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United States District Court, C.D. California.

ABSOLUTE USA, INC., et al., Plaintiffs,
v.
HARMAN PROFESSIONAL, INC., et al., Defendants.

Case No.: 2:21-cv-06410-MEMF(MAAx)
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Signed December 7, 2023

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**ORDER GRANTING PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE [ECF NO. 34] AND DENYING DEFENDANTS' MOTION TO DISMISS [ECF NOS. 48, 50-1]**

MAAME EWUSI-MENSAH FRIMPONG, United States District Judge

***1** Before the Court is the Motion to Dismiss filed by Defendants Harman Professional, Inc. and Michael A. Schoen (ECF No. 49) and the Request for Judicial Notice filed by Plaintiffs Absolute USA, Inc. and Mohammad Razipour (ECF No. 50-1). For the reasons stated herein, the Request for Judicial Notice is GRANTED and the Motion to Dismiss is DENIED.

## BACKGROUND

### I. Factual Background [1]

Plaintiff Absolute USA, Inc. ("Absolute") is a California corporation headed by its sole owner, Plaintiff Mohammad Razipour ("Razipour", collectively with Absolute, the "Absolute Plaintiffs"). TAC ¶¶ 1–2, 10. Defendant Harman Professional Solutions ("Harman") is a manufacturer of audio, video, lighting, and control systems for the professional market. [2] Joint Case Management Statement ("Joint CMS"), ECF No. 40 at 2. Defendant Michael A. Schoen ("Schoen") is a California resident employed by Harman. *Id.*

On or about May 28, 2015, Absolute and Harman entered into a Dealer Agreement (the "Agreement"), authorizing Absolute to "purchase, sell [,] and market certain Harman-approved and designated products ... to end users" on a non-exclusive basis. TAC ¶¶ 10, 21; *see* ECF No. 23-2 ("Agreement"). Under the terms of the Agreement, Absolute was authorized solely to sell Harman products through solely through the internet, and specifically, through the websites specified in the Agreement. TAC ¶ 22.

The Agreement provides for a one-year term, starting on the designated "Effective Date" and expiring on June 30 of the "calendar year immediately following the Effective Date." Agreement § 8.1. It includes an automatic renewal for successive twelve (12)-month periods, unless "either Party notifies the other at least thirty (30) days prior to the expiration of the then-current Term, that it does not wish to further renew the Term." *Id.* Either party may terminate the Agreement for any reason "at any time"

  

upon giving the other party thirty days advance written notice. *Id.* § 8.2. A party may also terminate the Agreement in whole or as to a particular brand or line of products if "the other Party breaches any material obligation under [the Agreement] and fails to cure such breach within fifteen (15) days after being notified of such breach." *Id.* § 8.3. Upon termination or expiration of the Agreement, the "Dealer [Absolute] shall discontinue operating and holding itself out as an authorized dealer or reseller of Harman or its products, and permanently discontinue any and all use of the Trademarks and Proprietary Rights, including such use in advertising." *Id.* § 8.4.

***2** The Agreement was automatically renewed for multiple successive one-year terms until March 2020 when Schoen, acting on behalf of Harman, orally terminated the Agreement without prior notice or the opportunity to cure. TAC ¶¶ 10–12. During the termination, Schoen expressed to Absolute and Razipour that he was "happy to finally be able to terminate the Agreement" and that he had wanted to do so for some time because "all you ... Iranians need to be terminated." [3] *Id.* ¶ 12.

## II. Procedural History

On May 12, 2021, the Absolute Plaintiffs filed this case in Los Angeles Superior Court alleging nine claims against Harman and Schoen (collectively the "Harman Defendants"). *See* ECF No. 1-2 ("Complaint" or "Compl."). The action was removed to this Court on August 9, 2021. *See* Notice of Removal ("NOR"), ECF No. 1. The action was initially before Judge Scarsi.

On September 15, 2021, the Harman Defendants filed their First Motion to Dismiss, ECF No. 15 ("FMTD"). On October 4, 2021, the Absolute Plaintiffs filed a First Amended Complaint, adding Razipour as a plaintiff to certain claims and adding two new causes of action by Absolute: violation of California Corporate Code § 31000 and violation of California Business and Professions Code § 20000. *See generally* First Amended Complaint, ECF No. 19 ("FAC"). On October 12, 2021, the Court denied the Harman Defendants' First Motion to Dismiss as moot. ECF No. 22.

On October 18, 2021, the Harman Defendants filed their Second Motion to Dismiss, ECF No. 27 ("SMTD"). On October 28, 2021, the Court granted the Harman Defendants' Second Motion to Dismiss solely on the basis that the Absolute Plaintiffs failed to timely file their opposition to the Second Motion to Dismiss. *See* ECF No. 29.

On November 9, 2021, the Absolute Plaintiffs filed their Second Amended Complaint ("SAC"). ECF No. 30. The Harman Defendants subsequently filed their Third Motion to Dismiss, ECF No. 32 ("TMTD") on November 23, 2021. The action was transferred to Judge Frimpong, who currently presides over the case, on February 10, 2022. ECF No. 37.

On February 14, 2023, the Court granted the Harman Defendants' Third Motion to Dismiss in part, and granted the Absolute Plaintiffs leave to file an amended complaint addressing certain deficiencies identified by the Court. *See* ECF No. 47 ("Third Motion to Dismiss Order" or "TMO"). In the Third Motion to Dismiss Order, the Court noted that although the Absolute Plaintiffs pled facts concerning various fees paid to the Harman Defendants, the Absolute Plaintiffs did not allege that these were in excess of $1000.00 or provide any indication that the fees were non-recoverable or anything more than incidental business fees; because these are two requirements of a franchise fee, the Court held that the Absolute Plaintiffs failed to plead the required franchise fee element. *See* TMO at 12–14.

On March 14, 2023, the Absolute Plaintiffs filed a Third Amended Complaint ("TAC"). ECF No. 48 ("TAC"). The TAC alleges the following six causes of action against the Harman Defendants: (1) Violation of California Business and Professions Code section 2000, *et seq.*; (2) Fraud; (3) Negligent Misrepresentation; (4) Unruh Civil Rights Act, California Code of Civil Procedure sections 51 and 52; (5) Breach of Contract; and (6) Breach of Implied Covenant of Good Faith and Fair Dealing. *See generally* TAC.

***3** On March 28, 2023, the Harman Defendants filed their current Motion to Dismiss. ECF No. 49 ("Motion" or "Mot."). The Motion is fully briefed. *See* ECF Nos. 50 ("Opposition" or "Opp'n") [4], 51 ("Reply"). The Absolute Plaintiffs filed a Request for Judicial Notice in support of their Opposition. ECF No. 50-1 ("RJN"). The RJN is unopposed. On November 13, 2023, the

  

Court took the Motion under submission, deeming the matter appropriate for resolution without oral argument and vacating the hearing. ECF No. 57; *see also* C.D. Cal. L.R. 7-15.

## REQUEST FOR JUDICIAL NOTICE

### I. Applicable Law

A court may take judicial notice of facts not subject to reasonable dispute where the facts "(1) [are] generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Under this standard, courts may take judicial notice of "*undisputed* matters of public record," but generally may not take judicial notice of "*disputed* facts stated in public records." *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001), *overruled on other grounds by Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119, 1125–26 (9th Cir. 2002). The Ninth Circuit has recognized public records, including documents on file in federal court, as appropriate for judicial notice. *See, e.g.*, *Harris v. County of Orange*, 682 F.3d 1126, 1132–33 (9th Cir. 2012); *United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2007).

### II. Discussion

The Absolute Plaintiffs request that the Court take judicial notice of a webpage from the California Department of Business Oversight entitled "Commissioner's Release 3-F: When Does an Agreement Constitute a 'Franchise.' " RJN at 2, 5–8. [5] The Court has previously taken judicial notice of this webpage and need not do so again. *See* TMO at 5.

## MOTION TO DISMISS

### I. Applicable Law

Federal Rule of Civil Procedure 12(b)(6) allows an attack on the pleadings for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

***4** The determination of whether a complaint satisfies the plausibility standard is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. Generally, a court must accept the factual allegations in the pleadings as true and view them in the light most favorable to the plaintiff. *Park v. Thompson*, 851 F.3d 910, 918 (9th Cir. 2017); *Lee*, 250 F.3d at 679. But a court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

### II. Discussion

At issue in this Motion are the Absolute Plaintiffs' first cause of action in the TAC is for a violation of the California Franchise Relations Act (the "CFRA") and sixth cause of action for breach of implied covenant of good faith and fair dealing.

The Harman Defendants argue that the Absolute Plaintiffs cannot bring a claim under the CFRA because they cannot establish a franchisor/franchisee relationship. [6] *See* Mot. at 7–10. The Harman Defendants also request that the Court dismiss the Absolute Plaintiffs' claim for breach of implied covenant of good faith and fair dealing because it is based on the same conduct and seeks the same relief as the Absolute Plaintiffs' breach of contract claim. Mot. at 10. As further summarized below, the Court concludes that the Absolute Plaintiffs have adequately pled a claim under the CFRA and that their claim for breach of implied covenant of good faith and fair dealing is not merely duplicitous of their breach of contract claim.

  

**A. The Absolute Plaintiffs Adequately Pled a Cause of Action under the California Franchise Relations Act**

The CFRA defines as a franchise as

> a contract or agreement, either express or implied, whether oral or written, by which (1) a franchisee is granted the right to engage in a marketing system substantially prescribed by the franchisor; (2) the business is substantially associated with the franchisor's trademark or other commercial symbol; and (3) the franchisee is required to pay a franchise fee.

*Thueson v. U-Haul Int'l, Inc.*, 50 Cal. Rptr. 3d 669, 672 (Cal. Ct. App. 2006). [F]ailure to satisfy any statutory element of the franchise definition is fatal" to this claim. *Id.*

The parties' dispute concerning the Absolute Plaintiffs' CFRA claim solely concerns the third element—that is, whether the Absolute Plaintiffs' have adequately pled that they paid a franchise fee. A franchise fee is "any fee or charge that a franchisee or subfranchisor is required to pay or agrees to pay for the right to enter into a business under a franchise agreement, including but not limited to, any payment goods and services." *Id.* (quoting Cal. Corp. Code § 31011, Cal. Bus. & Prof. Code § 20007).

The Harman Defendants argue that the Absolute Plaintiffs cannot satisfy this element on three grounds: (1) the Absolute Plaintiffs admitted in another filing that Harman has never directly charged Absolute any franchise fee and there is no provision concerning a franchise fee in the Agreement; (2) the TAC fails to allege any facts concerning the date, amount, and recoverability of payments made by Absolute; and (3) the Agreement expressly states that "[n]othing stated in this agreement shall be construed as creating the relationship of ... franchisor and franchisee," and that "this is not a 'franchise' or equivalent agreement under state or federal law." *Id.* at 9–11. The Court addresses each argument in turn.

i. The Court does not consider documents outside of the complaint in ruling on a motion to dismiss under 12(b)(6)

***5** In analyzing a motion to dismiss under Rule 12(b)(6), a court is limited to the four corners of complaint and any documents that are either judicially noticed or incorporated by reference. *See Lee*, 250 F.3d at 688. The Absolute Plaintiffs' opposition to the Harman Defendants' motion to transfer, which the Harman Defendants' have not requested that the Court take judicial notice of, is outside the scope of this Motion. *See* Mot. at 7. Similarly, the Court also does not consider the allegations in the Razipour Declaration submitted in support of the Absolute Plaintiffs' opposition to the Harman Defendants' motion to transfer. ECF No. 20; *see* Mot. at 9 n. 4. [7]

Moreover, as the Court previously stated in its Third Motion to Dismiss Order, a franchise fee may be direct or indirect. TMO at 13. The Commission of Corporations has issued guidelines, which the Court has judicially noticed, for determining whether an agreement constitutes a franchise and what types of payments may be franchise fees. California courts have used the guidelines in analyzing franchise agreements. *See, e.g., Thueson*, 50 Cal. Rptr. at 673. The guidelines state that a franchise fee is "any fee or charge which the franchisee is required to pay to the franchisor *or an affiliate of the franchisor* for the right to engage in business ... regardless of the designation given to or the form of, such a payment." RJN at 6–7 (emphasis added); *see also Thueson*, 50 Cal. Rptr. at 673 (quoting the Guidelines).

Thus, the Court DENIES the Motion on this ground.

  

ii. The Absolute Plaintiffs do not need to allege facts concerning the date or amount of the payments made to the Harman Defendants

In the Second Motion to Dismiss Order, the Court found that the Absolute Plaintiffs failed to properly allege the franchise fee element because

> There is no indication that the Absolute Plaintiffs' expenses were non-recoverable or were anything more than incidental business fees. Indeed, as currently pleaded, the alleged payments only appear to have been made after the Absolute Plaintiffs had entered business with Harman and allowed the Absolute Plaintiffs to conduct subsequent business with third-parties, rather than as an entry fee to create the initial relationship between the parties.

TMO at 14.

The Harman Defendants renew this argument in their Motion, arguing that the Absolute Plaintiffs have not remedied the previously identified deficiencies because they have not identified the alleged payments made, when the payments were made, or which payments were non-recoverable. Mot. at 8.

***6** The Court finds that the TAC remedies the defects in the SAC on this point. The TAC, like the SAC, identifies several types of "franchise fees" under the guidelines; however, the TAC takes a step further and provides the Court provides with details concerning the types of payments the Absolute Plaintiffs made that fall into each category of franchise fee:

> a. An initial or set-up fee (Comm. Op. Nos. 72/23F, 73/15F) – HARMAN required ABSOLUTE to pay set-up fees and as initial fees for doing business in the form of training fees and marketing fees.;
>
> b. Fee for advertising (Comm. Op. Nos. 72/11F, 73/17F) – HARMAN mandated and ABSOLUTE was required to pay for advertising of HARMAN products in amounts in excess of $1000;
>
> c. A payment for training and school expenses (Comm. Op. Nos. 71/60F, 73/39F) – HARMAN required ABSOLUTE to pay for the initial and periodic training of their employees on the HARMAN products and business model.;
>
> d. Royalty or percentage of gross receipts (Comm. Op. Nos. 72/47F, 73/23F, 73/24F) – HARMAN imposed MAP pricing on ABSOLUTE and other franchisees and thereby required them to a percentage royalty on each HARMAN product sold
>
> e. Charges for sales kits, brochures, programs, forms, decals, shirts, displays and announcements (Comm. Op. Nos. 71/49F, 73/29F, 82/1F) – HARMAN required ABSOLUTE to purchase demonstration equipment, displays and brochures for amounts in excess of $1000 and to use HARMAN specific displays that were purchased for its marketing.;
>
> f. Payment for services, such as consulting or management fees (Comm. Op. Nos. 73/25F, 73/41F, 77/1F, 79/2F) – HARMAN required ABSOLUTE to pay for the initial and periodic training of their employees on the HARMAN products and business model.;

TAC ¶¶ 28(a)–(f); *see* TMO at 14–15. [8]

Viewing the facts in the Absolute Plaintiffs' favor, at least some of the identified fees appear to fit into the definition of "franchise fee." For example, the Absolute Plaintiffs allege that they paid an "initial or set up fee" in the form of training and marketing fees. Such a fee could reasonably be construed as one required to enter into business with Harman. *See Thueson*, 50 Cal. Rptr.

  

3d at 672 (defining "franchise fee" as a "fee for the right to enter into a business under a franchise agreement."). Moreover, although the Absolute Plaintiffs do not explicitly classify any fee as "non-recoverable," drawing all inferences in the Absolute Plaintiffs' favor, the fees appear to be non-recoverable. For example, a royalty fee charged for each Harman product sold is likely a non-recoverable fee, as recoverability would defeat the purpose of a royalty.

Thus, the Court DENIES the Motion on this ground.

iii. The classification of the agreement is not dispositive

The Harman Defendants also renew their previous argument that a franchisor-franchisee relationship cannot be found in a contract that does explicitly call for the payment of a franchise fee. Mot. at 8. The Court addressed this very argument in its Third Motion to Dismiss Order and found that a lack of a franchise fee clause in a contract is not dispositive. TMO at 14. The case cited by the Harman Defendants in their Motion does not compel a finding otherwise, as even the quoted portion of the language used by the Harman Defendants makes clear that the language of a contract is only *probative* of the intent of the parties, which falls short of being dispositive. *See* Mot. at 8 (citing *Adees Corp. v. Avis Rent-A-Car Sys., Inc.* No. CV 02-6363-GHK(RCx), 2003 U.S. Dist. LEXIS 26293, at *3 (C.D. Cal. Nov. 19, 2003)).

Thus, the Court DENIES the Motion on this ground.

**B. The Absolute Plaintiffs Adequately Pled a Claim for Breach of Implied Covenant of Good Faith and Fair Dealing** [9]

***7** " 'Every contract imposes upon each party a duty of good faith and fair dealing its performance and its enforcement.' 'The implied promise requires each contracting party to refrain from doing anything to injure the right of the other to receive the benefits of the agreement.' " *Howard v. Am. Nat'l Fire Ins. Co.*, 115 Cal. Rptr. 3d 42, 69 (Cal. Ct. App. 2010) (quoting Rest. 2d Contracts, § 205). If "the allegations [in support of a claim for breach of the implied covenant of good faith and fair dealing] do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion cause of action, they may be disregarded as superfluous as no additional claim is actually stated." *Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*, 272 Cal. Rptr. 387, 400 (Cal. Ct. App. 1990).

Here, the TAC does not base the breach of implied covenant cause of action on the same facts as the breach of contract claim, instead, the TAC alleges that the Harman Defendants *unfairly* exercised their contractual discretion. *See* TAC ¶¶ 84(a)–(e). It is a central tenant of contracts law that "when a party is given absolute discretion by express contract language, the courts will imply a covenant of good faith and fair dealing to limit that discretion in order to create a binding contract and avoid a finding that the promise is illusory." *Storek & Storek, Inc. v. Citicorp Real Estate, Inc.*, 122 Cal. Rptr. 2d 267, 278 (Cal. Ct. App. 2002). The Absolute Plaintiffs claim exactly this—that Harman *unfairly* exercised its discretion in rejecting or refusing orders. *See* TAC ¶¶ 84(a)–(e).

**CONCLUSION**

For the foregoing reasons, the Court GRANTS the Absolute Plaintiffs' Request for Judicial Notice and DENIES the Harman Defendants' Motion to Dismiss.

IT IS SO ORDERED.

  

**All Citations**

Slip Copy, 2023 WL 11944440

## Footnotes

1 All facts stated herein are taken from the allegations in Plaintiff's Third Amended Complaint, ECF No. 48 ("TAC"), unless otherwise indicated. For the purposes of this Motion, the Court treats these factual allegations as true, but at this stage of the litigation, the Court makes no finding on the truth of these allegations and is therefore not—at this stage—finding that they *are* true.

2 The professional market includes "entertainment venues, cinemas, [and] recording studios." Joint CMS at 2.

3 The Court notes that the Absolute Plaintiffs allege that Schoen used an expletive when referring to Iranians. As the specifics of the expletive are not relevant to the Court's decision on this motion, the Court omits it here.

4 The Court notes that the Absolute Plaintiffs' Opposition includes material that was not raised in the Motion, such as whether the Absolute Plaintiffs properly pled breach of implied contract, or why the statute of limitations that barred the Absolute Plaintiffs' prior California Franchise Investment Law claim does not bar the Absolute Plaintiffs' new cause of action under the California Franchise Relations Act. *See* Mot. at 10–11; *see also* Reply at 1. Although the Harman Defendants argue that the Absolute Plaintiffs concede to some of the Harman Defendants' arguments by failing to address the arguments in their Opposition, *see, e.g.*, Reply at 2 (stating that the Absolute Plaintiffs concede that they have no facts concerning the dates or amounts of payments made to the Harman Defendants, or whether these payments were non-recoverable), the Court declines to make such a finding.

5 In referring to the RJN, the Court uses the pagination imposed by the CM/ECF system rather than nay internal pagination that is natively within the document.

6 The Harman Defendants assert that the Absolute Plaintiffs' CFRL claim has been dismissed twice. Mot. At 7. However, this is incorrect, as the Absolute Plaintiffs' FAC was not dismissed on the merits but was dismissed due to the Absolute Plaintiffs' failure to file a timely opposition to the then-operative motion to dismiss. *See* ECF No. 22.

7 Although Razipour's Declaration does not explicitly mention a franchise fee, Razipour does state that Absolute "paid a fee to Harman[ ] to use Harman trademarks and advertise Harman products in a retail setting." ECF No. 20. This language does not contradict any part of the TAC, which provides more details concerning the fees the Absolute Plaintiffs paid to the Harman Defendants.

8 The Court's Third Motion to Dismiss Order does not state that the Absolute Plaintiffs must include the dates, amounts, or recoverability of any payment alleged to be a franchise fee. TMO at 13–15. The Harman Defendants also do not point the Court to any case law that states as much.

9 In its Third Motion to Dismiss Order, the Court dismissed the Absolute Plaintiffs' claim for breach of implied-in-fact contract without leave to amend. TMO at 22. In this Motion, the Absolute Plaintiffs' claim for breach of implied covenant of good faith and fair dealing is at issue, however, in the Motion, the Harman Defendants occasionally erroneously refer to claim as one for breach of implied-in-fact contract claim, *see, e.g.*, Mot. at 1. The Absolute Plaintiffs thus erroneously refer to the claim as one for breach of implied-in-fact contract in their heading and discussion.