counsel; and it is further

ORDERED that to the extent not already exchanged and such information is within their possession, defendants First Corporate Sedans, Inc. and Elite Limousine Plus, Inc. shall each


furnish class counsel a list containing the names, last known mailing addresses and last known telephone and/or cell phone numbers of all certified class and sub-class members, described above, within thirty (30) days after service of this order with written notice of entry; and it is further

ORDERED that after receipt of the lists, above, plaintiffs shall move, pursuant to CPLR 904, for approval of a notice of class action, and shall serve and file said motion no later than sixty (60) days after service of this order with written notice of entry; and it is further

ORDERED that the motion by defendants Elite Limousine Plus, Inc. and Shafquat Chaudhary to dismiss the claims asserted by plaintiffs Shimon Asol, Viorel Sirbu, Arthur Nace, Shair Jawaid and Roman Stasintchouk and to dismiss the first, second, third, fifth, sixth, seventh, eighth and tenth causes of action asserted against them (motion sequence no. 004) is granted to the extent of: (1) dismissing the first, third, fifth, sixth, seventh, eighth and tenth causes of action of plaintiffs Shimon Asol, Viorel Sirbu, Arthur Nace and Shair Jawaid; (2) dismissing the third, eighth and tenth causes of action; (3) dismissing the seventh cause of action with leave to replead in conformity with the record of July 28, 2021; and (4) the balance of the motion is otherwise denied; and it is further

ORDERED that the first, third, fifth, sixth, seventh, eighth and tenth causes of action asserted by plaintiffs Shimon Asol, Viorel Sirbu, Arthur Nace and Shair Jawaid and the third, eighth and tenth causes of action asserted by the remaining plaintiffs are dismissed as against defendants Elite Limousine Plus, Inc. and Shafquat Chaudhary; and it is further

ORDERED that the seventh cause of action asserted against defendant Elite Limousine Plus, Inc. is dismissed with leave to replead in conformity with the record of July 28, 2021 within fifteen (15) days after service of this order with written notice of entry.

<u>3/29/2022</u> DATE	 MELISSA CRANE, J.S.C.	
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART
	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE