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United States District Court, C.D. California.

QUICK DISPENSE, INC.
v.
VITALITY FOODSERVICE, INC. et al.

Case No.: 8:23-cv-02322-FWS-ADS
|
Filed February 2, 2024

Attorneys and Law Firms

Ronald Rus, Brown Rudnick LLP, Irvine, CA, for Plaintiff.

Jonathan Solish, Kristy Murphy, Bryan Cave Leighton Paisner LLP, Santa Monica, CA, for Defendant.

PROCEEDINGS: ORDER DENYING PLAINTIFF'S *EX PARTE* APPLICATION FOR TEMPORARY RESTRAINING ORDER [14]

FRED W. SLAUGHTER, UNITED STATES DISTRICT JUDGE

***1** On January 30, 2024, Plaintiff Quick Dispense, Inc. ("Plaintiff") filed an *Ex Parte* Application for Temporary Restraining Order Against Defendants Vitality Foodservice, Inc. and Darin Perry (collectively, "Defendants"). (Dkt. 14 ("Application" or "App.").) Defendant Vitality Foodservice, Inc. ("Defendant Vitality") opposed the Application on January 31, 2024. (Dkt. 15 ("Opposition" or "Opp.").) The court finds this matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78(b) ("By rule or order, the court may provide for submitting and determining motions on briefs, without oral hearings."); L.R. 7-15 (authorizing courts to "dispense with oral argument on any motion except where an oral hearing is required by statute"). Based on the state of the record, as applied to the applicable law, the Application is **DENIED**.

I. Background

A. Summary of the Second Amended Complaint's Allegations

Plaintiff is a California corporation with is principal place of business in Los Angeles County. (Dkt. 7 ("SAC") ¶ 4.) Plaintiff is in the business of distributing wholesale beverage products under a program established by Defendants. (*Id.*) Defendant Vitality, doing business as Nestlé Professional, is a Delaware corporation with its principal place of business in Solon, Ohio. (*Id.* ¶ 5.) Defendant Darin Perry is an individual residing in Utah who was Defendant Vitality's "Senior Vice President - Sales Division" at certain relevant times. (*Id.* ¶ 6.)

Plaintiff alleges that on November 20, 2020, Plaintiff and Defendant entered into three agreements: (1) the Distributorship Agreement; (2) Sales Agent Agreement; and (3) Independent Contractor Services Agreement, (collectively "Distribution Agreement"). [1] (*Id.* ¶ 11.) Plaintiff alleges that the Distribution Agreement established a franchise relationship between Plaintiff and Defendant Vitality as defined by California Corporation Code § 31005. (*Id.*) Through this Distribution Agreement, Defendants allegedly granted Plaintiff the right to engage in the business of offering, selling, and distributing goods, including but not limited to beverages under the trademark "Nestlé" and "Nescafé." (*Id.* ¶ 13.)

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Defendants "own, control, and use" both the Nescafé and Nestlé trademarks and purportedly granted Plaintiff the right to use these trademarks. (*Id.* ¶ 15.) As a result, Plaintiff alleges its business "was substantially associated" with these trademarks based on "the receipt, storage in inventory, sale, and distribution to others of thousands of cases of Defendants' products over extended lengths of time and hundreds of thousands or millions of Defendants' products over extended lengths of time." (*Id.* ¶ 16.)

***2** Defendants also purportedly granted Plaintiff the right "to engage in the business under a marketing plan or system prescribed in substantial part by Defendants." (*Id.* ¶ 14.) Pursuant to this marketing plan, Defendants would distribute Nestlé branded goods to a network of independent distributors with each distributor responsible for a territory, carefully structure exclusive territories, and "advertise, market, and promote themes and methods." (*Id.* ¶ 14(A)-(D).) Plaintiff was allegedly granted "the exclusive right" to distribute Defendant Vitality's coffee, tea, and judice product throughout Arizona, Utah, twelve counties in California, six counties in Idaho, four counties in Nevada, and northeast Colorado. (*Id.* ¶ 14(C)(i-v).)

Plaintiff further alleges it was "required to pay fees and costs and bear substantial costs that were in the nature of an investment and that constituted direct and indirect franchise fees," such as payment "for inventory of equipment and products in excess of quantities needed or that a reasonable businessperson normally would purchase to maintain a going inventory or supply" and payments of "$60,000 per week to Defendants for deductions that Defendants granted to an upstream distributor ... that were passed on to Plaintiff." (*Id.* ¶¶ 17-18.)

Based on these allegations, Plaintiff asserts seven claims against Defendants for: (1) violations of California Franchise Investment Law, Cal. Corp. Code §§ 31000 *et seq.*; (2) breach of contract; (3) breach of implied contract; (4) wrongful termination/nonrenewal in violation of California Franchise Relations Act ("CFRA"), Cal. Bus. & Prof. Code § 20000 *et seq.*; (5) declaratory relief; (6) unfair business practices in violation of California Business and Professions Code § 17200 *et seq.* ("UCL"); and (7) intentional interference with prospective economic advantage. (*Id.* ¶¶ 19-72.)

B. Procedural Background

Plaintiff initiated this action in Orange County Superior Court on October 23, 2024. (Dkt. 1-1.) On November 23, 2023, Plaintiff filed a First Amended Complaint. (Dkt. 1-2.) On December 8, 2023, Defendants removed pursuant to 28 U.S.C. § 1332. (Dkt. 1.) On December 21, 2023, the parties stipulated to allow Plaintiff to file a second amended complaint. (Dkt. 6.) On December 22, 2023, Plaintiff filed the Second Amended Complaint ("SAC"), the operative complaint in this matter. (Dkt. 7.) On January 12, 2024, Defendants filed a Motion to Dismiss the SAC set for hearing on February 15, 2024. (Dkt. 13.) On January 30, 2024, Plaintiff filed the Application. (Dkt. 14.) Defendant Vitality Foodservice, Inc. opposed the Application on January 31, 2024. (Dkt. 15.)

II. Legal Standard

A. *Ex Parte* Relief

Ex parte applications are "rarely justified." *Mission Power Eng'g Co. v. Cont'l Cas. Co.*, 883 F. Supp. 488, 490 (C.D. Cal. 1995). To justify *ex parte* relief, the moving party must establish: (1) that their cause of action will be irreparably prejudiced if the underlying motion is heard according to regular noticed procedures; and (2) that they are without fault in creating the crisis that requires *ex parte* relief, or that the crisis occurred as a result of excusable neglect. *Id.* at 492-93. In *Horne v. Wells Fargo Bank, N.A.*, the district court discussed the legal standard for *ex parte* applications:

> The "opportunities for legitimate *ex parte* applications are extremely limited." *In re Intermagnetics America, Inc.*, 101 B.R. 191, 193 (C.D. Cal. 1989); *see also Mission Power Engineering Co. v. Continental Casualty Co.*, 883 F. Supp. 488, 489 (C.D. Cal. 1995) (stating that to be proper, an *ex parte* application must demonstrate that there is good cause to allow the moving party to "go to the head of the line in front of all other litigants and receive special treatment").

***3** ...

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> The use of such a procedure is justified only when (1) there is a threat of immediate or irreparable injury; (2) there is danger that notice to the other party may result in the destruction of evidence or the party's flight; or (3) the party seeks a routine procedural order that cannot be obtained through a regularly noticed motion (i.e., to file an overlong brief or shorten the time within which a motion may be brought).

969 F. Supp. 2d 1203, 1205 (C.D. Cal 2013).

The *Horne* court also reiterated the dangers of *ex parte* applications:

> [E]x parte applications contravene the structure and spirit of the Federal Rules of Civil Procedure and the Local Rules of this court. Both contemplate that noticed motions should be the rule and not the exception. Timetables for the submission of responding papers and for the setting of hearings are intended to provide a framework for the fair, orderly, and efficient resolution of disputes. Ex parte applications throw the system out of whack. They impose an unnecessary administrative burden on the court and an unnecessary adversarial burden on opposing counsel who are required to make a hurried response under pressure, usually for no good reason. They demand priority consideration, where such consideration is seldom deserved. In effect, they put the applicant 'ahead of the pack,' without cause or justification.

Id. (citation omitted).

B. Temporary Restraining Order

A temporary restraining order ("TRO") may be issued upon a showing "that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition," and "the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required." Fed. R. Civ. P. 65(b)(1). *Ex parte* temporary restraining orders "should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer." *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Loc. No. 70 of Alameda Cnty.*, 415 U.S. 423, 439 (1974).

The analysis for granting a TRO is "substantially identical" to that for a preliminary injunction. *Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839 n. 7 (9th Cir. 2001). Either "is an extraordinary remedy that may be awarded only if the plaintiff clearly shows entitlement to such relief." *See Am. Beverage Ass'n v. City & Cnty. of San Francisco*, 916 F.3d 749, 754 (9th Cir. 2019) (en banc) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)).

A plaintiff seeking such relief must demonstrate (1) they are "likely to succeed on the merits"; (2) they are "likely to suffer irreparable harm in the absence of preliminary relief"; (3) that "the balance of equities tips in [their] favor"; and (4) that "an injunction is in the public interest." *Id.* (quoting *Winter*, 555 U.S. at 20). Courts in the Ninth Circuit "also employ an alternative serious questions standard, also known as the sliding scale variant of the *Winter* standard." *Fraihat v. U.S. Immigr. & Customs Enf't*, 16 F.4th 613, 635 (9th Cir. 2021) (cleaned up). Under that approach, "serious questions going to the merits" and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011).

***4** A party seeking preliminary injunctive relief must make a "certain threshold showing" on "each [*Winter*] factor." *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011). However, "[t]he first factor under *Winter* is the most important," to the extent the court need not consider the remaining three elements where a plaintiff fails to show a likelihood of success on the merits. *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc) (citations omitted).

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III. Analysis

Plaintiff argues that a TRO is necessary to "prevent the destruction of Plaintiff's business and the loss of employment of more than 60 individual employees in this state" as a result of Defendant Vitality ending the alleged franchise relationship between Plaintiff and Defendant Vitality. (App. at 8-10.) Plaintiff also argues it is likely to succeed on the merits of its claims because it is a valid franchisee under the CFRA and CFIL, is at risk of immediate and irreparable harm if Defendants do not perform under the Distribution Agreement, and the balance of equities tips in Plaintiff's favor. (*Id.* at 8-10, 16-28.)

Plaintiff requests broad-ranging injunctive relief in the form of an order preventing Defendants from: (1) "[t]aking any action to terminate, non-renew, cancel, deprive Plaintiff benefits of or otherwise render null the distribution agreement between Plaintiff and [Defendant]"; (2) "[r]emoving, replacing, and/or encouraging or soliciting others to remove or replace, Plaintiff's equipment and accessories installed by Plaintiff for the express purpose of dispensing products purchased from or provided by Plaintiff to Plaintiff's customers at all locations where such Equipment is installed, including without limitation all such equipment installed as of the date of the filing of the Complaint in this action"; (3) "[i]nstalling any [Defendant] or third-party equipment at any of Plaintiff's Customers that would disrupt the business of Plaintiff in providing Plaintiff's customers with products to be dispensed through Plaintiff's equipment"; and (4) "failing to provide Plaintiff with all Nestle products for resale in the ordinary course of business under the Distribution Agreement." (App. at 6.)

In the Opposition, Defendant generally argues that Plaintiff has known of the circumstances underlying its request for relief for at least nine months and thus cannot demonstrate any exigent circumstances warranting *ex parte* relief. (Opp. at 7-12.) Defendant further argues that Plaintiff has not demonstrated a likelihood of success on the merits of any claim, that the balance of equities tip sharply in their favor, or that the broad-ranging injunctive relief sought would "restore the status quo." (*Id.* at 18-31.)

A. The Circumstances Do Not Warrant Expedited Relief.

As a preliminary matter, the court finds that Plaintiff has not adequately demonstrated that either *ex parte* relief or a temporary restraining order is warranted under the circumstances. Plaintiff argues *ex parte* relief is necessary because Defendant Vitality is "attempting to steal Plaintiff's business by circumventing Plaintiff, using Plaintiff's [e]quipment without recompense, and selling product directly to Plaintiff's customers while insisting that Plaintiff service Plaintiff's [e]quipment for the benefit of Defendant." (App. at 8.) Plaintiff also provided the declaration of Alice M. Ellingson, Plaintiff's Vice President of Operations, which states that "[r]ecently a representative from [Defendant Vitality] appeared at the premises of one of [Plaintiff's] customers and removed parts from equipment owned by [Plaintiff] and used those parts to make operational [Defendant Vitality's] equipment, which rendered Plaintiff's equipment inoperable." (Dkt. 14-1 ("Ellingson Decl.") ¶ 4.)

***5** Plaintiff's alleged harm and corresponding request for injunctive relief ostensibly stems from two sources: (1) the termination of the alleged franchise relationship; and (2) the "recent" cannibalization of equipment. However, the record before the court suggests neither warrant expedited relief. First, to the extent Plaintiff contends that its irreparable harm stems from the end of the alleged franchise relationship, Plaintiff substantially delayed in seeking injunctive relief. Plaintiff admits that it received notice on May 1, 2023, that Defendant Vitality would not be renewing the Distribution Agreement and that the Distribution Agreement, by its terms, would expire on November 16, 2023. (App at 9 & Exh. 4.) Nonetheless, Plaintiff waited approximately six months to file a complaint and then another three months to file the Application. Plaintiff neither acknowledges its own nine-month delay in seeking relief nor offers any explanation for why it did not seek relief earlier through a regularly-noticed preliminary injunction. Second, to the extent Plaintiff's irreparable harm stems from the "recent" equipment incident, and such conduct can be considered as separate from the termination of the alleged franchise relationship, Plaintiff has not provided evidence or testimony demonstrating *when* this event occurred or *why* this purported triggering event necessitates *ex parte* relief.

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A TRO may be "granted only if there is a true emergency[.]" *R.F. by Frankel v. Delano Union Sch. Dist.*, 224 F. Supp. 3d 979, 987 (E.D. Cal. Dec. 19, 2016). Here, Plaintiff's nine-month delay in bringing this Application "implies a lack of urgency and irreparable harm." *See Oakland Trib., Inc. v. Chron. Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985). The court further concludes that Plaintiff's nine-month delay demonstrates that Plaintiff is not without fault in creating the crisis necessitating *ex parte* relief and that Plaintiff has not adequately demonstrated irreparable harm. *See, e.g., Youlin Wang v. Kahn*, 2020 WL 6891834, at *2 (N.D. Cal. 2020) (denying plaintiff's request for TRO because plaintiff failed to make a "clear showing that he is likely to face immediate and irreparable harm in the absence of a TRO" by delaying two months); *Alatus Aerosystems v. Velazquez*, 2019 WL 7166987, at *2 (C.D. Cal. Oct. 2, 2019) (denying request for TRO based on plaintiff's one-month delay in bringing the application); *Way.com, Inc. v. Singh*, 2018 WL 6704464, at *12 (N.D. Cal. Dec. 20, 2018) (denying plaintiff's request for TRO based on plaintiff's three-month delay); *Sam Yang (U.S.A.), Inc. v. Samyang Foods Co., Ltd.*, 2016 WL 8999842, at *2-3 (C.D. Cal. July 29, 2016) (finding plaintiffs' three-month delay in seeking expedited relief warranted denying the TRO application). Because Plaintiff has not demonstrated an entitlement to expedited relief, the court **DENIES** the Application on this basis.

B. Plaintiff Has Not Demonstrated a Likelihood of Success on the Merits.

Alternatively, even if Plaintiff had not unduly delayed in seeking injunctive relief, the court also finds Plaintiff has not adequately demonstrated a likelihood of success on the merits on any of its claims. Plaintiff seeks a TRO based on its claims for violations of the CFIL, violations of the CFRA, unfair business practices in violation of the UCL, breach of contract, and breach of implied contract. (App. at 18-26.) Defendant Vitality argues that Plaintiff has failed to demonstrate a likelihood of success on the merits as to any claim. (Opp. at 13-22.) The court discusses each claim in turn. [2]

1. Plaintiff Has Not Sufficiently Demonstrated It Operates as a Franchisee for Purposes of Its CFRA, CFIL, or UCL Claims.

***6** Although "disparate statutes with different functions," the CFIL and CFRA both apply only "in the context of a franchisor-franchisee relationship." *Absolute USA, Inc., v. Harman Pro., Inc.*, 2023 WL 2064048, at *5 (C.D. Cal. Feb. 14, 2023); *see also Gentis v. Safeguard Bus. Sys., Inc.*, 60 Cal. App. 4th 1294, 1298 (1998) (stating CFIL "protects consumers in the sale of franchises" and CFRA "regulates certain events after the franchise relationship has been formed."). In addition, Plaintiff's "unfair business practices" claims under the UCL are predicated upon violations of the CFIL and a Federal Trade Commission regulation applicable to franchisors. (*See, e.g.*, SAC ¶¶ 59-65.) Thus, the court first considers whether Plaintiff has adequately established a franchisor-franchisee relationship.

Plaintiff argues that it has established a franchise relationship because Defendant Vitality: (1) required Plaintiff to maintain a marketing plan; (2) authorized Plaintiff to use Defendant Vitality's "Nescafé" trademark on equipment, including a sign advertising a Customer Service Line; and (3) mandated that Plaintiff pay franchise fees in the form of "required purchases of excess inventory," such that Plaintiff operated as Defendant Vitality's franchisee. (App. at 19-24.) Defendant Vitality argues that Plaintiff has failed to allege any of the three elements of a franchise relationship and thus cannot bring CFRA or CFIL claims. (Opp. at 17-20.)

The CFRA defines a "franchise" as an arrangement by which:

> (a) A franchisee is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor; and
>
> (b) The operation of the franchisee's business pursuant to that plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate; and

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(c) The franchisee is required to pay, directly or indirectly, a franchise fee.

Cal. Bus. & Prof. Code § 20001. "[F]ailure to satisfy any statutory element of the franchise definition is fatal to [a plaintiff's] claims." *Thueson v. U-Haul Int'l Inc.*, 144 Cal. App. 4th 664, 671 (2006).

The Commissioner of Corporations has issued guidelines that are considered prima facie evidence of the definition of franchise under California law.[3] *See* Cal. Bus. & Prof. Code § 20009; *When Does an Agreement Constitute a "*Franchise*?"*, Commissioner's Release 3-F, California Commissioner of Corporations (June 1994) ("Guidelines"). "While the responsibility for statutory interpretation ultimately rests with the court, the Guidelines, as interpretation of a statute by the officials charged with its administration, are entitled to great weight." *Thueson*, 144 Cal. App. 4th at 671 (citing *People v. Kline*, 110 Cal. App. 3d 587, 593 (1980); *see also City & Cnty. of S.F. v. State of California*, 87 Cal. App. 3d 959, 965 (1978)). Whether an agreement constitutes a franchise agreement is "a mixed question of fact and law." *Macedonia Distrib., Inc. v. S-L Distrib. Co., LLC*, 2018 WL 6190592, at *6, 8 (C.D. Cal. Aug. 7, 2018) (citing Guidelines, ¶ 1(2)(4)(1)). Courts should construe "the CFRA broadly" to effect its purpose of "protect[ing] individuals from the loss of their investments in franchises." *1-800-Got Junk? LLC v. Superior Ct.*, 189 Cal. App. 4th 500, 511, 515-16 (2010).

***7** In this case, the court finds Plaintiff has not sufficiently demonstrated that it was required to pay a direct or indirect franchise fee. A "franchise fee" is defined as "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 for goods and services." Cal. Corp. Code § 31011; Cal. Bus. & Prof. Code § 20007. Whether or not a fee or charge is " 'required' and whether it is made 'for the right to enter into a business,' is considered a mixed question of fact and law." *Thueson*, 144 Cal. App. 4th at 671–72 (quoting Guidelines 3-F ¶ 1(2)(4)(1)). Generally, "in determining whether a franchise fee has been paid, courts must draw a distinction between ordinary business expenses and unrecoverable investments made for the right to do business." *Macedonia Distrib.*, 2018 WL 6190592, at *6 (citing *Thueson*, 144 Cal. App. 4th at 672-73).

Certain categories of payment are excluded from the definition of franchise fees. For example, California Corporations Code § 31011 excludes, in pertinent part, "[t]he purchase or agreement to purchase goods at a bona fide wholesale price if no obligation is imposed upon the purchaser to purchase or pay for a quantity of the goods in excess of that which a reasonable businessperson normally would purchase by way of a starting inventory or supply or to maintain a going inventory or supply" and "[t]he payment of a reasonable service charge to the issuer of a credit card by an establishment accepting or honoring that credit card." Cal. Corp. Code § 31011; *see also* Cal. Bus. & Prof. Code § 20007(a).

Here, as evidence of franchise fees, Plaintiff alleges it "was required to pay fees and costs and bear substantial costs that were in the nature of an investment and that constituted direct and indirect franchise fees"; purchased and paid for "inventory of equipment and products in excess of quantities needed or that a reasonable businessperson normally would purchase to maintain a going inventory or supply"; and made "payments of $60,000 per week to Defendants for deductions that Defendants granted to an upstream distributor ... that were passed on to Plaintiff." (SAC ¶¶ 17-18(A)-(B).) Plaintiff also points to the Ellingson Declaration, which states "[i]n 2023, [Defendant] demanded that [Plaintiff] increase its minimum 'hot solution' purchase requirements to [420] units while at the same time requiring Plaintiff to purchase 'brand new' models of dispensers" and these costs exceeded $700,000. (*Id.* ¶ 17 & Exh. 2 ¶ 7.)

The court finds Plaintiff has provided insufficient evidence of a franchise fee. To start, the majority of Plaintiff's allegations, including those claiming franchise fees from "fees and costs" "in the nature of an investment" and "excess" product quantities, constitute legal conclusions unsupported by substantiating factual allegations. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (reiterating that "recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to state a plausible claim for relief). For example, Plaintiff provides no evidence or allegations as to what quantities of product it was required to purchase or how those quantities exceed "that which a reasonable businessperson normally would purchase by way of a starting inventory or supply or to maintain a going inventory or supply." Cal. Bus. & Prof. Code § 20007. Absent such information, Plaintiff has "not establish[ed] that it paid a 'franchise fee,' as distinguished from a mere purchase of product at

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fair market value." *Gabana Gulf Distrib., Ltd. v. Gap Intern. Sales, Inc.*, 343 F. App'x 258, 259 (2009) (citing Cal. Bus. & Prof. Code § 20007).

Furthermore, Plaintiff's one factual allegation, that Defendant Vitality required Plaintiff to pay $60,000 to an upstream distributor" is too vague to demonstrate a franchise fee because Plaintiff fails to identify the purpose of this fee, when this fee was first assessed, or what portion of the fees were ultimately returned to Plaintiff. Likewise, Plaintiff's cites to the Ellingson Declaration, suggesting that Defendant Vitality required Plaintiff to increase "its minimum 'hot solution' purchase requirements" and purchase 'brand new' dispenser models in 2023, do not demonstrate "a fee paid for the right to do business" as opposed to "ordinary business expenses paid during the course of business," particularly because this payment occurred several years after the parties entered into the agreement. *Thueson*, 144 Cal. App. 4th at 676; *see also Absolute USA*, 2023 WL 2064048, at *8 (finding no franchise fee where "[t]here is no indication that the Absolute [p]laintiffs' expenses were non-recoverable or were anything more than incidental business fees" and "the alleged payments only appear to have been made after the Absolute [p]laintiffs had entered business with [defendant]").

***8** In sum, Plaintiff has failed to demonstrate that it paid Defendant Vitality a franchise fee "for the right to do business" and thus has not established the existence of franchise relationship. *Thueson*, 144 Cal. App. 4th at 671 ("[F]ailure to satisfy any statutory element of the franchise definition is fatal to [a plaintiff's] claims."). Because Plaintiff has not sufficiently demonstrated a franchise relationship, the court concludes Plaintiff has not shown a likelihood of success on its CFRA or CFIL claims. In addition, because Plaintiff's UCL claim is also predicated upon the existence of a franchise relationship, the court concludes Plaintiff also has not demonstrated a likelihood of success on the UCL claim. *See, e.g., Century 21 Real Est. LLC v. All Pro. Realty, Inc.*, 600 F. App'x 502, 506 (9th Cir. 2015) ("To the extent that the [plaintiffs'] unfair competition claims [under the UCL] are duplicative of their breach of contract and other claims, they fail[.]").

2. Plaintiff Also Has Not Sufficiently Demonstrated a Likelihood of Success on Its Breach of Contract or Implied Breach of Contract Claims.

Plaintiff asserts breach of contract and breach of implied contract claims against both Defendants. (*See, e.g.*, SAC ¶¶ 32-45.) Although Plaintiff admits that Defendant Vitality provided notice that the Distribution Agreement would not be renewed and would expire on November 16, 2023, Plaintiff argues that Defendants renewed the contract through its conduct by "continuing to sell Nestlé products ... run through Plaintiff's equipment installed by Plaintiff and located at Plaintiff's customers" and Plaintiff continuing to deliver Nestlé products to and service Plaintiff's customers after the contract expired. (SAC ¶ 34; *see also* App. at 24-25.) Plaintiff further alleges that Defendant Vitality breached the renewed contract by failing to make its monthly payment to Plaintiff "[w]ithin the past four years of the filing date of the" SAC. (*Id.* ¶¶ 36-38.) Defendant Vitality argues Plaintiff cannot demonstrate a likelihood of success as to either claim because the Distribution Agreement terminated on November 16, 2023, and an implied contract cannot arise in light of Defendant Vitality's "express writing to the contrary." (Opp. at 20-21.)

Under California law, "the elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." *Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821 (2011) (citation omitted). A contract exists under California law where there are (1) "[p]arties capable of contracting"; (2) "[t]heir consent"; (3) "[a] lawful object"; and (4) "[a] sufficient cause or consideration." Cal. Civ. Code § 1550. "A written contract may be pleaded either by its terms—set out verbatim in the complaint or a copy of the contract attached to the complaint and incorporated therein by reference—or by its legal effect." *McKell v. Wash. Mut., Inc.*, 142 Cal. App. 4th 1457, 1489 (2006) (citation omitted). "In order to plead a contract by its legal effect, plaintiff must allege the substance of its relevant terms," which "requires a careful analysis of the instrument, comprehensiveness in statement, and avoidance of legal conclusions." *Id.* (citation and internal quotation marks omitted).

In this case, the court finds Plaintiff has not demonstrated a likelihood of success as to its breach of contract claims. With respect to the express breach of contract alleged, Plaintiff has not adequately demonstrated an existing and active contract between

the parties. [4] "It is the general rule that when a contract specifies its duration, it terminates on the expiration of such period." *Citizens for Amended Proposition L v. City of Pomona*, 28 Cal. App. 5th 1159, 1189 (2018) (quoting *Beatty Safway Scaffold, Inc. v. Skrable*, 180 Cal. App. 2d 650, 654 (1960)). "A terminated contract cannot be extended or modified; both extension and modification as those terms are commonly understood presuppose the existence of a valid contract to extend or modify." *Id.*

***9** Here, the undisputed evidence in the record demonstrates that: (1) the Distribution Agreement explicitly states it would terminate after three years, or on November 16, 2023, if "either party gives at least ninety (90) days written notice of non-renewal prior to the end of the Initial Term of Extension Term, as applicable," (SAC, Exh. 1 at 2); and (2) Defendant Vitality gave notice ninety days before the expiration of the Initial Term on May 1, 2023, (*id.*, Exh. 4.) Thus, the court concludes the Distribution Agreement terminated on November 16, 2023, and could not be extended absent an additional written agreement between the parties. The court's conclusion is buttressed by the Distribution Agreement's inclusion of an integration clause, which provides that the Distribution Agreement "may not be amended or modified ... except in writing, signed by both parties." (SAC, Exh. 3 ¶ 19.)

In addition, Plaintiff has not sufficiently demonstrated the existence of an implied-in-fact contract through the parties' continued performance. A "contract implied in fact 'consists of obligations arising from a mutual agreement and intent to promise where the agreement and promise have not been expressed in words.' " *Retired Emps. Ass'n of Orange Cnty., Inc. v. Cnty. of Orange*, 52 Cal.4th 1171, 1178, (2011) (quoting *Silva v. Providence Hosp. of Oakland*, 14 Cal.2d 762, 773 (1939)); *see also Yari v. Producers Guild of Am., Inc.*, 161 Cal. App. 4th 172, 182 (2008) ("A cause of action for breach of implied contract has the same elements as does a cause of action for breach of contract, except that the promise is not expressed in words but is implied from the promisor's conduct."). "The existence and scope of implied-in-fact contracts are determined by the totality of the circumstances." *Citizens for Amended Proposition L*, 28 Cal. App. 5th at 1189 (citation omitted.) "The question whether such an implied-in-fact agreement exists is a factual question for the trier of fact unless the undisputed facts can support only one reasonable conclusion." *Faigin v. Signature Group Holdings, Inc.*, 211 Cal. App. 4th 726, 739 (2012).

Here, Plaintiff's cited examples of continued performance do not demonstrate *mutual* agreement to continue performing under the contract. "Consent is not mutual[ ] unless the parties all agree upon the same thing in the same sense." *Weddington Prods., Inc. v. Flick*, 60 Cal. App. 4th 793, 811 (1998) (citing Cal. Civ. Code §§ 1580, 1636). Thus, Plaintiff's unilateral conduct, including sales of products Plaintiff may have previously purchased from Defendant Vitality, cannot demonstrate Defendant Vitality's assent to an implied contract. Nor has Plaintiff provided adequate, objective evidence of Defendant Vitality's assent via continued performance. For example, Plaintiff's other allegation, that Defendant Vitality has continued to perform by using Plaintiff's machines to sell Defendant Vitality's product, is too vague to demonstrate mutual assent to the contractual obligations outlined in the Distribution Agreement. Plaintiff does not indicate where or when this alleged use of Plaintiff's equipment took place or explain how this alleged equipment use demonstrates Defendant Vitality's assent to continue delivering goods to Plaintiff, the apparent purpose of the Distribution Agreement. [5] The court finds the scant factual allegations and evidence as to Defendant Vitality's assent insufficient to demonstrate an implied contract. [6]

***10** Second, Plaintiff has not sufficiently shown how an implied contract exists between the parties in light of "an express writing to the contrary." *Citizens for Amended Proposition L*, 28 Cal. App. 5th at 1189. " '[I]t is well settled that an action based on an implied-in-fact or quasi-contract cannot lie where there exists between the parties a valid express contract covering the same subject matter." *Lance Camper Mfg. Corp. v. Republic Indem. Co.*, 44 Cal.App.4th 194, 203 (1996). Here, the court finds that the express contract, the Distribution Agreement, embraces the same subject matter and obligations as the alleged implied contract, and requires a contrary result, namely continued performance by Defendant Vitality after the termination date. (*See, e.g.*, SAC ¶¶ 32-45.) Because "[t]here cannot be a valid express contract and an implied contract, each embracing the same subject, but requiring different results," *Shapiro v. Wells Fargo Realty Advisors*, 152 Cal. App. 3d 467, 482, (1984), *disapproved of on other grounds in Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 700 n.42 (1989), the court concludes Plaintiff has not demonstrated the existence of an implied contract. Accordingly, for the alternative reasons stated above, Plaintiff has not adequately demonstrated a likelihood of success on its breach of contract or breach of implied contract claims.

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In sum, the court **DENIES** the Application because Plaintiff has not satisfied the applicable *ex parte* standards, including Plaintiff has not demonstrated that the circumstances warrant expeditated relief. *See Mission Power*, 883 F. Supp. at 490; *Horne*, 969 F. Supp. 2d at 1205; *Youlin Wang*, 2020 WL 6891834, at *2; *Alatus Aerosystems*, 2019 WL 7166987, at *2; *Way.com, Inc.*; 2018 WL 6704464, at *12; *Sam Yang (U.S.A.), Inc.*, 2016 WL 8999842, at *2-3. As an independent and alternative basis, the court also **DENIES** the Application because Plaintiff has not demonstrated it is likely to succeed on the merits of its claims or serious questions as to those claims. *See Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017) (holding courts "need not consider the other factors in the absence of serious questions going to the merits") (citations and internal quotation marks omitted).

IV. Disposition

For the reasons stated above, the court **DENIES** the Application.

IT IS SO ORDERED.

All Citations

Slip Copy, 2024 WL 655996

Footnotes

1 Plaintiff also attached each of these agreements to the SAC. (*See* SAC, Exhs. 1-3.) The court finds the SAC incorporates these three agreements by reference because "the plaintiff refers extensively to the document[s]" and "the document[s] form the basis of Plaintiff's claims," including its claims for breach of contract, breach of implied contract, violations of the California Franchise Relations Act, and violations of the California Franchise Investment Law. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018) (quoting *United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003)). The court notes that the "Distribution Letter Agreement & Program" is dated November 16, 2023. (SAC, Exh. 1.)

2 "A federal court sitting in diversity jurisdiction, 28 U.S.C. § 1332, applies substantive state or foreign law." *Cooper v. Tokyo Electric Power Co. Holdings, Inc.*, 960 F.3d 549, 557 (9th Cir. 2020) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)); *see also Unified W. Grocers, Inc. v. Twin City Fire Ins. Co.*, 457 F.3d 1106, 1111 (9th Cir. 2006) (stating to determine which state law to apply, "a federal court applies the choice-of-law rules of the state in which it sits") (quoting *Kohlrautz v. Oilmen Participation Corp.*, 441 F.3d 827, 833 (9th Cir. 2006)). The court notes that the Distribution Agreement contains a "governing law" provision that provides that it "will be governed by and enforced in accordance with the law of the State of Delaware, without regard to its choice-of-law principles." (*See* SAC, Exh. 2 ¶ 19.) Neither party discusses this choice-of-law-provision, and both parties apply California law in their briefing. (*See generally* App.; Opp.) At this stage, absent argument from the parties, the court assumes *arguendo* that California law applies to Plaintiff's claims.

3 The court finds the Guidelines appropriate for judicial notice because courts may take judicial notice of information "made publicly available by government entities ... and neither party disputes the authenticity of the website or the accuracy of the information displayed therein." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992–99 (9th Cir. 2010); *see also Absolute USA, Inc., v. Harman Pro., Inc.*, 2023 WL 2064048, at *3 (C.D. Cal. Feb. 14, 2023) (granting request for judicial notice of the Guidelines).

4 In fact, based on the record, Plaintiff has not demonstrated that it ever entered into a contractual relationship with Defendant Perry.

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5 In addition, Plaintiff does not address how the allegation that Defendant Vitality is using Plaintiff's equipment squares with Plaintiff's stated need for *ex parte* relief based on Defendant Vitality's "cannibalization" of Plaintiff's parts to use in Defendant Vitality's own equipment.

6 For the same reasons, Plaintiff's reliance on *Bambu Franchising, LLC v. Nguyen*, 537 F. Supp. 3d 1066, 1076-77 (N.D. Cal. 2021), in which defendants did manifest assent to continue operating the franchise after the agreement expired, is not inapposite.

End of Document

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