SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60M

----------X

SHAHID BUTTAR, HAROON RASHID, JOSE RODRIGUEZ, STEFAN BERNICZKY, and MUHAMMAD TARAR,, individually and as class representatives on behalf of all others similarly situated, and ARTHUR NACE, CHAUDHRY AHSAN, 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, ROMAN STASINTCHOUK, SALMAN TARAR, ITALO VERA, AHMAD KHAN, MUHAMMAD YOUNIS MALIK, INDIVIDUALLY,

Plaintiffs,

- v -

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

Defendants.

----------X

**INDEX NO.** 651088/2019

**MOTION DATE** 04/28/2023, 04/28/2023, 04/28/2023

**MOTION SEQ. NO.** 012 013 014

**DECISION + ORDER ON MOTION**

HON. MELISSA CRANE:

The following e-filed documents, listed by NYSCEF document number (Motion 012) 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 656, 512-1, 520-1, 526-1, 534-1, 535-1, 536-1, 537-1, 542-1, 543-1, 557-1, 558-1, 563-1, 564-1, 565-1, 567-1, 573-1, 581-1, 582-1, 568-1, 521-1, 663, 670, 679, 684, 689, 692, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 747, 748, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 845, 846, 847, 848, 849, 852, 853, 854, 855, 856

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 013) 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 674, 680, 685, 690, 693, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 843

were read on this motion to/for MISCELLANEOUS.

The following e-filed documents, listed by NYSCEF document number (Motion 014) 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 671, 681, 686, 691, 694, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 844, 860

were read on this motion to/for JUDGMENT - SUMMARY.

Motion sequence nos. 012, 013, and 014 are consolidated for disposition.

Plaintiffs bring this class action for breach of contract and unjust enrichment and for alleged violations of the Franchise Sales Act (*see* General Business Law § 680 et seq.), the Debtor and Creditor Law (*see* Debtor and Creditor Law § 270 et seq.), and the Freelance Isn't Free Act (*see* Administrative Code of the City of New York § 927 et seq.).

In motion sequence no. 012, plaintiffs Shahid Buttar, Haroon Rashid, Jose Rodriguez, Stefan Berniczky, and Muhammad Tarar, individually and as class representatives on behalf of all other similarly situated, and Arthur Nace, Chaudhry Ahsan, 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, Roman Stasintchouk, Salman Tarar, Italo Vera, Ahmad Khan, Muhammad Younis Malik, individually (collectively, plaintiffs), move, pursuant to CPLR 3212, for partial summary judgment on the second, third, eighth, and ninth causes of action pled in the second amended class action complaint (the complaint).

In motion sequence no. 013, defendants First Corporate Sedans, Inc. (FCS), Guy Ben Zion (Guy) and Amir Ben Zion (Amir) (collectively, the FCS Defendants) move, pursuant to CPLR 901 and 902, to decertify the class. In motion sequence no. 014, pursuant to CPLR 3212, they move for summary judgment dismissing the complaint with prejudice.

## BACKGROUND

FCS was a black car ground transportation company based in New York (NY St Cts Elec Filing [NYSCEF] Doc No. 350, complaint, ¶ 50). Amir, a Florida resident (NYSCEF Doc No. 362, FCS Defendants answer, ¶ 51), founded New York Radio Cars (NYRC) in 1985, which later became FCS (NYSCEF Doc No. 624, Guy aff, ¶¶ 3-4). Amir's brother, Guy (NYSCEF Doc No. 362, ¶ 52), worked at FCS from 1994 and served as its president from 2011 to May 2017 (NYSCEF Doc No. 624, ¶¶ 4-5). Their mother, Atalia Ben Zion (Atalia), worked in collections (NYSCEF Doc No. 529, Evan Fried [Fried] affirmation, exhibit 18, Yoav Cohen [Cohen] tr at 109).

Now bankrupt defendant Elite Limousine Plus, Inc. (Elite) operated a black car ground transportation company in New York (NYSCEF Doc No. 350, ¶ 53). Defendant Shafquat Chaudhary (Chaudhary) (together with Elite, the Elite Defendants) is Elite's president (NYSCEF Doc No. 361, Elite Defendants answer, ¶ 54). Chaudhary's nephew supervised Elite's dispatch (NYSCEF Doc No. 518, Fried affirmation, exhibit 7, Chaudhary tr at 193) and drove for the company (NYSCEF Doc No. 519, Fried affirmation, exhibit 8, Guy tr at 227-228). On May 25, 2017, Elite acquired certain assets and assumed certain liabilities from FCS.

Plaintiffs are black car drivers who acquired franchise rights from FCS prior to May 2017 (NYSCEF Doc No. 350, ¶ 1). After May 2017, many plaintiffs drove for Elite (*id.*, ¶¶ 12-20, 22-24, 26-27, 29, 31-32, 34-35, 38-40, 43-48).

A. The Drivers and FCS

Drivers who previously worked for NYRC (NYSCEF Doc No. 512, Fried affirmation, exhibit 1, Amir tr at 45) moved to FCS in 1992 as independent contractors (*id.* at 76). FCS later adopted a franchisor/franchisee system (*id.*). The purchase of a franchise granted a driver the right to work for FCS, drive on its platform, lease its franchise to another driver, and sell its franchise

when the driver was done using it (*id.* at 80-81). Amir testified that some drivers "had so-called radio rights, as the term was called before when it was called a franchise. At one point we started to sell the radio right based on a franchise, but those that had the radio rights before, they didn't change categories" (*id.* at 77). The only change was "the document that they would sign, I believe, was considered a franchise" (*id.*), whereas previously, drivers signed a radio right lease agreement (*id.* at 95). Amir testified that "[d]ifferent drivers leased their franchise or their radio to a friend" by way of a radio lease agreement (*id.* at 97). A driver in the 1990s could be an independent contractor without being a franchisee "by purchas[ing] radios under independent contractor agreements" (*id.*).

Guy avers that a person may drive for FCS under a short-term lease arrangement, for which the driver must execute an independent contractor agreement (ICA) with FCS, or by purchasing a franchise (NYSCEF Doc No. 624, ¶¶ 8-9). Under a radio right lease agreement, a driver, as a lessee, pays FCS a refundable $500 security deposit in exchange for the installation of FCS's proprietary communication system in that lessee's vehicle (NYSCEF Doc No. 651, Howley affirmation, exhibit at 1 and 3). Each lessee pays a security deposit to be deducted from the lessee's monthly settlement statement (*id.* at 3). FCS, in turn, dispatches work and pays the lessee net commissions at the rate of 81.5% of revenues derived for services rendered, subject to certain deductions (*id.* at 2). In the event a lessee chooses to purchase the system, FCS refunds the security deposit in the form of a credit on a future statement (*id.* at 3). If a lessee terminates the lease agreement, FCS refunds the security deposit after the system is removed from the lessee's vehicle (*id.*). After the initial lease term expires, a lessee may continue the lease arrangement by paying $475 every month to FCS (NYSCEF Doc No. 624, ¶ 9).

Guy attests that each prospective franchisee signs a franchise disclosure form and receives a franchise agreement from FCS (*id.*). According to FCS's franchise agreement in its franchise disclosure document from April 2017, a franchisee purchases "a Franchise which furnishes the Franchisee with the right to participate in the Franchisor's fare referral system and the right to use the Franchisor's tradename and leased communications device (the 'Communications Device'), all of which will remain the property of the Franchisor. All of the foregoing rights are hereafter referred to as the 'Franchise'" (NYSCEF Doc No. 653, Joshua N. Howley [Howley] affirmation, exhibit at 1 and 34). The prospective franchisee pays an "Initial Franchise Fee" to FCS (*id.* at 6). If FCS helps finance the purchase, the franchisee must repay the principal in installments deducted each month (*id.* at 35). The franchisee must also pay a non-refundable monthly service fee, voucher processing fees, credit card processing fees, a monthly fee for a "Communications Device," and a $500 security deposit or the actual cost of the Communications Device to FCS (*id.* at 36 and 44-46). A franchisee may assign, transfer, or sell his or her rights with FCS's consent, provided the franchisee has paid the franchise fee in full and pays a transfer fee (*id.* at 49-50). The purchasing franchisee must execute a franchise agreement in the same form and subject to the same terms and conditions as the franchise agreement on file with the New York State Attorney General (*id.* at 51). Finally, the franchise agreement states that the "Franchisor may sell, assign and/or transfer this Agreement without the consent of the Franchisee" (*id.* at 60).

Guy testified that new franchisees typically purchased their franchises from existing franchisees (NYSCEF Doc No. 519 at 260-261). He stated that "FCS would collect the money as a debit from the franchise buyer and transfer it to the [outgoing] franchise owner" (*id.* at 261). In the five years preceding 2017, most drivers in FCS's fleet had fully paid for their franchises, with

only 20 to 22 drivers leasing a franchise (*id.* at 181-182). Guy believed there were between 310 and 335 drivers in FCS's fleet "towards [the] end" (*id.* at 181).

Plaintiffs allege they paid between $25,000 to $40,000 for franchises that allowed them to drive on FCS's network; receive a percentage of the revenues derived from each ride they serviced as independent contractors; and transfer their franchises to a third party directly or by consignment (NYSCEF Doc No. 350, ¶¶ 2 and 60). Each plaintiff signed a document acknowledging receipt of FCS's franchise disclosure document (*id.*, ¶ 59). Plaintiffs allege that underlying their franchises are two documents – a transfer sales agreement (TSA) and an ICA (*id.*, ¶ 61).

The parties to the TSA are the "outgoing contractor" selling title to FCS's proprietary system, which corresponds to a four-digit dispatch radio number unique to FCS's dispatch, and the "incoming contractor" with whom FCS had an ICA[1] (*id.*, ¶ 62; NYSCEF Doc No. 650, Howley affirmation, exhibit U at 8). FCS was not a party "except as described elsewhere herein" (NYSCEF Doc No. 650 at 8). FCS was "aware" of the transaction and agreed to "undertake and execute the administrative obligations authorized by the Outgoing and Incoming Contractors" (*id.* at 8 and 10). After a certain period of years, an incoming contractor who resigns or is terminated from FCS may take any of the following actions with respect to the system: (1) retain custody of it; (2) place the system with FCS for offer to future incoming contractors; (3) assign the system to another person, subject to payment of a transfer fee; or (4) return the system to the outgoing contractor in exchange for a specified sum no later than seven years after the date of the TSA[2] (NYSCEF Doc No. 650 at

[1] Plaintiffs produced nine TSAs in discovery, not all of which are signed (NYSCEF Doc No. 629, Howley affirmation, ¶ 22). There are at least two different versions of the TSA. Some consist of 6 pages while others are 12 pages in length and certain terms and conditions, such as those pertaining to repurchase funds, also differed. In addition, the TSA signed by plaintiff Stefan Berniczky (Berniczky) identifies "Fleet Management Enterprises Inc." as the entity with which he had an ICA (NYSCEF Doc No. 650 at 1).

[2] The sum is either $2,000 (NYSCEF Doc No. 650 at 4, 34, 53, 58, 64 and 70) or $7,716 (*id.* at 16, 28 and 46).

3-5). Guy testified that the TSA was "our contract," although he was not sure why FCS was not a party to those agreements (NYSCEF Doc No. 519 at 41).

The four-page ICA details the independent contractor and FCS's obligations to each other (NYSCEF Doc No. 652, Howley affirmation, exhibit W at 1). Each independent contractor agrees to "acquire, or otherwise obtain use of [FCS's] proprietary system to accomplish this assignment" and is "free to contract for similar services and provide such services to other individuals and other businesses without the consent of [FCS]" (*id.* at 2-3).

B. The Rosenthal Loans

On July 11, 2001, FCS, as "Borrower," and nonparty Rosenthal & Rosenthal, Inc. (Rosenthal), as "Lender," executed a financing agreement (the Financing Agreement) under which Rosenthal agreed to lend money to FCS on a revolving basis in exchange for a security interest and lien against certain collateral, including FCS's accounts receivables, property and the proceeds thereof (NYSCEF Doc No. 522, Fried affirmation, exhibit 11 at 1-3). In the event of a default, Rosenthal may demand immediate payment (*id.* at 7). Amir and Guy executed personal guaranties (NYSCEF Doc No. 519 at 50 and 123; NYSCEF Doc No. 531, Fried affirmation, exhibit 20 at 1).

It is not disputed that the Rosenthal loans were not re-paid. This caused Rosenthal to raise the interest rate on loans or advances over $1.55 million (NYSCEF Doc No. 534-1, Fried affirmation, exhibit 23). In July 2015, Rosenthal demanded that nonparty Ben-Zion Holdings III, Inc. (BZH), a Florida corporation in which Amir, Guy and two others are shareholders (NYSCEF Doc No. 512 at 28 and 181), grant to Rosenthal a security interest in payments, distributions or proceeds payable to BZH from nonparty North Miami Avenue, LLC, a Florida limited liability company, as "consideration of and in order to induce Rosenthal to continue to extend credit and other accommodations" to FCS (NYSCEF Doc No. 535-1, Fried affirmation, exhibit 24 at 1).

Amir, as BZH's president, agreed to Rosenthal's terms (*id.* at 4). On November 25, 2015, Rosenthal informed FCS that it had defaulted on the Financing Agreement (NYSCEF Doc No. 536-1, Fried affirmation, exhibit 25 at 1). At Rosenthal's suggestion (NYSCEF Doc No. 529 at 45), FCS retained nonparty NYC Advisors, LLC and its principal, Cohen, pursuant to a consulting agreement dated December 17, 2015 (NYSCEF Doc No. 527, Fried affirmation, exhibit 16 at 9). Cohen testified that when he reviewed FCS's financial records, he noted that FCS had "lost money" and had a working capital deficiency. This meant "the company has much more obligations than assets to cover the obligation[s]" (NYSCEF Doc No. 529 at 62 and 80-81). FCS's debt to Rosenthal had also increased each year (*id.* at 85).

Cohen began serving as FCS's Chief Restructuring Officer in April 2016 and was tasked with restructuring the company and preparing it for a turnaround or a sale (NYSCEF Doc No. 527 at 8; NYSCEF Doc No. 529 at 111). Cohen began by eliminating Amir's consulting fees (NYSCEF Doc No. 529 at 119 and 172). Amir was not involved in FCS's daily operations (*id.* at 118) and had moved to Florida years earlier (NYSCEF Doc No. 512 at 169 and 216). Cohen reduced Guy's overall compensation (NYSCEF Doc No. 529 at 125), that had included the rent for Guy's apartment, medical and life insurance, utilities, telephone, car insurance, car lease, and other personal expenses (*id.* at 179-181). Cohen added sales staff, increased FCS's rate book and the commissions drivers paid to FCS and eliminated the company's 401k and dental plans (NYSCEF Doc No. 519 at 76-77). These actions resulted in FCS turning a profit of $600,000 in 2016 (NYSCEF Doc No. 529 at 146).

Cohen also helped negotiate an April 2016 forbearance agreement between Rosenthal and BZH, Guy, Amir, Atalia, and Guy's wife, nonparty Daniela Ben Zion (Daniela) (collectively, the Credit Parties), who were in default on the Financing Agreement and other loan agreements (*id.* at

84-85). In addition to Guy's and Amir's personal guaranties, Guy, Daniela and Atalia had executed mortgages, security agreements. and separate personal guaranties (NYSCEF Doc No. 531 at 1). The balance due to Rosenthal as of April 28, 2016 was $5,960,092.50, plus interest, fees, and expenses (*id.* at 2). Rosenthal agreed to forebear from exercising its rights and remedies under the Financing Agreement and other agreements until the "Forbearance Termination Date" (*id.* at 2-3). In exchange, the Credit Parties agreed to take actions, including converting $3.5 million of the outstanding debt into a term loan (*id.* at 4-5), as evidenced in a promissory note executed by FCS due to mature on January 31, 2017 (*id.* at 18).

FCS and NYC Advisors, LLC agreed that Cohen would assist FCS with a sale, acquisition, merger or other similar transaction (NYSCEF Doc No. 528, Fried affirmation, exhibit at 1). Cohen testified that despite the changes he had made, he resolved to sell FCS to a competitor because it was the best solution to ensure that FCS's debts were paid (NYSCEF Doc No. 529 at 135). Market pressure from companies such as Uber and Lyft, $700,000 in unpaid sales taxes due to New York State, plus the short period before the promissory note matured, were all factors (*id.* at 89-90 and 137-138). Additionally, FCS owed $403,000 to the Black Car Injury Fund (*id.* at 156). Cohen approached Elite and others as potential buyers (*id.* at 159 and 187-188). FCS received letters of intent from nonparty Addison Lee and Elite (*id.* at 154, 159, and 189). Cohen furnished Addison Lee with information about the Rosenthal loans and created a spreadsheet using information from FCS's audited financial statements (*id.* at 161-162). The document shows that FCS operated at a loss each year from 2012 to 2016; the principal balance on the Rosenthal loans increased from $3,426,642 in 2012 to $7,104,997 in 2016; and total owner's compensation decreased from $1,904,423 in 2012 to $601,973 in 2016 (NYSCEF Doc No. 526-1, Fried affirmation, exhibit 15 at 3). Cohen also provided Addison Lee with an itemized list of payments FCS made to Amir,

Guy, and Atalia as consulting fees or salaries, among other expenses (*id.* at 4). Between 2012 and 2015, these amounts totaled $6,809,062 (*id.*). FCS chose not to pursue a transaction with Addison Lee because "[t]he number they brought was far, far away from the Rosenthal debt … and Rosenthal would not approve it" (NYSCEF Doc No. 519 at 88). Addison Lee also declined to pursue a transaction (NYSCEF Doc No. 529 at 186).

Chaudhary testified that he could not recall meeting Amir or Guy before 2017 and had not heard any rumors about FCS's performance (NYSCEF Doc No. 518 at 35). Chaudhary expressed that, given pressure in the industry from Uber (*id.* at 37 and 48), Elite pursued a transaction with FCS because of "synergies, with consolidation, with reduced strength, with reduced overhead, one dispatch system … to become profitable" (*id.* at 44).

C. The FCS/Elite Transaction

On May 25, 2017, FCS, as "Seller," and Elite, as "Buyer," executed an asset purchase agreement (APA) under which FCS sold assets "free and clear of all liens, other than liens of Rosenthal … which will be discharged promptly following Closing upon payment to Rosenthal of the payoff amount … and liens for New York sales taxes to be discharged upon payment by Buyer" (NYSCEF Doc No. 548, Fried affirmation, exhibit 37 at 2). Elite purchased FCS's customer lists and customer records; its lists of drivers under FCS's base license; FCS's name and trademarks' all OZOcar assets owned by FCS[3]; goodwill associated with FCS; and "[d]rivers' loans in the amount of $39,281.79, among other specified assets (*id.* at 2-3). Elite also assumed certain of FCS's liabilities (the Assumed Liabilities) that had balances as of April 30, 2017, to be adjusted on the closing date. This included approximately $1.24 million in unpaid vouchers to drivers; $47,328.00 for drivers' savings accounts; $103,744.81 for drivers' security deposits; and

[3] FCS acquired OZOcar in 2014 and was required to make periodic payments on that purchase (NYSCEF Doc No. 529 at 72-73).

$11,377,844.59 due to Rosenthal as set forth in a payoff letter (*id*. at 4-5). Additionally, Elite paid the unpaid sales taxes and Black Car Injury Fund surcharges collected from FCS's customers through the day before closing (*id.* at 4). The total purchase price on the transaction (the Transaction) was $13,540,240.53 (*id.* at 5). A closing statement from May 25, 2017 shows that Elite paid the purchase price by assuming the Assumed Liabilities (NYSCEF Doc No. 628, Howley affirmation, exhibit D). Rosenthal financed the Transaction by extending three loans to Elite secured by Elite's accounts receivables under a separate financing agreement (*id.*). As a result, FCS fully paid the amounts due in sales taxes to the State and to the Black Car Injury Fund with the proceeds from the Transaction (NYSCEF Doc No. 529 at 248). Guy avers that neither he nor any of his family members received any proceeds (NYSCEF Doc No. 624, ¶ 28).

On June 3, 2017, FCS and Elite met with FCS's drivers to announce the Transaction. Chaudhary testified that Elite would "honor" FCS's franchise agreements by giving FCS drivers an Elite franchise (NYSCEF Doc No. 518 at 102). Elite was "offering them similar same [sic] but better terms, and everything" (*id*. at 69) and "want[ed] them to become Elite's franchisees" (*id.* at 94-95). Guy explained that Elite would "honor" the franchises purchased from FCS, meaning "there was an honorable acceptance by Elite to take on the FCS drivers" (NYSCEF Doc No. 519 at 142). Guy stated that drivers who had paid off their FCS franchise would not be charged a franchise fee to drive for Elite, though Elite would continue to charge for dues, commission, the use of vouchers, and the like (*id.* at 136). Drivers were also informed that their security deposits and savings accounts had transferred to Elite (*id.* at 120-121).

Some FCS drivers expressed their displeasure with the Transaction and refused to drive for Elite (NYSCEF Doc No. 350, ¶ 25). Those who chose to work for Elite were dissatisfied with Elite's treatment of them. This was due to paying duplicative fees that they had already paid to

FCS and Elite's practice of dispatching jobs to drivers connected to Chaudhary (*id.*, ¶¶ 110-112 and 123-124). Guy, who worked at Elite after the Transaction (NYSCEF Doc No. 519 at 21) admitted that former FCS drivers had complained to him about a lack of work (*id.* at 185-186). Plaintiffs also complained that Elite refused to allow former FCS drivers to sell or transfer their radio or franchise to Elite or to a third party (NYSCEF Doc No. 350, ¶¶ 24, 26, 32, 43 and 44). Guy, though, testified it was not FCS's practice, nor the practice of any black car group, to repurchase a franchise from a franchisee (NYSCEF Doc No. 519 at 144).

## PROCEDURAL HISTORY

Plaintiff Shahid Buttar (Buttar) commenced this action by filing a summons with notice on February 21, 2019 (NYSCEF Doc No. 1), followed by the filing of a class action complaint on July 22, 2019 (NYSCEF Doc No. 7) and an amended complaint on September 13, 2019 (NYSCEF Doc No. 18). In a decision and order dated March 29, 2022 (the March 2022 Order), this court granted plaintiffs' motion for class certification (NYSCEF Doc No. 234). The class consists 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." The sub-class consists 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" (*id.*). The March 2022 Order also partially granted the Elite Defendants' motion to dismiss (*id.*). Plaintiffs were later granted leave to amend their complaint to replead their cause of action alleging a violation of the Freelance Isn't Free Act, which had been dismissed previously (NYSCEF Doc No. 345).

The complaint dated June 27, 2022 pleads nine causes of action for: (1) breach of contract against Elite for uneven dispatching of jobs; (2) violations of the Franchise Sales Act (FSA) (General Business Law [GBL] §§ 683, 687 and 691 [3]), against the Elite Defendants; (3) violations of the Freelance Isn't Free Act (FIFA) (Administrative Code §§ 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, and 279 against Elite and FCS; (8) violations of DCL §§ 273, 274, 275, 278, and 279 against the FCS Defendants; (9) violations of the FSA (GBL §§ 683, 687 and 691 [3]), against the FCS Defendants.

Plaintiffs Zurab Anuashvili, Arora Gaganot, Sarabjeet Sodhi, Sukhvinder Sodhi, Milton Villagomez, Rabah Temzi, Eric Kibanda, Gregory Lachowicz, Roman Stanistchouk, Viorel Sirbu, and Rajwinder Singh have been discontinued their claims (NYSCEF Doc Nos. 225, 231, 315, 322, and 330). The remaining plaintiffs now move for partial summary judgment on their statutory claims. The FCS Defendants oppose and move separately for summary judgment dismissing the complaint and for an order decertifying the class. This action is stayed as to Elite because it filed for bankruptcy (NYSCEF Doc No. 864). However, the court granted plaintiffs' motion to sever its claims against the non-bankrupt defendants, the FCS Defendants and Chuadhary (NYSCEF Doc 873). Thus, this decision addresses plaintiffs' summary judgment motion (MS 12) to the extent that it is directed at defendants other than Elite.

## DISCUSSION

### I. The FCS Defendants' Motion to Decertify the Class (MS 13)

The FCS Defendants contend that decertification is appropriate because plaintiffs do not meet the elements of commonality, typicality and superiority.

In order to maintain a class action, the "prerequisites under section 901 must have been satisfied" (CPLR 902). Those prerequisites are "numerosity, commonality, typicality, adequacy of representation and superiority" (*City of New York v Maul*, 14 NY3d 499, 508 [2010]). "Each requirement is an essential prerequisite to class action certification" (*Alix v Wal-Mart Stores, Inc.*, 57 AD3d 1044, 1045 [3d Dept 2008]; *accord Rife v Barnes Firm, P.C.*, 48 AD3d 1228, 1229 [4th Dept 2008], *lv dismissed in part, denied in part* 10 NY3d 910 [2008]). The plaintiff's proof on each of these criteria must be in admissible form (*see Mid Is. LP v Hess Corp.*, 184 AD3d 439, 440 [1st Dept 2020]). If class treatment is inappropriate, the court may "decertify the class at any time before a decision on the merits if it becomes apparent that class treatment is inappropriate" (*City of New York*, 14 NY3d at 514).

Contrary to plaintiffs' contention, the FCS Defendants are not estopped from raising the same arguments against class certification that they had raised in opposition to plaintiffs' earlier class certification motion. CPLR 902 allows the court to amend its prior order "on the court's own motion or on motion of the parties."

Here, the FCS Defendants have not established that plaintiffs cannot satisfy the commonality requirement (CPLR 901 [a] [2]). "Commonality is not to be confused with unanimity" (*Maddicks v Big City Props., LLC*, 34 NY3d 116, 125 [2019]). The FCS Defendants contend that plaintiffs executed one, two or all three agreements – a radio right lease agreement with FCS, a TSA with a third-party, and an ICA with FCS – with respect to their franchises.[4] However, as discussed *infra*, plaintiffs are proceeding on an implied contract theory because those agreements do not mention the purchase of a franchise from FCS, and FCS was not a party to the TSA, which relates to the sale of a communications system. The FCS Defendants further allege

[4] Plaintiff Bimal Kunwar also entered into a "Smartphone Device Usage Agreement" with FCS, though the document is not dated or signed (NYSCEF Doc No. 597, Howley affirmation, exhibit 13 at 18).

that plaintiffs failed to produce signed franchise agreements, but the FCS Defendants, as the franchisor, have not produced copies of those same agreements, either. At least three plaintiffs testified they purchased a franchise because they no longer wished to lease a radio (NYSCEF Doc No. 588, Howley affirmation, exhibit 4, Jose Rodriguez [Rodriguez] tr at 32; NYSCEF Doc No. 589, Howley affirmation, Berniczky tr at 47-48; NYSCEF Doc No. 601, Howley affirmation, exhibit 17, Italo Vera tr at 20-21). While Guy testified that the TSA was FCS's contract, neither he, Amir nor anyone associated with FCS has explained whether the TSA was the vehicle by which FCS sold a "franchise" such that the TSA controls FCS's relationship with plaintiffs. Additionally, whether plaintiffs paid different amounts for their franchises or paid in installments is unrelated to whether FCS breached an implied contract. The common issues concerning the FCS Defendants' course of conduct related to plaintiffs' franchises prevail (*see Freeman v Great Lakes Energy Partners, L.L.C.*, 12 AD3d 1170, 1171 [4th Dept 2004]). The unjust enrichment and DCL claims also arise from their time as FCS franchisees.

Nor have the FCS Defendants established that plaintiffs cannot meet the typicality requirement (CPLR 901 [a] [3]). Typicality is satisfied where a plaintiff's claims and defenses are typical of those of the class (*Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 423 [1st Dept 2010]). "If 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 … [the typicality] requirement is satisfied'" (*id*. [citation omitted]). The FCS Defendants argue that individualized inquiries must be made because not every plaintiff executed the same agreements with FCS and their damages differ. However, "[t]ypicality does not require identity of issues and the typicality requirement is met even if the claims asserted by class members differ from those asserted by other class members" (*id*.).

Regarding the superiority prerequisite (CPLR 901 [a] [5]), a class action is superior to adjudicating each of the claims individually (*see Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 400 [2014]), especially given the amounts each individual plaintiff may recover in damages (*see Williams v Air Serv. Corp.*, 121 AD3d 441, 442 [1st Dept 2014]).

As for numerosity[5] (CPLR 901 [a] [1]), plaintiffs cannot satisfy this requirement on one of their causes of action. Plaintiffs in their ninth cause of action allege that the FCS Defendants breached the FSA by failing to furnish an offering prospectus to prospective franchisees. The presumed threshold necessary to satisfy the numerosity requirement is 40 plaintiffs (*see Agolli v Zoria Hous., LLC*, 188 AD3d 514, 514 [1st Dept 2020], citing *Borden*, 24 NY3d at 400). Discovery has shown that only one plaintiff, class representative Rodriguez, purchased a franchise in the three years preceding the commencement of the action (*see* GBL § 691 [4]). Plaintiffs have not proffered any other admissible evidence demonstrating that, at a minimum, 39 other drivers purchased a franchise between February 21, 2016 and February 21, 2019 such that the action may be maintained on a class-wide basis. Plaintiffs rely on a chart produced by the FCS Defendants in discovery that plaintiffs claim lists the entire class of 186 franchisees in chronological order based on when each driver purchased a franchise (NYSCEF Doc No. 847, Fried affirmation, exhibit 1; NYSCEF Doc No. 846, Fried affirmation, ¶ 2). The chart bears the title "FCS Franchisees as of May 25, 2017" and lists each driver's name, address and telephone number (NYSCEF Doc No. 847 at 1). However, there is no indication anywhere on the document that the franchisees were listed in sequential or chronological order based on a date of purchase, and the FCS Defendants have denied listing them in this fashion (NYSCEF Doc No. 860 at 4).

[5] The FCS Defendants had reserved their right to move to decertify the class if their summary judgment motion on the FSA is granted (NYSCEF Doc No. 622, FCS Defendants' mem of law at 2 n 2).

Plaintiffs further argue that Rodriguez's franchise purchase was preceded and followed by other purchases made monthly as indicated in an undated document that partially reads, "We have drivers joining and buying franchise [sic] from former drivers through FCS almost on a monthly basis" (NYSCEF Doc No. 848, Fried affirmation, exhibit 2 at 3). The document, however, is not authenticated and does not relate to the subject chart.

Further examination of the chart itself appears to refute plaintiffs' assertion that franchisees are listed sequentially based on when they bought their franchises. For instance, class representative Buttar purchased a franchise in 2011 (NYSCEF Doc No. 632, Howley affirmation, Buttar tr at 26). Plaintiff Kuldip Singh purchased a franchise in 2007 (NYSCEF Doc No. 647, Howley affirmation, Kuldip Singh tr at 15). Singh appears 40 places higher on the list than Kuldip Singh (NYSCEF Doc No. 847 at 1). Plaintiffs have not accounted for this discrepancy. Thus, the FCS Defendants motion to decertify the class is granted to the extent that the class is decertified only as to the ninth cause of action. The motion is otherwise denied.

**II. The Summary Judgment Motions**

**A. The Plaintiffs' Motion for Partial Summary Judgement (MS 12)**

The FCS Defendants contend that plaintiffs' motion is procedurally deficient because they failed to tender affidavits from persons with knowledge and the evidence is not in admissible form. These arguments are largely unpersuasive. CPLR 3212 (b) provides that a motion for summary judgment shall be supported by affidavit, and plaintiffs state correctly that an "attorney affirmation [may] properly serve[ ] as the vehicle for the submission of admissible evidence" (*Monaghan v Cole*, 171 AD3d 558, 559 [1st Dept 2019]). Cohen, Amir, or Grey authenticated several documents. For instance, Cohen testified that he created one of the documents (NYSCEF Doc No. 529 at 162). Amir discussed the Financing Agreement and the audited financial statements

(NYSCEF Doc No. 115, 135, 142 and 152), and Guy discussed the APA at their depositions (NYSCEF Doc No. 519 at 113). Other documents relate to the alleged contract between FCS and at least one plaintiff (NYSCEF Doc No. 538, Fried affirmation, exhibit 270) (*see Advanced Alternative Media, Inc. v Hindlin*, 220 AD3d 474, 474-475 [1st Dept 2023]). However, not all documents are in admissible form. Plaintiffs proffer a video and a transcript of Guy's speech at the June 2017 meeting (NYSCEF Doc Nos. 551-552, Fried affirmation, exhibits 40-41), but neither the video nor the transcript are certified or authenticated (*see Pesquera v 1968 2nd Ave.*, — AD3d —, 2024 NY Slip Op 00689, *1 [1st Dept Feb. 8, 2024]). Plaintiffs' counsel provides an analysis of plaintiffs' damages in terms of loss of gross revenues, but there is no evidence that counsel is qualified as an expert. Nonetheless, because not every document is inadmissible, the court will not deny merely for procedural defects.

Before Elite filed for bankruptcy, the Elite Defendants also opposed plaintiffs' summary judgment motion. Plaintiffs' motion is held in abeyance to the extent that they seek partial summary judgment on the second and third causes of action against Elite and Chuadhary. In the second cause of action, plaintiffs assert that Elite violated GBL §§ 683 and 687 (Doc 350 at pg. 30). They also assert that Chaudhary is jointly and severally liable for Elite's violations under GBL § 691 (3). Section 691 (3) states that "[a] person who . . . controls [liable entity] under this article . . . who materially aids in the act of transaction constituting the violation, is also liable jointly and severally with . . . the controlled [entity]." Because this case is stayed against Elite, the court must hold this part of Motion 12 in abeyance pending the conclusion of Elite's bankruptcy proceedings. Likewise, Motion 12 is held in abeyance to the extent that plaintiffs seek summary judgment on their third cause of action. In that claim, plaintiffs seek damages against Elite for alleged violations of the Freelance Isn't Free Act

**B. The Fourth Cause of Action for Breach of Implied Contract against FCS**

Plaintiffs allege that, although they were not in contractual privity with FCS on the TSAs, they entered into franchise agreements with FCS under which they paid FCS fees, drove on its network, received compensation according to a formula, and could transfer their franchises (NYSCEF Doc No. 350, ¶¶ 171-172). FCS allegedly frustrated the franchise agreements by selling them to Elite, knowing that Elite would not honor them (*id.*, ¶¶ 172-173). Plaintiffs claim that FCS has continued to collect and retain franchise payments and has refused plaintiffs the ability to transfer their franchises (*id.*, ¶ 174).

The elements for a cause of action for breach of an implied contract are the same as those on an express contract, which are "consideration, mutual assent, legal capacity and legal subject matter" (*Maas v Cornell Univ.*, 94 NY2d 87, 93-94 [1999]). "A contract implied in fact may result as an inference from the facts and circumstances of the case, although not formally stated in words, and is derived from the 'presumed' intention of the parties as indicated by their conduct" (*Jemzura v Jemzura*, 36 NY2d 496, 503-504 [1975] [internal citations omitted]). An implied contract may also be established by express agreement (*Mirchel v RMJ Sec. Corp.*, 205 AD2d 388, 390 [1st Dept 1994]). "The conduct of a party may manifest assent if the party intends to engage in such conduct and knows that such conduct gives rise to an inference of assent" (*Maas*, 94 NY2d at 94; *Young v United States Mtge. & Trust Co.*, 214 NY 279, 287 [1915] ["[a] meeting of the minds may be inferred from acts as well as words"]). A claim based on an implied contract cannot be maintained where an express contract governing the parties' dispute exists (*Thompson v Peters*, 197 AD3d 929, 930 [4th Dept 2021], citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-389 [1987]). Ordinarily, "[t]he existence of an implied contract is a question of fact" (*Shapira v United Med. Serv.*, 15 NY2d 200, 210 [1965]).

Applying these principles, FCS has failed to meet its prima facie burden. To begin, a cause of action for breach of implied contract is subject to a six-year statute of limitations (CPLR 213 [2]), and FCS maintains that the claim is time-barred. FCS submits that numerous plaintiffs began driving for FCS more than six years before February 21, 2019, when they commenced the action. As just one example, plaintiff Zawar Shahid (Shahid) began driving for FCS as early as 1994 (NYSCEF Doc No. 785, Howley affirmation, exhibit G, Shahid tr at 18; *see also* NYSCEF Doc No. 655, FCS Defendants' mem of law at 12 [summary chart]).

However, a cause of action for a breach of implied contract begins to run from the time of the breach (*Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]), not when the parties first entered into an agreement. In addition, FCS has submitted testimony from two plaintiffs who began driving for FCS after February 2013 (NYSCEF Doc No. 633, Howley affirmation, exhibit D, Sikander Awan tr at 27; NYSCEF Doc No. 638, Howley affirmation, exhibit I, Rodriguez tr at 24). Thus, FCS has not demonstrated that the implied contract claim is untimely.

Next, FCS contends that plaintiffs cannot demonstrate the elements necessary to form an implied contract, namely the contract's material terms and FCS's assent. However, the evidence upon which FCS relies, such as the affidavits from four class representatives Buttar, Haroon Rashid (Rashid), Berniczky, and Muhammad Tarar (Tarar) proffered on the motion for class certification, suggests otherwise. According to the affidavits, these plaintiffs purchased what they believed was a "franchise" from FCS (NYSCEF Doc No. 654 at 2, 8, 14, and 18). As consideration, these plaintiffs paid FCS tens of thousands of dollars for their franchises. This included the right to be dispatched jobs, drive on FCS's network and receive compensation for each completed job (*id.*). Each averred that he had made a substantial living driving for FCS (*id.*).

In his affidavit in support of the motion, Guy does not dispute that the purchase of a franchise granted a franchisee those rights and averred only that "[p]laintiffs did not obtain any equity in FCS as a result of them purchasing an FCS franchise" (NYSCEF Doc No. 624, ¶ 11). This course of dealing seemingly implies the existence of an implied agreement that, after plaintiffs paid an initial fee, FCS allowed class members to drive on its network, dispatched jobs to them, and paid them a percentage of the revenues received from the jobs they completed. A triable issue of fact also exists whether the implied contract included a term that FCS would purchase a franchise back from a franchisee. While Guy denied that it was FCS's practice to do so, Tarar testified that Moshe Abed, a manager at FCS, told him that FCS would purchase Tarar's franchise back if he ever left the company (NYSCEF Doc No. 802, Fried affirmation, exhibit 1, Tarar tr at 29). Numerous plaintiffs, though, testified that they never attempted to sell their FCS franchises (NYSCEF Doc No. 771, FCS Defendants' mem of law at 12 [summary chart]).

FCS argues that it could not have frustrated plaintiffs' franchises because it was allowed to transfer their franchise agreements without plaintiffs' approval (NYSCEF Doc No. 624, ¶ 10). A provision in FCS's franchise agreement states it "may sell, assign and/or transfer this Agreement without the consent of the Franchisee" (NYSCEF Doc No. 653 at 60). FCS, though, has not shown that the document's terms were incorporated into and form part of the parties' implied contract through a course of conduct or by express agreement (*see e.g. Schubtex, Inc. v Allen Snyder, Inc.*, 49 NY2d 1, 6 [1979], *rearg denied* 49 NY2d 801 [1980] [evidence must support whether a written provision was incorporated into an oral agreement between the parties]). Guy attests that a person wishing to purchase a franchise would sign a disclosure form and receive a franchise agreement (NYSCEF Doc No. 624, ¶ 9). Although the complaint alleges that plaintiffs signed "FCS Franchise Disclosure Document[s]" (NYSCEF Doc No. 350, ¶ 59), Buttar, Rashid, Berniczky, and

Tarar averred that they could not recall signing a separate franchise agreement. FCS has presented no evidence showing that plaintiffs had agreed to the terms of FCS's franchise agreement.

FCS also posits that the TSA governs the purchase and sale of plaintiffs' FCS franchises. The TSA, though, concerns the transfer of title to FCS's proprietary communication system that an independent contractor needed to perform under an ICA (NYSCEF Doc No. 650 at 1). None of the TSAs mention the purchase of a franchise, and the document expressly states that FCS was not a party to the TSAs. FCS also refers to a provision in the TSA that allowed it to terminate a driver, but that provision relates to the termination of an independent contractor's services under an ICA, not the termination of a "franchise" (NYSCEF Doc No. 650 at 3, 12, 24, 32, 42, 51, 56, 62, and 69). Regarding such services, the ICA states that a "Contractor agrees to perform services for [FCS] as follows: i.e., To render radio dispatched luxury ground transportation services to customers of [FCS]" (NYSCEF Doc No. 652 at 1, 4, 6, 10, 12, and 16) (italics removed). Guy attests that a driver entering into a radio lease agreement must sign an ICA, but he does not state whether a franchisee must also sign an ICA. Meanwhile, Amir testified that FCS sold radio rights based on franchises, and that those drivers with previously purchased radio rights "didn't change categories" (NYSCEF Doc No. 512 at 77). Guy also testified that franchisees often purchased their franchises from existing franchisees. As such, FCS has not adequately explained its use of an ICA, TSA and franchise agreement when a driver wished to purchase a "franchise." In viewing this evidence in the light most favorable to plaintiffs as the nonmoving parties (*see Scurry v New York City Hous. Auth.*, 39 NY3d 443, 457 [2023]), questions of fact as to the existence of an implied contract preclude granting FCS summary judgment.

Next, FCS contends that even if an implied contract exists, the contract claim should be dismissed because plaintiffs have not produced competent evidence of their damages. Plaintiffs

identify four categories of damages in response. The first three concern compensation that FCS failed to remit to plaintiffs: (1) $900,000 skimmed from drivers' commissions over the one and one-half year period preceding the Transaction; (2) premiums related to the "Black Car Injury Fund"; and (3) bounced checks.[6] The fourth relates to a devaluation of plaintiffs' franchises between $2.236 million and $3.44 million.

It is well settled that "'damages for breach of contract should put the plaintiff in the same economic position [they] would have occupied had the breaching party performed the contract'" (*Empery Asset Master, Ltd. v AIT Therapeutics, Inc*., 215 AD3d 10, 16 [1st Dept 2023]). "'The damages for which a party may recover for a breach of contract are such as ordinarily and naturally flow from the non-performance. They must be proximate and certain, or capable of certain ascertainment, and not remote, speculative or contingent'" (*Fruition, Inc. v Rhoda Lee, Inc*., 1 AD3d 124, 125 [1st Dept 2003] [citation omitted]). Damages are measured from the time of the breach (*Indeck Energy Servs., Inc. v Merced Capital, L.P*., 200 AD3d 455, 456 [1st Dept 2021]). "Where a party has failed to come forward with evidence sufficient to demonstrate damages flowing from the breach alleged and relies, instead, on wholly speculative theories of damages, dismissal of the breach of contract claim is in order" (*Lexington 360 Assoc. v First Union Natl. Bank of N. Carolina*, 234 AD2d 187, 190 [1st Dept 1996], citing *Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986]).

Addressing the Black Car Injury Fund first, plaintiffs claim they are entitled to recover $448,180 in premiums drivers paid to FCS for the purpose of receiving New York State Insurance Fund, or workers' compensation, benefits (NYSCEF Doc No. 532, Fried affirmation, exhibit 21). FCS, though, has demonstrated that plaintiffs are not entitled to those premiums. As a condition

[6] Plaintiffs did not claim their savings accounts and security deposits as a category of damages on the implied contract claim (NYSCEF Doc No. 800, plaintiffs' mem of law at 8).

of conducting business in New York, central dispatch facilities[7] must become members of the New York Black Car Operators' Injury Compensation Fund, Inc. (the Fund) (*see* Executive Law §§ 160-hh [1]) and 160-jj [3]). The Fund is a not-for-profit corporation (*see* Executive Law § 160-dd) that secures payment of workers' compensation benefits to black car operators[8] (*see* Executive Law § 160-ii [1]). Payments are funded via a uniform percentage surcharge added to the invoices the Fund's members send to their clients for "covered services" (*see* Executive Law § 160-jj [2]). Each member is responsible for paying into the Fund the surcharges paid by the member's customers for covered services as determined under a set formula (*see* Executive Law § 160-jj [2]). The Fund was created to ensure that black car operators injured while providing covered services receive workers' compensation benefits (*see Matter of Cisnero v Independent Livery Driver Benefit Fund*, 195 AD3d 1344, 1345-1346 [3d Dept 2021], *lv dismissed* 38 NY3d 994 [2022]). As such, plaintiffs cannot recover the premiums paid to the Fund.[9] FCS's customers also paid the surcharges imposed under Executive Law § 160-jj (2). In any event, Cohen testified that FCS fully paid the amounts due to the Fund (NYSCEF Doc No. 529 at 249), and plaintiffs have offered no evidence refuting his testimony. Accordingly, the court dismisses Plaintiffs' claim for $448,180 in damages related to the Fund.

FCS has also demonstrated that plaintiffs have not suffered any damages from their receipt of bounced checks (*see Tour Cent. Park Inc. v Thor 38 Park Row LLC*, — AD3d —, 2024 NY

[7] A "central dispatch facility" is "a central facility… that (a) dispatches the registered owners of for-hire vehicles …and (b) has … more than ninety percent of its for-hire business on a payment basis other than direct cash payment by a passenger" (Executive Law § 160-cc [3]). The New York City Taxi & Limousine Commission licensed FCS as a black car ground transportation company (NYSCEF Doc No. 624, ¶ 6; NYSCEF Doc No. 512 at 63).

[8] A "black car operator" is "the registered owner of a for-hire vehicle … whose injury arose out of and in the course of providing covered services to a central dispatch facility that is a registered member of the [Fund]" (Executive Law § 160-cc [1]; *see also* Administrative Code § 19-502 [u]).

[9] The ICA requires independent contractors to furnish their own workers' compensation insurance (NYSCEF Doc No. 652 at 2, 4, 8, 10, 14, and 16).

Slip Op 00252, *1 [1st Dept 2024] ["lack of damages defeats the breach of contract and unjust enrichment claims"]). Plaintiffs have not quantified their damages from this alleged breach with any specificity. Merely repeating the assertion that checks bounced does not establish the damages flowing therefrom (*see Lexington 360 Assoc.*, 234 AD2d at 190 [dismissing a contract claim where the record did not support plaintiff's damages theories]). Moreover, not every plaintiff received a check that bounced. Of the 18 plaintiffs deposed in this action, eight testified that they never received a check from FCS that bounced (NYSCEF Doc No. 771 at 15-16 [summary chart]). One plaintiff testified that he could not recall ever receiving a check from FCS that bounced and stated that FCS did not owe him any money (*id.*). Another stated that he was unsure if any checks he received from FCS had bounced (*id.*). Seven testified to having received at least one bounced check, but these plaintiffs admitted that they were paid what they were entitled to receive, and that FCS did not owe them money (*id.*). Another plaintiff testified that FCS never failed to make a payment to him (*id.*). Plaintiffs admit they were paid but still seek prejudgment interest (NYSCEF Doc No. 860, oral argument 4/28/23 tr at 25). However, they have not produced any evidence, testimonial, expert or otherwise, quantifying their underlying damages stemming from bounced checks on which prejudgment interest may be calculated (*see Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 193 [2008], *rearg denied* 10 NY3d 890 [2008] ["proof of consequential damages cannot be speculative or conjectural"]). Accordingly, the court dismisses Plaintiffs' damages claim based on bounced checks.

Plaintiffs maintain that FCS "surreptitiously" increased FCS's commissions (NYSCEF Doc No. 582-1 at 7 n 3). They point to Cohen's testimony in which he admitted modifying the rate.[10] Plaintiffs, though, misrepresent the testimony. Cohen testified that he did not know whether

[10] Both the ICA and form franchise agreement permit FCS to change the fees each driver pays on 30 days written notice (NYSCEF Doc No. 652 at 1; NYSCEF Doc No. 653 at 48).

FCS sought written agreements from its drivers for the increase because he did not deal with them (NYSCEF Doc No. 529 at 127).

Further, plaintiffs' claim that FCS skimmed $900,000 from drivers is speculative. Plaintiffs base this number on FCS's annual revenue of $30 million and a 2% increase over 18 months (NYSCEF Doc No. 860 at 20). Cohen, though, could not recall the new rate, testifying that if FCS received 18% of each fare, then FCS "upped it to get to 20%, roughly" (NYSCEF Doc No. 529 at 126). Guy recalled the rate increased by 1% (NYSCEF Doc No. 519 at 76). Neither Cohen nor Guy stated when the change was put into effect. Plaintiffs claim they were compensated according to a formula (NYSCEF Doc No. 350, ¶ 172) but have submitted no evidence of the prior formula in effect before the increase. The only proof of a formula appears in a December 22, 2016 letter from FCS informing drivers that it was increasing its commission from 20% to 23% beginning January 1, 2017 (NYSCEF Doc No. 541, Fried affirmation, exhibit 30 at 1). While FCS submits that nothing prevented it from raising the rate (NYSCEF Doc No. 860 at 7), curiously, plaintiffs have not produced a single affidavit or testimony stating that any of them were aware of this change when it was made or had challenged it. The announcement of the rate change in December 2016 also appears to defeat any claim that FCS surreptitiously withheld additional commissions. As indicated earlier, 18 plaintiffs testified that FCS never withheld monies owed or that no payments were due from FCS. Absent evidence that plaintiffs disputed the rate change, it appears that plaintiffs, through their course of conduct, agreed to the change such that there was a meeting of the minds (*see* Restatement [Second] of Contracts § 19 ["[t]he manifestation of assent may be made wholly or partly … by failure to act"]), thereby negating any claim of a breach. Plaintiffs' demand for damages of $900,000 in skimmed commissions is dismissed.

As to the last category, plaintiffs assert that FCS devalued plaintiffs' franchises and seek between $2.236 million and $3.44 million based on the market value of those franchises. Plaintiffs have offered no expert proof to support these amounts and relied solely on the purchase price Rodriguez paid for his franchise as proof of the trading value (NYSCEF Doc No. 860 at 26). But "[w]here … 'it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach" (*Cole v Macklowe*, 105 AD3d 604, 605 [1st Dept 2013]). FCS's argument on plaintiffs' proof concerns the absence of a quantification of their damages and not FCS's liability, if any. Because a triable issue of fact exists as to the existence of an implied contract and whether FCS breached that contract, an issue of fact exists as plaintiffs' damages in this category, as well. Thus, only plaintiffs' claims for damages related to the Fund, bounced checks, and skimmed commissions are dismissed against FCS.

**C. The Sixth Cause of Action for Unjust Enrichment against FCS**

Plaintiffs allege that FCS was unjustly enriched from the Transaction because its principals evaded liability on the Rosenthal loans and obtained $13.5 million from Elite, FCS continued to exist in another form by combining with Elite, and FCS evaded liability to plaintiffs on their franchise agreements (NYSCEF Doc No. 350, ¶ 182).

Unjust enrichment is "the receipt by one party of money or a benefit to which it is not entitled, at the expense of another" (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 473 [1st Dept 2010]). To prevail on a cause of action for unjust enrichment, the "plaintiff must show that (1) the other party was enriched; (2) at that party's expense; and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Kramer v Greene*, 142 AD3d 438, 442 [1st Dept 2016] [internal quotation marks and citation omitted]). "[U]njust

enrichment is not a catchall cause of action" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012], *rearg denied* 19 NY3d 937 [2012]).

Under these precepts, FCS has shown that it was not unjustly enriched at plaintiffs' expense from the Transaction. The evidence demonstrates that plaintiffs paid FCS for the right to drive on FCS's network and that FCS, in return, FCS dispatched jobs to plaintiffs for which they were paid.

Plaintiffs, in response, contend that FCS was unjustly enriched when it skimmed $900,000 in commissions, bounced checks, retained premiums to the Fund, and failed to reimburse security deposits and savings. The arguments concerning bounced checks and premiums paid to the Fund fail for the reasons explained above. With regard to FCS's commissions, plaintiffs do not deny that they were paid for their work, and plaintiffs have not set forth a basis for why it would be inequitable or against good conscience for FCS to retain a commission from each driver for each ride it dispatched (*see e.g. Stevens v RX Med. Dynamics, LLC*, 191 AD3d 487, 488 [1st Dept 2021], *lv denied* 37 NY3d 909 [2021]; *Angé v Holley-Angé*, 121 AD3d 595, 596 [1st Dept 2014]).

Plaintiffs also posit that FCS was unjustly enriched because it retained the value of their franchises without remuneration after Elite purchased its assets, but the two cases on which they rely are inapposite. In *Herald Hotel Assoc. v Ramada Franchise Sys.* (191 AD2d 288, 289 [1st Dept 1993]), the Court reinstated an unjust enrichment cause of action because the application fee plaintiff had paid to the defendant's successor on a failed transaction to purchase a hotel franchise constituted an unjustified windfall. By contrast, here, plaintiffs admit to having exercised their franchise rights to drive on FCS's network and were paid for their work. Moreover, Buttar, Rashid, Berniczky, and Tarar admitted to having made a substantial living driving for FCS.

Plaintiffs also cite *Lake Erie Distribs. v Martlet Importing Co.* (221 AD2d 954 [4th Dept 1995]). The Court in that action denied a motion to dismiss brought under CPLR 3211 where the

plaintiff alleged that it had "conferred a benefit upon defendants in the form of enhanced product recognition and good will through its marketing and distributorship efforts" (*id.* at 956). The procedural posture in *Lake Erie Distribs.*, however, is different, as FCS is moving for summary judgment. "Unlike on a motion for summary judgment where the court 'searches the record and assesses the sufficiency of the parties' evidence,' on a motion to dismiss the court 'merely examines the adequacy of the pleadings'" (*Davis v Boeheim*, 24 NY3d 262, 268 [2014] [citations omitted]). In any event, the mere fact that plaintiffs drove for FCS, thereby increasing its goodwill, amounts to an incidental benefit for which they are not entitled to compensation (*see D3 Intl, Inc. v AGGF Cosmetic Grp. S.P.A.*, 2023 WL 2390552, *11, 2023 US Dist LEXIS 38119, *31-33 [SD NY, Mar. 7, 2023, No. 21-cv-06409 (LJL)] [dismissing unjust enrichment claim where any value generated for defendant in the form of goodwill was a "necessary incidental effect" of the parties' agreement"]; *Gidatex, S.r.L. v Campaniello Imports, Ltd.*, 49 F Supp 2d 298, 305 [SD NY 1999] [dismissing counterclaim for unjust enrichment where the defendant worked to support the plaintiff's trademark "because it wished to ensure that its customers would continue to purchase furniture at its stores. Any benefit to Gidatex was a by-product"]).

Regarding the security deposits and savings accounts, Guy admitted that FCS did not have "cash on hand" to satisfy the security deposits and savings accounts at the time of the Transaction, but he also testified that "Rosenthal would have covered that" on the Transaction (NYSCEF Doc No. 519 at 119). Indeed, FCS accounted for those payments when it negotiated the APA with Elite (*see Parkview Rest. Group-NY v WWF N.Y.*, 309 AD2d 636, 638 [1st Dept 2003], *rearg denied* 2004 NY App Div LEXIS 2368 [1st Dept 2004] [per the express terms of the asset purchase agreement, defendant assumed the plaintiff's payment obligations to a third party]). Those amounts formed part of the purchase price on the Transaction, and FCS has shown that it did not

retain any proceeds from the sale. Thus, FCS cannot have been unjustly enriched because it did not retain those amounts. Therefore, the sixth cause of action for unjust enrichment is dismissed against FCS.

**D. The Debtor and Creditor Law Claims against the FCS Defendants**

The seventh cause of action pleads claims under DCL §§ 273, 274, 275, 278, and 279 against FCS stemming from the Transaction, in which FCS transferred valuable assets, including its client base and fleet of drivers, to Elite without fair consideration at a time when FCS was insolvent (NYSCEF Doc No. 350, ¶¶ 187-188). Plaintiffs claim they were creditors of FCS at the time of the Transaction because FCS had fallen behind on payments due to them and "FCS had a material liability on behalf of the transferability liability due to Plaintiffs" (*id.*, ¶ 190). Plaintiffs largely repeat these same allegations on the eighth cause of action against FCS, Amir, and Guy under DCL §§ 273, 274, 275, 277, 278, and 279 (*id.*, ¶¶ 194-199). Plaintiffs seek to set aside the conveyances made to Elite, Amir, and Guy to the extent necessary to satisfy FCS's obligations to plaintiffs (*id.*, ¶¶ 192 and 200).

At the outset, the New York State Legislature repealed and replaced article 10 of the DCL after plaintiffs commenced this action (*see* Uniform Voidable Transactions Act, L 2019, ch 580, § 2, eff April 4, 2020). Because the changes do not apply retroactively (*see* L 2019, ch 580, § 7), the former version of the DCL applies to the seventh and eighth causes of action, and the law cited herein refers to the version of the DCL in effect before the amendments.

DCL § 273 provides that a conveyance that renders the transferor insolvent is fraudulent as to creditors when it is made without fair consideration. Under DCL § 274, a conveyance is fraudulent as to creditors without regard to actual intent when it is "made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which

the property remaining in his [or her] hands after the conveyance is an unreasonably small capital." A conveyance made without fair consideration is fraudulent as against creditors under DCL § 275 when the transferor "intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors." Under DCL § 272, "[f]air consideration is given … [w]hen in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or … [w]hen such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained." The transaction must also have been made in good faith, which is required of the transferor and transferee (*Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership*, 25 AD3d 301, 303 [1st Dept 2006], *rearg denied* 2006 NY App Div LEXIS 6386 [1st Dept 2006]). DCL §§ 278 and 279 govern a creditor's matured and unmatured claims. The party challenging the conveyance must demonstrate the lack of fair consideration and insolvency, which are generally issues of fact (*see Epstein v Nieves*, 258 AD2d 436, 436 [1999]).

**i. <u>The Seventh Cause of Action against FCS</u>**

It is well settled that "[a]n antecedent debt can constitute fair consideration" (*Matter of CIT Group/Commercial Servs., Inc*., 25 AD3d at 302). "[A] conveyance which satisfies an antecedent debt made while the debtor is insolvent is neither fraudulent nor otherwise improper, even if its effect is to prefer one creditor over another" (*Ultramar Energy v Chase Manhattan Bank*, 191 AD2d 86, 90-91 [1st Dept 1993]).

FCS has shown that the proceeds from the Transaction were primarily used to satisfy an antecedent secured debt (*id.* at 91). The closing statement for the Transaction contains a detailed account of the disbursement of the proceeds, including $11,377,844.59 paid to Rosenthal and

additional funds directed to FCS's accounts payable, voucher payments due to drivers, driver savings accounts, and driver security deposits (NYSCEF Doc No. 628). FCS has also established that the Transaction was the result of an arms-length transaction with Elite, a competitor. Cohen testified that he believed selling FCS to a competitor "would be a good solution to have all the debts of the company paid if I'm able to get a good price" and that "Rosenthal wanted to get paid" (NYSCEF Doc No. 529 at 135). Cohen also testified that he initiated contact with Elite, and that he was not aware of any preexisting relationship between FCS's principals and Elite's principals (*id.* at 187-188). Chaudhary testified that Elite purchased FCS because it wished to grow its business (NYSCEF Doc No. 518 at 47-49).

Plaintiffs, in opposition, have not offered any evidence refuting FCS's proof that the proceeds from the Transaction were used to satisfy an antecedent debt (*see Ultramar Energy*, 191 AD2d at 91). Because plaintiffs have not disputed the existence of the Rosenthal debt, having tendered copies of the Financing Agreement in support, their reliance on *Matter of Mega Personal Lines v Halton* (297 AD2d 428, 429 [3d Dept 2002] [no written records substantiating the antecedent debt]), is misplaced. *Sardis v Frankel* (113 AD3d 135, 138 [1st Dept 2014]), likewise, is distinguishable, as plaintiffs have not alleged that FCS implemented an "asset protection plan" to shield its assets to prevent plaintiffs from collecting on a judgment adverse to it. That the Transaction ensured Rosenthal would not enforce the personal guaranties executed by Amir, Guy and other family members also does not render the Transaction fraudulent, since it was FCS that principally owed the debt to Rosenthal. Moreover, after satisfying the debt to Rosenthal, the balance of the proceeds was directed to paying FCS's liabilities.

Plaintiffs have also failed to put forward any facts or evidence demonstrating that the transfers to Elite were made without fair consideration. First, plaintiffs have not shown that the

purchase price for FCS's assets did not constitute fair value (*see Uni-Rty Corp. v New York Guangdong Fin., Inc.*, 140 AD3d 446, 447 [1st Dept 2016] [lack of proof that reassignment of loans did not constitute fair consideration]; *Chemung Canal Trust Co. v Living Better, Inc.*, 127 AD3d 1373, 1375 [3d Dept 2015] [no proof the company was worth more than the antecedent debt assumed by the defendant]). Second, plaintiffs have not shown that FCS and Elite shared common ownership so as to defeat the fraudulent conveyance claims for the lack of good faith (*see ADM Assoc. v Grease 'n Go*, 905 F Supp 79, 87 [ED NY 1995] [no commonality of ownership]). Neither Guy nor Amir were officers or shareholders in Elite prior to the Transaction (*see Matter of Mega Personal Lines, Inc. v Halton*, 9 AD3d 553, 555 [3d Dept 2004] ["insider's participation in both the transferor and the transferee is not sufficient to resolve the issue as a matter of law unless the insider controls the transferee"]). Therefore, the seventh cause of action is dismissed as against FCS.

**ii. <u>The Eighth Cause of Action against FCS, Amir, and Guy</u>**

"Under New York law, '[t]he payment of salary is presumed to be for fair consideration for purposes of, inter alia, DCL §§ 273-75 … [unless there is] evidence of one of the following: (1) bad faith, (2) excessive or unreasonable payments, or (3) 'that the corporation did not receive full value in return'" (*Emerson Elec. Co. v Asset Mgt. Assoc. of N.Y.*, 2023 WL 4850528, *4, 2023 US Dist LEXIS 131016, *10 [ED NY, July 28, 2023, No. 16-CV-1390 (PKC) (SIL)] [citations omitted]). Before assessing whether the transfers to Amir and Guy were made for fair consideration, plaintiffs must demonstrate they were creditors of FCS. Whether a plaintiff is a creditor is a threshold issue on a DCL claim (*see Paragon v Paragon*, 164 AD3d 1460, 1462 [2d Dept 2018], citing *Galgano v Ortiz*, 287 AD2d 688 [2d Dept 2001]; *First Keystone Consultants, Inc. v Schlesinger Elec. Contractors, Inc.*, 871 F Supp 2d 103, 116 [ED NY 2012]). A "creditor"

for purposes of the DCL is "a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent" (DCL § 270). "Under the statute a creditor has standing to maintain an action to set aside a fraudulent transfer, though his debt may not have been in existence at the time of the transfer" (*Julien J. Studley, Inc. v Lefrak*, 66 AD2d 208, 214 [2d Dept 1979], *affd* 48 NY2d 954 [1979]). A "debt" is "any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent" (DCL § 270). Alleging a breach of contract may be sufficient to establish a plaintiff's status as a creditor (*see Board of Mgrs. of E. Riv. Tower Condominium v Empire Holdings Group, LLC*, 175 AD3d 1377, 1379 [2d Dept 2019]).

Here, triable issues of fact preclude granting summary judgment to plaintiffs or the FCS Defendants. As a preliminary matter, plaintiffs have not tendered an affidavit or testimony setting forth the amounts allegedly owed to them by FCS with particularity or attesting to their status as creditors at the time the transfers to Amir and Guy were made. Additionally, plaintiffs have not proffered any evidence to show that any of them had deposited savings with or paid a security deposit to FCS. Instead, plaintiffs collectively assert that FCS repeatedly bounced checks, skimmed $900,000 in commissions, and failed to return hundreds of thousands of dollars in driver security deposits and savings. The evidence adduced thus far refutes their claims on the skimmed commissions and bounced checks, as above. Plaintiffs also claimed that they were owed $1.2 million in unpaid vouchers (NYSCEF Doc No. 350, ¶ 85), but Chaudhary testified that "[w]hen [Elite] paid their monies nobody ever objected or challenged or disputed or corrected or any mistakes in those – on those payments or charges" (NYSCEF Doc No. 518 at 83).

Regarding the security deposits and savings, Elite contractually assumed those liabilities under the APA (*compare Parkview Rest. Group-NY*, 309 AD2d at 638, with *172 Van Duzer Realty*

*Corp. v 878 Educ., LLC*, 142 AD3d 814, 817-818 [1st Dept 2016] [denying dismissal of DCL §§ 273, 274 and 275 claims where the purchaser assumed certain liabilities belonging to the seller corporation under an asset purchase agreement, but supplementary evidence showed that the consideration paid was not the fair equivalent of the assets transferred]). Chaudhary testified that "some people took … their savings. They were entitled" (NYSCEF Doc No. 518 at 85), and Guy testified that FCS often refunded a driver's security deposit within 18 months of that driver joining FCS's fleet (NYSCEF Doc No. 519 at 117). Nevertheless, triable issues of fact exist as to whether plaintiffs are creditors under the DCL. Although 18 plaintiffs testified that FCS never failed to make a payment due to them (NYSCEF Doc No. 771 at 15-16), their testimony acknowledging payment appears to relate to bounced checks, not their security deposits or savings.

Additionally, issues exist whether the compensation paid to Guy and Amir was excessive or unreasonable or whether FCS received full value in return at a time when FCS was operating with a working capital deficiency. The FCS Defendants contend that Amir was an owner entitled to compensation. FCS, though, did not employ a compensation committee to determine Amir's salary (NYSCEF Doc No. 529 at 168). Instead, FCS used an annual budget, approved by Rosenthal, to determine the salaries of its officers and shareholders (NYSCEF Doc No. 512 at 134-135). Between 2012 and 2015, FCS paid Amir $2.748 million in consulting fees even though he had been a full time Florida resident for years (*id.* at 161-162 and 169). Cohen testified that he stopped Amir from taking consulting fees from FCS "[b]ecause the company could not afford it," though Cohen was not privy to the advice Amir had given to Guy to earn those fees (NYSCEF Doc No. 529 at 170 and 172). Neither Amir nor Guy adequately explained the nature and the extent of Amir's consulting services. In addition, Guy ran FCS on a day-to-day basis, but Cohen

reduced the overall compensation paid to him, as well (NYSCEF Doc No. 529 at 176-180). Summary judgment on the eighth cause of action is denied to plaintiffs and to the FCS Defendants.

**E. The Ninth Cause of Action under the Franchise Sales Act against the FCS Defendants**

Plaintiffs posit that the FCS Defendants violated the FSA when they failed to apprise drivers of FCS's precarious financial condition, they failed to amend FCS's franchise disclosure document to disclose the company's financial issues and used "straw entities" to sell franchises.

For their part, the FCS Defendants note that plaintiffs who purchased a franchise before February 21, 2019 are time-barred from bringing a claim under the FSA. They reject the assertion that FCS used straw entities to sell franchises because numerous plaintiffs testified that they had purchased their franchises from existing franchisees. Finally, they claim that plaintiff cannot prove they were damaged from an alleged FSA violation.

GBL § 680 (2) states, in relevant part, that "it is the intent of [the FSA] 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." To that end, the FSA sets out comprehensive requirements that "apply to all written or oral arrangements between a franchisor and franchisee in connection with the offer or sale of a franchise" (GBL § 682). Before offering a franchise for sale, a franchisor must register an offering prospectus with the New York State Attorney General that includes the information specified in the statute, such as "[t]he most recent financial statement of the franchisor, together with a statement of any material changes in the financial condition of the franchisor from the date thereof" (GBL § 683 [1] and [2] [g]). Each prospective franchisee must be given "a copy of the offering prospectus, together with a copy of all proposed agreements relating to the sale of the franchise" within a specific timeframe (GBL § 683 [8]). A franchisor may not offer a franchise for sale except by the registered offering prospectus (GBL § 683 [11]). The FSA renders it

unlawful for franchisors to "[e]ngage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person" (GBL § 687 [2] [c]) or violate any provision the FSA (GBL § 687 [3]).

The failure to comply with the FSA subjects a franchisor to criminal and civil penalties (GBL §§ 690-691). The purchaser of a franchise may sue a person who sells a franchise in violation of GBL §§ 683 and 687 and recover damages, 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]). A principal executive officer or director of a corporation and a person who occupies a similar status or performs similar functions is also jointly and severally liable for the violation (GBL § 691 [3]).

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]). As such, the FSA applies to offers and sales of a franchise but "does not cover problems or disputes that can develop during the course of the franchise relationship" (*EV Scarsdale Corp. v Engel & Voelkers N. E. LLC*, 48 Misc 3d 1019,1033 [Sup Ct, NY County 2015] [internal quotation marks and citation omitted]; *see also Kroshnyi v U.S. Pack Courier Services, Inc.* (771 F3d 93, 104 [2d Cir 2014] [the FSA "does not seek to regulate the ongoing operations of a franchise"]). Moreover, an action for a violation of the FSA must be brought within "three years after the act or transaction constituting the violation" (GBL § 691 [4]).

The FCS Defendants contend, and plaintiffs concede, that only those drivers who purchased their franchises in the three years preceding February 21, 2019 may maintain a claim. Thus far, plaintiffs have identified only one franchisee, Rodriguez, as having purchased a franchise

within the limitations period. Thus, claims for an FSA violation, other than Rodriguez, are dismissed against FCS.

Plaintiffs submit that FCS regularly used straw entities to sell franchises. On this point, plaintiffs proffer a TSA listing "JZP Partners" as the "Outgoing Contractor" and Rodriguez as the "Incoming Contractor" (NYSCEF Doc No. 538 at 1). Amir admitted that "JBZ is basically us. Basically me," and that he used JBZ Partners "in the early days" to "help people buy cars, or finance radios, or when they exit, we would buy the radio back and so-called sell it at a later date" (NYSCEF Doc No. 512 at 104-105). The TSA, however, is not signed, and the last page lists "Yiu Kai Tam," not Rodriguez, as the "Incoming Contractor" (NYSCEF Doc No. 538 at 6).

The FCS Defendants contend that Rodriguez has failed to identify any fraudulent statement that induced him into purchasing a franchise. Rodriguez, though, has alleged that he was never given an offering prospectus informing him of FCS's imminent financial collapse (NYSCEF Doc No. 350, ¶ 90). GBL § 683 (8) requires the franchisor to give each prospective franchisee a duly registered offering prospectus and all proposed agreements related to the sale, and Guy averred that each prospective franchisee is given a copy of FCS's franchise disclosure document. But, when asked whether FCS provided Rodriguez with a disclosure document, Guy testified, "I don't remember" (NYSCEF Doc No. 519 at 87). Guy also could not recall whether FCS had given Rodriguez a franchise agreement, stating that he "would need to ask Lisa DeJesus and Moshe Abed" (*id.*). Crucially, Rodriguez did not submit an affidavit or other sworn testimony describing the circumstances surrounding the purchase of his franchise. Such evidence is probative to determining whether there was a violation and whether Rodriguez has satisfied his prima facie burden. The only evidence showing that he was not given an offering prospectus and agreement before he purchased the franchise appears in a prior affidavit tendered in connection with the

motion for class certification. Rodriguez averred, "I recall signing a document, but Guy refused to give me a signed copy of the contract. I do not believe I signed a 'franchise agreement,' and I never saw a 'franchise disclosure document'" (NYSCEF Doc No. 42, Rodriguez aff, ¶ 2). Rodriguez, though, did not tender this affidavit in support of his motion.

Even assuming that there was an FSA violation, Rodriguez must demonstrate that the violation proximately caused his damages (*see Burgers Bar Five Towns, LLC v Burger Holdings Corp.*, 71 AD3d 939, 941 [2d Dept 2010]; *see also Dunkin Donuts, Inc. v HWT Assoc.*, 181 AD2d 711, 711 [2d Dept 1992], *lv dismissed* 80 NY2d 893 [1992], *rearg dismissed* 84 NY2d 966 [1994] ["[w]ithout damage there can be no action for fraud" under GBL § 687]). More specifically, the FCS Defendants' failure to furnish an offering prospectus must "have been material to [Rodriguez's] investment decision" (*EV Scarsdale Corp. v Engel & Voelkers N.E. LLC*, 2017 NY Slip Op 32380[U], *7 [Sup Ct, NY County 2017]; *accord BMW Co. v Workbench, Inc.*, 1988 WL 45594, *2, 1988 US Dist LEXIS 3719, *6 [SD NY, April 29, 1998, No. 86 Civ. 4200 (RO)]). Here, Rodriguez has not proffered any evidence establishing that he would not have gone forward with the purchase had FCS given him an offering prospectus that revealed FCS's precarious financial position (*see Baker Boy of Glendale v 35-63 82nd St. Corp.*, 166 AD2d 397, 399 [2d Dept 1990], *lv denied* 77 NY2d 807 [1991] [no admissible proof that a failure to furnish an offering prospectus was material]; *see also A Love of Food I, LLC v Maoz Vegetarian USA, Inc.*, 70 F Supp 3d 376, 412 [D DC 2014] [franchisee failed to put forth evidence connecting the franchisor's failure to timely disclose an offering prospectus to franchisee's losses]).

*South Shore D'Lites LLC v First Class Prods. Group, LLC* (215 AD3d 412 [1st Dept 2023]) (*South Shore*) is distinguishable. The defendants in *South Shore* disputed whether the parties' sub-license agreements created a "franchise" as that term is defined in GBL § 681 (3) such that the

agreements qualified for protection under the FSA (brief for respondents in *South Shore*, available at 2023 WL 3029806, *6). The Court determined that the sub-license agreements constituted franchise agreements and that the defendants had failed to furnish the plaintiffs with a registered offering prospectus (*South Shore*, 215 AD3d at 412-413). The latter finding was based, in part, upon defendants' sworn response to an interrogatory stated that "no 'Franchise Disclosure Documents' were or could have been involved in the transactions" (brief for appellants in *South Shore*, available at 2023 WL 3029804, *10). An answer to an interrogatory "may be used to the same extent as the depositions of a party" (CPLR 3131). Thus, the defendants essentially admitted to that there was an FSA violation. In this case, the FCS Defendants do not dispute that Rodriguez purchased a "franchise." Guy testified only that he could not recall whether Rodriguez was given a franchise disclosure document, and thus, his testimony is not dispositive. As such, triable issues of fact preclude granting summary judgment to both Rodriguez and the FCS Defendants on the ninth cause of action.

**CONCLUSION**

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment on the seventh cause of action against defendant First Corporate Sedans, Inc. (FCS) and the eighth and ninth causes of action against FCS and defendants Guy Ben Zion and Amir Ben Zion (collectively, the FCS Defendants) (motion sequence no. 012) is denied; and it is further

ORDERED that the balance of plaintiffs' motion for summary judgment against defendants Elite Limousine Plus, Inc. and Shafquat Chaudhary is held in abeyance pending the resolution of the bankruptcy proceeding filed by Elite Limousine Plus, Inc.; and it is further

ORDERED that the motion brought by the FCS Defendants to decertify the class (motion sequence no. 013) is granted to the extent that the class is decertified as to the ninth cause of action, only, and the balance of the motion is otherwise denied; and it is further

ORDERED that the motion brought by the FCS Defendants for summary judgment dismissing the complaint (motion sequence no. 14) is granted to the extent of dismissing plaintiffs' claims for damages for premiums paid to the New York Black Car Operators' Injury Compensation Fund, Inc., bounced checks, and skimmed commissions and dismissing the sixth and seventh causes of action pled against FCS, and the balance of the motion is otherwise denied.

20240913143158MACRANE1957789A1D9448B3BB2AB751F4D854EB

| 9/13/2024 | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| DATE | | | | | MELISSA A. CRANE, J.S.C. | | | |
| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | | |
| | | GRANTED | | DENIED | X | GRANTED IN PART | | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | | REFERENCE |