SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION
DOCKET NO.: A-002741-93TS

KUBIS & PERSZYK ASSOCIATES, INC., d/b/a ENTRE COMPUTER,

Plaintiff,

-vs-

SUN MICROSYSTEMS, INC., SUN MICROSYSTEMS COMPUTER CORPORATION, KARL E. HOLTZTHUM, ELLIOT MAYO, and ROBERT B. KLOPMAN,

Defendants.

CIVIL ACTION

ON APPEAL FROM:

Superior Court of New Jersey
Law Division: Somerset County
Docket No. SOM-l-2349-93

SAT BELOW:

Honorable Edward M. Coleman, J.S.C.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

LOWENSTEIN, SANDLER, KOHL, FISHER & BOYLAN
A PROFESSIONAL CORPORATION
65 Livingston Avenue
Roseland, New Jersey 07068
Attorneys For Plaintiff-Appellant

Of Counsel:
Douglas S. Eakeley

On the Brief:
Ronald D. Coleman

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

MISCELLANEOUS

PRELIMINARY STATEMENT

This appeal involves the issue of whether a franchisor, through its superior bargaining power, should be permitted to force a New Jersey franchisee to waive the protection of this State's Franchise Practices Act, N.J.S.A. 56:10-1 et seq. (the "Act"), by including a forum selection clause in the parties' franchise agreement. Plaintiff-appellant Kubis & Perszyk Associates, d/b/a Entre Computer ("Entre"), is a New Jersey franchisee of defendants Sun Microsystems, Inc. and Sun Microsystems Computer Corporation (collectively "Sun"). Entre's franchise was wrongfully terminated in October of 1993, with the active connivance of the individual defendants, who are members of Sun's direct selling force based in New Jersey. The verified complaint charges those defendants with tortious interference with Entre's New Jersey-based customers and with disparaging Entre to those customers -- all for the purpose of competing unfairly with Entre in New Jersey. The trial court granted Sun's motion to dismiss Entre's complaint on the grounds that the forum-selection clause in the agreement between Entre and Sun required that litigation of this New Jersey-specific matter be conducted in the courts of California, notwithstanding the lack of any assurance that those courts would apply the Act or otherwise protect Entre against termination of its franchise without cause. This appeal followed.

As a New Jersey-based franchisee, Entre is entitled to the protections of the Act. As the Supreme Court made clear in Instructional Systems, Inc. v. Computer Curriculum Corp., 130 N.J. 324 (1992), those protections may not be waived at the insistence of a franchisor. Those protections effectively would be lost, however, if Entre were required to litigate its claims in a forum far removed from its home base and sources of proof -- a forum which does not share this State's strong policy of protecting New Jersey franchisees and has no reason to apply the law of New Jersey instead of its own law. That forum is in addition not only seriously inconvenient for trial, but lacks jurisdiction over the individual defendants as well.

This lawsuit belongs in the courts of New Jersey, where New Jersey policy can be applied to protect New Jersey franchisees from precisely the depredations that the New Jersey Legislature sought to forestall in passing the Franchise Practices Act. This appeal seeks, then, a

reversal of the court below, entry of a preliminary injunction in Entre's favor, and a remand of the action for trial on the merits.

STATEMENT OF PROCEDURAL HISTORY

On December 29, 1993, Entre filed a verified complaint [Pa6 with an order to show cause which sought preliminary injunctive relief and temporary restraints in the interim. Pa19. As a result of defendants' offer to extend the effective date of termination of the agreement between the parties and their commitment not to initiate litigation in California pursuant to the agreement's forum selection clause pending a decision on Entre's application for a preliminary injunction [Pa31], Entre agreed to the entry of the order to show cause without temporary restraints. Pa33.

The order to show cause set January 21, 1994 as the return date for the motion for a preliminary injunction, with a January 11 deadline for defendants' answer and opposition papers. Id. Instead of responding on the merits to Entre's preliminary injunction motion, defendants chose to cross-move for dismissal on the forum selection clause issue -- effectively conceding, for purposes of the motion, that Entre is a franchisee entitled to protection under the Franchise Practices Act, including the entry of preliminary injunctive relief. Pa136.

The order to show cause also permitted the parties to take "paper discovery" on the forum selection issues in the interim. Pa35. Defendants' failure to provide the requested discovery led Entre's counsel to file a motion to compel discovery. Pa138. Although the trial court inquired at oral argument on January 21, 1994 about the need for such discovery [Pa145, 147, 199], neither the motion to compel nor the lack of factual record which discovery would have provided was addressed when the court rendered its decision from the bench, dismissing the complaint. Pa168.

Entre filed an emergent appeal on January 24, 1994. Pa176. Following an hour-long argument by telephone conference call, this Court entered its order of January 26, 1994, staying dismissal of the action and temporarily restraining defendants from initiating any legal proceedings in California or from terminating Entre's franchise. Pa180. On March 17, 1994, defendants moved for summary disposition of the appeal. Pa181. That motion was denied on

May 4, 1994. Pa183. Defendants then moved on May 24, 1994 for leave to appeal to the Supreme Court. Pa184. Their motion is currently pending.

STATEMENT OF FACTS

Entre is a New Jersey corporation with its principal place of business in Shrewsbury, New Jersey. At all relevant times, and until November 30, 1993, Entre's principal place of business was in Eatontown, New Jersey. It is engaged in the business of selling, serving and supporting computer systems. Pa9. Entre is owned and managed by its two principals, Robert Kubis and Benedict Perszyk. Entre began some ten years ago as a franchisee of Entre Computer Centers, Inc. but that franchise agreement was replaced by a distribution agreement with Intelligent Electronics after the latter acquired Entre Computer Centers in 1989. Pa37.

Defendant Sun Microsystems, Inc. ("Sun Microsystems") is a California corporation. Formed in 1982, it is an integrated portfolio of businesses that supply distributed computing technologies, products and services. Pa9. Defendant Sun Microsystems Computer Corporation ("Sun Computer") is a California corporation and a subsidiary of Sun Microsystems. Id. It handles Sun Microsystems' computer hardware business, including sales of its workstations and servers which are based upon Sun Microsystems' technologically-advanced computer central processing unit, called a "SPARC" processor, its unique operating systems, called "SOLARIS" and "SUN-OS", and its "S-BUS" and "M-BUS" structures which accommodate additional computer functions, such as input-output commands and interfaces. Pa10, Pa38. Sun Computer sells these workstations and servers through a direct sales force directly to end-users, as well as through "Master Resellers" who in turn sell to other resellers and dealers. Pa11.

Sun Microsystems and Sun Computer (collectively, "Sun") command the largest share of the market for computer workstations and servers, which is one of the computer industry's fastest-growing segments. In 1992, Sun's "SPARC" systems had a 51.9% share of the relevant workstation/ workstation server market -- more than two and one-half times that of the closest competitor. Pa10. Sun's revenues in fiscal 1993 were $4.3 billion. Pa9. Sun maintains offices in New Jersey in Somerset, Mount Laurel and Paramus. Pa11, Pa91.

In or about August 1990, Sun announced a new distribution/marketing plan. Under the new plan, Sun appointed three Master Resellers to which Sun would supply workstations and servers based on its "SPARC" architecture. The three Master Resellers would, in turn, sell these products to Sun-authorized "Value Added Resellers" ("VARs") and "Value Added Dealers" ("VADs"). Under the terms of the VAR and VAD agreements, the VARs and VADs would supply "Added Value" with each sale of Sun products. The required "Added Value" was to be in the amount of 20% of the value of the product sold and was to take the form of services (e.g., consulting, installation, training) or unique hardware or software developed by third parties or by the VARs or VADs, upon approval by Sun. Pa11-12.

On or about August 3, 1990, representatives of Sun and of a Master Reseller, Intelligent Electronics, met with representatives of Entre and other Intelligent Electronics distributors to solicit their participation in the new Sun marketing program. Thereafter, Sun and Entre entered into a VAD Agreement effective as of December 21, 1990. Pa12.

When Entre was approached by Sun in 1990, it was confronted with a critical business decision: whether to remain in the market for personal computers, or to enter the market for sophisticated workstations and related products. Unlike personal computers, workstations involve expensive, complex computers, sophisticated operating systems, and related "architecture" that permit multiple programs to be run simultaneously and multiple users to work on several different terminals. Most workstations are sold to businesses for research and development. Pa38.

Entre decided to cast its lot solely with Sun and Sun's workstations. Entre did not, and does not, sell any workstations made by any of Sun's competitors. Indeed, Entre has consistently invested its future in the exclusive marketing of Sun workstations largely because the Sun product is technologically superior and better supported. Id.

Effective April 9, 1993, the Entre-Sun VAD Agreement was replaced by Sun with a new agreement entitled "Indirect Value Added Reseller Agreement" ("IVAR Agreement"). Under that Agreement, Entre continued to have the right:

(a) to be an authorized non-exclusive IVAR to make sales of Sun products (product tiers 1-desktop and 2 - desk side and servers) as part of a total solution consisting of Sun products and significant added value approved by Sun;

(b) to use the Sun Value Added Reseller logo and Sun Trademarks in Entre's advertising and marketing materials;

(c) to distribute and sublicense Sun products consisting of software to be run on Sun hardware; and

(d) to resell or sublicense Sun products at prices determined solely by Entre. Pa14-15.

Under the new IVAR Agreement, Sun further required that Entre:

(a) use its best efforts to promote the sale of Sun Products;

(b) engage primarily in the business of the sale and support of computer systems;

(c) market and support Sun products in compliance with a business plan developed by Entre and approved by Sun;

(d) purchase and maintain at its authorized Eatontown, New Jersey location the Sun-specified demonstration configuration;

(e) provide to each end-user complete pre- and post-installation support including (1) complete installation, training and continuous technical service, and (2) hardware and software maintenance support;

(f) submit for Sun's approval a detailed, location specific support plan prior to installing products at any end-user site located more than 200 miles from Eatontown, New Jersey;

(g) maintain on-site at its authorized Eatontown, New Jersey location at least one fulltime Sun-trained and -certified sales representative and one full-time Sun-trained and-certified systems engineer;

(h) use only Sun-trained and -certified full-time employees to sell, install and service Sun products;

(i) comply with all rules and procedures set forth in the VAR Reference Guide; and

(j) provide to Sun monthly Product Status Reports ("PSRs") as detailed in the VAR Reference Guide.

Moreover, under the IVAR Agreement, Sun prohibited Entre from selling, leasing or otherwise dealing in any product based on "SPARC" architecture unless such product is a Sun product or a non-competitive laptop system. Pa14-16, 23-24.

As a precondition of approving the 1993 Agreement, Sun required Entre to submit a business plan for review and approval. That business plan committed Entre to selling Sun products exclusively, and projected hiring new staff to augment Entre's sales efforts. Pa16.

Paragraph 17A of the IVAR Agreement provided: "Any action related to this Agreement will be governed by California law, excluding choice of law rules, and will be brought exclusively in the United States District Court for Northern California or the California Superior Court for the County of Santa Clara. The parties hereby submit to the personal jurisdiction and venue of such courts." Pa29. Although the trial court referred to this provision as a "bargained-for contractual promise" made by Entre [Pa174], the parties did not discuss the provision and Entre's principals did not understand it to be negotiable. Pa41.

Pursuant to the VAD and IVAR Agreements, Entre made substantial Sun-dedicated investments. These include but are not limited to the purchase of demonstration products (hardware and software), sales and technical training, and advertising and promotional materials. Entre also developed, tested and revised its entire line of proprietary software as part of the process of becoming a Sun-authorized reseller. Pa17.

All of Entre's training and development efforts for the past three years have been geared to selling Sun's work stations on a Sun-exclusive basis. At the Sun-authorized location in Eatontown, Entre displayed an 18-foot-long "Sun" banner that was visible from the parking lot. An entire room was devoted to housing Sun demonstration workstations, with external disk- and tape-drives, CD players, and bookshelves stocked with Sun manuals. This Sun-dedicated equipment alone cost more than $25,000. Entre's business cards and Yellow Pages advertising

all displayed the Sun logo and no other. And Entre itself paid for at least ten Sun sales and technical training courses for its personnel, at an average cost of $1500 per course exclusive of travel, to assure that Entre met Sun's requirements for performance. Pa39.

In 1991, the first year of its commitment to Sun, Entre's sales of Sun products and Sun-approved Added Value totaled $4,886,490.23, comprising 86.3% of Entre's total sales of product and service. In 1992, Entre's sales of Sun products and Sun-approved Added Value totaled $4,052,479.07, comprising 85.7% of Entre's total sales of product and service. Pa14.

Entre's successful efforts to develop and service the market for Sun's products apparently did not please everyone at Sun. To the contrary, the Sun direct-sales force in New Jersey seems to have resisted Sun's new dual distribution program of selling through a limited number of authorized resellers. That sales force, led by defendants Holzthum, Mayo and Klopman, interfered with a large order of Sun products from AT&T. Pa20. The individual defendants also disparaged Entre's abilities and services to Entre's customers and potential customers, refused to provide information and assistance as agreed upon by the parties, and even suggested to Entre's customers and potential customers that it was no longer supported by Sun. Pa20-21.

Ultimately, the individual defendants caused Sun to terminate its contract with Entre. Pa20-21. By letter dated October 1, 1993, Sun tendered notice of termination of Entre's IVAR Agreement, effective December 31, 1993. Pa18. Sun did not assert, and does not have, "good cause" to terminate the IVAR Agreement inasmuch as Entre has fully performed in all respects under that Agreement. Id.

Given the uniqueness of, and Entre's nearly complete identification with, Sun's products, termination of the IVAR Agreement will destroy Entre's business. Pa18. One hundred percent of workstations sold by Entre are Sun workstations. Since Entre made its strategic commitment to Sun's workstations, it no longer has the ability to engage in high-volume sales of personal computers; its sales of that product line represent less than 15% of its overall sales. Pa39. For the past three years, Entre has devoted its best efforts to developing a market for Sun

workstations, vouching for their superior qualities over all competitors. If it lost its Sun franchise, Entre would be unable to sell the workstations of Sun's competitors (assuming it could obtain authorization to do so), since it has staked its identity and credibility in the marketplace upon the Sun product line. Pa41.

Litigation of this dispute in California would put Entre out of business. Entre is not the "multimillion dollar, multi-product line computer product distributor" defendants erroneously seek to portray. Entre lacks the resources necessary to conduct long-distance litigation where, as here, all of the parties and most of both sides' witnesses are based in New Jersey or elsewhere in the Northeast. Pa41.

ARGUMENT

POINT I

THE COURT BELOW ERRED IN ENFORCING THE FORUM SELECTION CLAUSE AND DISMISSING THE COMPLAINT.

Entre argued in the court below that enforcing the forum selection clause and requiring Entre to litigate this New Jersey-specific action in the courts of California would violate New Jersey's "strong policy in favor of protecting its franchisees" (quoting Instructional Systems, Inc. v. Computer Curriculum Corp., 130 N.J. 324, 345 (1992)) Pa159-160. Citing this Court's decision in Wilfred MacDonald, Inc. v. Cushman, Inc., 256 N.J. Super. 58 (App. Div. 1992), the trial court held that "enforcement of the forum selection clause does not violate any public policy of the State of New Jersey or the Franchise Practices Act." Pa173.

The trial court erred in failing to appreciate the policy implications of the Franchise Practices Act and the Supreme Court's decision in Instructional Systems. That fundamental misapprehension also led the court to conclude, erroneously, that a forum-selection clause depriving a New Jersey franchisee of recourse to this State's courts was neither unfair nor unreasonable as applied to Entre.

A. Enforcement of the Forum Selection Clause Is Contrary to New Jersey's Strong Public Policy of Protecting Its Franchisees.

Among the most significant protections afforded New Jersey franchisees by the Franchise Practices Act is the limitation of termination of the franchise except for good cause:

> The plain meaning of the language [of the Act], supported by the legislative history, sharply curtails a franchisor's right to end the franchise in the absence of a breach by the franchisee. Thus when the franchisee has complied with the terms of the agreement the franchisor does not possess an unrestricted authority to close out the arrangement in accordance with its terms.

Westfield Centre Service, Inc. v. Cities Service Oil Co., 86 N.J. 453, 465 (1981).

In Instructional Systems, Inc. v. Computer Curriculum Corp., supra, the plaintiff was a New Jersey franchisee; the defendant was a California-based franchisor. Their agreement stipulated that California law would apply to any disputes arising between the parties. The Supreme Court refused to enforce the choice of law provision in the parties' agreement. Applying the Restatement (Second) of Conflicts of Laws § 187(b) (1969), the Court concluded that New Jersey had "a materially greater interest" than California in the determination of the issue of whether there had been a wrongful termination of the franchise agreement, and that application of the law of California would be contrary to New Jersey's "strong policy in favor of protecting its franchisees." 130 N.J. at 341-346.

The Court's decision, however, was not limited to the choice of law issue. Thus, in reaching its decision to substitute New Jersey law for California law, the Supreme Court first cited Winer Motors, Inc. v. Jaguar Rover Triumph, Inc., 208 N.J. Super. 666, 671-73 (App. Div. 1986), as recognizing that "the state in which the franchisee is located has a significant policy interest in governing the relations between the parties." 130 N.J. at 343. The Court then quoted with approval the reasoning offered by the Seventh Circuit in Wright-Moore Corp. v. Ricoh Corp., 908 F.2d 128, 132 (7th Cir. 1990) for refusing to apply a contractual choice of law provision: "'A franchisor, through its superior bargaining power, should not be permitted to

force the franchisee to waive the legislatively provided protections, whether directly through waiver provisions or indirectly through choice of law.'" 130 N.J. at 343-344.

The Instructional Systems Court then embraced, in the following terms, the general principle that the Franchise Practices Act's protections may not be waived:

> Although New Jersey law contains no express provision against waiver of the Act's protection,[1] that the Act's protection may not be waived appears to be a common assumption. See Unif. Franchise and Business Opportunities Act §103, 7A U.L.A. 104 (Supp. 1992) (Uniform Act) ("A party to a franchise or business opportunity may not waive a right or benefit conferred, or avoid a duty imposed, by this [Act] . . . ")
>
> That a franchisee's principal place of business in a given state will afford the franchisee the protection of that state's law in connection with all products sold by the franchisee is implicit in other decisions as well. . . . Despite some contrary precedent, "[m]ost courts . . . have held that the parties to a franchise agreement cannot avoid the franchise law of the state in which the franchisee is located by providing in their agreement that the laws of another state will govern." Thomas M. Pitegoff, Choice of Law in Franchise Agreements, 9 Franchise Law Journal 15, 19 (1989).

Id. at 344 (footnote omitted).

The legal authority and policies that led the Supreme Court to reject the choice of law provision in Instructional Systems require that the forum-selection clause in the instant case be rejected. As a New Jersey franchisee, Entre is entitled to the protections afforded by the Act

---

1 Justice O'Hern apparently overlooked section 56:10-7(a) of the Act, which provides:

> It shall be a violation of this Act for any franchisor, directly or indirectly, through any officer, agent or employee, to engage in any of the following practices:
>
> a. To require a franchisee at time of entering into a franchise arrangement to assent to a release, assignment, novation, waiver or estoppel which would relieve any person from liability imposed by this Act.

against termination except for good cause. Just as enforcement of the provision selecting the law of California to govern the IVAR Agreement would remove those protections and prevent New Jersey from governing the relations between the parties, so too would enforcement of the forum-selection clause.

Thus, dismissal of this action pursuant to the forum selection clause would obviously deprive New Jersey of its "strong policy interest in governing the relations between the parties." Instructional Systems, 130 N.J. at 343. Moreover, requiring Entre to refile this case in a California state court would force Entre to submit to the jurisdiction of a state which has no interest in protecting franchisees of other states.[2] In all likelihood, the California courts would apply California law, rather than New Jersey law, given the California choice of law provision (which violates no public policy of the California forum) and the location of the Sun corporate defendants in California. See Nedlloyd Lines B.V. v. Superior Court, 3 Cal.4th 459, 464-65, 11 Cal.Rptr.2d 330, 834 P.2d 1148 (1992) (California has a "strong policy favoring enforcement" of choice of law provisions).[3] Even if the Franchise Practices Act were applied, there is no assurance that Entre would be accorded the Act's full protection against termination except for cause. See Treichler v. Johnson, 1992 US Dist LEXIS 8575 (N.D. Cal. June 3, 1992) (Washington franchisee held to have waived the protections of the Washington Franchise Investment Protection Act against termination except for cause by agreeing to a termination

---

2 Like New Jersey, California's franchise law protects only franchisees based in the state. See California Business and Professions Code, Division 8, Chapter 5.5, Article 2, § 20015. Pa97.

3 One California federal district court, in a case involving Sun that had been transferred to California from New Jersey pursuant to the federal venue transfer statute, 28 U.S.C. §1404, determined that New Jersey law should apply -- and then proceeded to misconstrue that law. Pride Technologies, Inc. v. Sun Microsystems, Inc., No.C-94-7001(RMW) (N.D. Cal. 1994); Pa186, 190-191. This unreported interlocutory decision, relied upon so heavily by Sun in the preliminary proceedings in this Court, provides no assurance that the courts of California will apply New Jersey law to the agreement between Sun and Entre, much less that they will afford Entre all of the protections of the Franchise Practices Act to which it is entitled pursuant to Instructional Systems.

clause in its franchise agreement). The likely effect, then, of the forum-selection clause would be to work a waiver of the protections of the Act, contrary to the holding in Instructional Systems.

The trial court rejected these concerns, apparently on the assumption that the courts in California would automatically apply New Jersey law to the dispute between the parties and would otherwise afford Entre all of the protections of the Franchise Practices Act that the courts of New Jersey are required to provide. Thus, citing Wilfred MacDonald, Inc. v. Cushman, Inc., supra, the court expressed its view that, since "the Franchise Practices Act shows no preference for a judicial forum in which Entre's claims are to be heard," it therefore follows that "[e]nforcement of the forum selection clause does not violate any public policy of the State of New Jersey or the Franchise Practices Act." Pa173. The trial court found Entre's reliance on Instructional Systems to be misplaced, "since there's no indication that California courts can't interpret New Jersey law, despite New Jersey's public policy protecting franchisees." Id.

But the fact that California courts are capable of interpreting New Jersey law doesn't mean that they will apply New Jersey law in the first place -- especially in a case involving a California franchisor and a contract stipulating that California law should apply. And the neutrality of the Act with respect to the judicial forum for its application is only to be inferred in those instances where it can be safely assumed that the forum will afford the New Jersey franchisee all of the protections under the Act that New Jersey courts would. To the extent that there is any significant loss of protection attendant upon enforcing a forum selection clause and dismissing an action brought by a wrongfully-terminated New Jersey franchisee, that loss would constitute a waiver prohibited by the Act and by Instructional Systems.

The question of whether the Nebraska courts would apply the Act was not addressed in Wilfred MacDonald, Inc. v. Cushman, Inc., supra, when this Court enforced a clause selecting Nebraska as the appropriate forum. Indeed, that question seems to have been obscured by the apparent (and apparently later withdrawn) "concession" by the franchisor's attorneys (counsel for defendants in the instant case) that the franchisee in Cushman would be able to enforce the New Jersey Franchise Practices Act in Nebraska if it were applicable to the parties' agreement:

> We note . . . that Cushman appears to concede that if the Act is applicable, MacDonald will be able to enforce it in the Nebraska forum notwithstanding a contrary choice-of-law provision in the agreement; for, as it says in its reply brief:
>
> > Unlike a choice of law clause, see, e.g., Winer Motors Inc. v. Jaguar Rover Triumph, Inc., 208 N.J. Super. 666 (App. Div. 1986), which if enforced might deny a franchisee the benefits of the Act, a forum selection clause has no effect on the Act's application. If the Act applies, MacDonald may enforce it, irrespective of venue.
>
> What we are called upon here to resolve is not whose law should apply, but in what forum should the law be applied.

256 N.J. Super. at 62-63.

This Court consequently framed the issue presented by Cushman as whether "enforcement of a forum selection clause resulting in application of the Act by another state is contrary to public policy." Id. at 65 (emphasis added). But the issue here is whether enforcement of the forum selection clause resulting in a waiver of at least some if not all of the Act's protections is contrary to New Jersey public policy.

In reaching its conclusion to enforce the clause in Cushman, this Court apparently did not consider the practical relationship between choice of law and forum-selection provisions in a franchise agreement. When a state's courts cede control of a case to a foreign court, they necessarily cede control over whether, as well as in what manner, the ceding state's laws and policies will be applied and enforced. Thus, in Cushman, the determination that Nebraska was

the appropriate forum led to the application by the Nebraska federal court of Nebraska law. Pa102. Contrary to the "concession" made by Cushman's counsel, then, the forum selection clause had the direct effect of renderinlyg the Franchise Practices Act inapplicable by operation of Nebraska's conflicts rules. If this Court had known that the Nebraska court would apply Nebraska law to the dispute in Cushman, it seems doubtful that the matter would have been sent to Nebraska in the first place.

Nor did this Court in Cushman have the benefit of the Supreme Court's Instructional Systems analysis. Under the rule of that case, New Jersey courts are charged with adjudicating the over-all relations between a franchisor and a New Jersey-based franchisee -- enforcing the crucial policy of assuring that the latter is afforded the protections of the Act and is not induced to waive those protections by virtue of the superior bargaining power of the franchisor. There is no logical distinction between a waiver triggered by a choice of law provision in a contract and a waiver triggered by a forum-selection clause: both are prohibited by the Act because they violate New Jersey's "strong policy in favor of protecting its franchisees."[4]

It is not only Entre which has substantial New Jersey contacts, and which should be a concern of the state's public policy on franchisees. Sun has not one but three locations in

---

[4] States with similar policies have applied this principle to retain jurisdiction over franchise disputes despite forum-selection clauses -- sometimes pointing out that while forum-selection clauses are generally enforced, they are not the kind of compelling interest which would "trump" an important state policy. Thus in High Life Sales Co. v. Brown-Forman Corp., 823 S.W.2d 493 (Mo.1992) [Pa105], the Missouri Supreme Court held that a forum-selection clause would not be enforced against a beer distributor in an action against a wine-cooler wholesaler for alleged wrongful termination under a Missouri statute, because of Missouri's strong public interest in regulating wrongful termination of liquor franchises. As the court put it: "Both the general subject . . . and the specific statutory protection [at issue] carry heightened public policy considerations that outweigh any public policy considerations involved in the enforcement of a forum selection clause." Id. at 498, Pa 108.

New Jersey, where it conducts "substantial operations." Pa91. All three of the individual defendants work and reside here. All of the third-party witnesses to Entre's claims of tortious interference, unfair competition and trade disparagement, including AT&T and the other former Entre customers, are located in this jurisdiction. Even the Sun management who ultimately decided to terminate Entre's franchise upon receipt of complaints from New Jersey by the individual defendants are located in states other than California. Pa88.

Given the foregoing, it is clear that there is only one "economically efficient" forum in which to litigate Entre's claims, and that is here in New Jersey. Since the California choice of law provision in the same sentence of the IVAR Agreement as the forum selection clause must be rejected pursuant to Instructional Systems (as Sun has apparently conceded), it makes no sense to send this case to California for adjudication. Defendants seek to handicap Entre's ability to pursue its claims by requiring it to litigate in a distant forum that is far less solicitous of affording New Jersey franchisees the protections of the Franchise Practices Act. See Fairfield Lease Corp. v. Liberty Temple University Church of Christ, Inc., 221 N.J. Super. 647, 653 (Law Div. 1987) ("the fact that plaintiff has a place of business in New Jersey lends credence to the thought that the [forum-selection] clause was inserted for the purpose of disadvantaging [the] buyer.")

A further illustration of the potential for mischief represented by enforcement of the forum-selection clause can be found in the arguments recently made by Sun in the federal court in California in opposition to the motion of Pride Technologies for a preliminary injunction. There, directly contradicting the teaching of Instructional Systems, Sun asserted that no state had a materially greater interest in the agreement between the parties than California, that "the parties' choice of law should be enforced regardless of any alleged 'fundamental' policies in New Jersey," [Pa199-200] (citing Nedlloyd, supra), that "[w]hen a putative franchisee in New Jersey signs a choice of law provision that specifies the law of the franchisor's state, the [Franchise Practices Act] does not apply" [Pa200] (citing Cushman), and that "[c]hoice of law

provisions aside, a franchisee is permitted to waive protections under the [Franchise Practices Act] and courts will enforce those waivers" [Pa202-203] (citing Treichler, supra).

In short, the only way that New Jersey can effectively enforce its "significant policy interest in governing the relations between the parties" to a New Jersey franchise agreement is by affording New Jersey franchisees a forum for resolution of their claims for wrongful termination. The issue is not whether a foreign court can protect New Jersey franchisees under the Act, but whether it will do so, and if so whether it will do so as effectively as a New Jersey court. The answer to that question, at least in the instant case, is "no."

B. Trial of This Case In California Would Be Seriously Inconvenient.

The order to show cause entered by the trial court had permitted the parties to pursue "paper discovery" (interrogatories and document requests) on the forum selection issue. Pa35. Defendants wrongfully refused to provide Entre with responsive answers to its interrogatories and documents responsive to its requests -- even refusing to identify Pride Technologies as another Sun reseller. Pa76, 91-92. At the hearing before the trial court, Entre's counsel attempted to explain why discovery was relevant to the issue of whether trial in California would be "seriously inconvenient." Pa143. Although the trial court indicated that it wanted to make sure that counsel "has all the discovery he needs in order to make his argument on the factors that are discussed in Cushman and [M/S Bremen v.] Zapata [Off-Shore Co., 407 U.S. 1 (1972)]" [Pa147], the court thereafter implicitly rejected without decision Entre's pending motion to compel discovery in granting defendants' motion to dismiss the complaint.

In reaching its decision to dismiss, the court below held that "Entre has also not convincingly explained how its appearance in the California courts would be seriously inconvenient for trial." Pa172. It made no reference to the fact that the individual defendants are present in this jurisdiction and may not be susceptible to process in California, and seemed to discount the problems of witness availability and financial burden of litigating in a distant forum

unrelated to Entre's claims because they were somehow "risks that were foreseeable at the time that Entre entered into the agreement." Id.

In rejecting Entre's claim that this forum is by far the more convenient, the trial court mistakenly applied the test found in Bremen v. Zapata, supra -- namely that the plaintiff must establish that he "will, for all practical purposes, be deprived [of] his day in court." Pa172. While Entre did not have the opportunity to develop this point more thoroughly through discovery, it did demonstrate that forcing it to litigate in California would be tantamount to depriving it of its opportunity for trial. But this is not the standard to apply in a franchise-termination case. Given this state's policy of protecting its franchisees against wrongful termination or other forms of overreaching by franchisors, a lesser showing of "serious inconvenience" should be all that is required. Cushman, 256 N.J. Super. at 65.

That showing has been made here. Unlike in Cushman, where the defendant was based in Nebraska and apparently had no offices or personnel in New Jersey, Sun's New Jersey contacts include three locations and a direct sales force. The only codefendant in the Cushman case was another distributor, who had a similar agreement with the franchisor containing a forum selection clause stipulating Nebraska as the selected forum. 256 N.J. Super. at 65. Here, the three individual co- defendants are all residents of New Jersey, employed by Sun in New Jersey. Id. These three have not volunteered to submit to the jurisdiction of the courts of California. Even were they to do so, it would not be reasonably convenient for the parties to this New Jersey dispute to litigate Entre's claims in that distant forum.

The prevalence and significance of third-party witnesses and sources of proof were also not as much a factor in Cushman as they are here. Entre is complaining about tortious actions that occurred within this jurisdiction in connection with its loss of major New Jersey-based customers. It has identified in its answers to defendants' interrogatories six AT&T employees based in New Jersey with knowledge of the facts, together with five other nonparty witnesses who are based either here in New Jersey, in adjoining New York, or in Massachusetts. Pa124.

The court below found that the various inconveniences listed here, as serious as they are, were "foreseeable" when the contract was signed. Pa172. So too, presumably, was the possibility that Sun might wrongfully terminate the IVAR Agreement and put Entre out of business. Simply because such actions were "foreseeable" should not deprive Entre of its day in court in the state with the most contacts with the controversy -- especially where that controversy involves claims of a New Jersey franchisee and where New Jersey law should be applied to protect the rights of that franchisee against termination without cause. As the official comment(g) to section 187(b) of the Restatement (Second) of Conflicts of Laws notes, "[f]ulfillment of the parties' expectations is not the only value in contract law; regard must also be had for state interests and for state regulation." Again, the policy underpinnings of the Franchise Practices Act should protect against a one-sided waiver of the right to litigate in the clearly more convenient forum, and the forum whose law is to apply pursuant to Instructional Systems.

C. Enforcement of the Forum-Selection Clause Would Otherwise Be Unfair and Unreasonable.

The court below concluded that enforcement of the forum-selection clause would not be unreasonable on the grounds that Entre had notice of the clause and that it could have been negotiated. Pa171. In fact, Entre was presented with the IVAR form as a fait accompli, with no discussion as to forum selection, much less opportunity for negotiation. Pa41.[5]

The court below also relied on Cushman in concluding that the forum selection clause was not the "product of . . . overweening bargaining power." Pa172. The facts of Cushman, however, contrast sharply with the facts of this case. MacDonald, the plaintiff in

[5] The only support purportedly in the record for the assertion that the forum-selection clause was negotiable is two other contracts which were never authenticated by defendants or explained by anyone with knowledge of the facts. Pa127. Nothing in the record suggests that Entre knew of these supposed contracts; nor does the record reflect whether comparable dynamics of business size or experience existed in the "other" contractual relationships.

Cushman, sold products of several different manufacturers. Indeed, MacDonald's primary line was not that of the defendant Cushman but of a competitor to Cushman and its sales of Cushman's products represented only about a fifth of its total sales. Cushman, 256 N.J. Super. at 60.

In rejecting MacDonald's claim that the forum-selection clause was unconscionable and should not be enforced, this Court distinguished Shell Oil Co. v. Marinello, 63 N.J. 402, 408-09 (1973), cert. denied, 415 U.S. 920 (1974), and Westfield Centre Service, Inc. v. Cities Service Oil Co., supra, 86 N.J. at 470, in the following relevant terms:

> Both of these cases focus upon the purpose of the [Franchise Practices] Act as protecting franchisees, pointing out that frequently the relationship between franchisor and franchisee is of one-sided bargaining power. In both cases, the franchisee was a gas station the sole product of which was that of the franchisor. The franchisee's entire financial stability, thus, was dependent upon the ability to continue selling the franchisor's product. The relationship here between MacDonald and Cushman is not so dependent. MacDonald does not rely upon Cushman for its sole business. It has many other products to sell; indeed Cushman's main competitor, Jacobsen, is MacDonald's primary product.

256 N.J. Super. at 64-65, n.4 (emphasis added).

But unlike the situation in Cushman, Entre's "entire financial stability" is dependent upon Sun. Pursuant to its Sun-approved business plan, Entre committed itself to selling exclusively for Sun; it has no replacement line of workstations to offer if its franchise is terminated. Sun induced Entre to become a Sun-authorized indirect value-added reseller, to use its best efforts to market Sun products, and to identify totally with Sun in the marketplace. Over 85% of Entre's sales and all of its workstation sales are of Sun products.

Less than six months after receiving its new contract with Sun, based on a business plan contemplating exclusive marketing of Sun products, and after complaining about the wrongful actions of Sun's direct sales force in New Jersey, Entre was cut off as a Sun reseller. These facts typify the naked vulnerability of an unfairly terminated franchise -- precisely the

situation meant to be prevented by the Act's protections, and its explicit provision of New Jersey's courts for relief.

POINT II

THE COURT BELOW ERRED IN DISMISSING ENTRE'S CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS.

A significant part of Entre's case as pleaded involves the activities of the individual defendants, who were members of Sun's direct-sales force in New Jersey and residents of this State. Pa10-11. Entre has alleged that they acted, in their individual capacities, to undermine Entre's business, in particular sabotaging a large order from AT&T as well as orders from other customers. Pa20.

In dismissing this action against Sun, the trial court dismissed the claims against the individual defendants as well, with a minimum of analysis:

> Moreover, the range of transaction participants parties and non-parties should benefit from and be subject to forum selection clauses. See Manetti-Farrow, Inc. v. Gucci America, 858 F.2d 509 ([9th Cir.] 1988).
>
> Therefore, this Court finds that the plaintiff's tort claims as against all defendants must be litigated in California, even though the litigants -- certain defendants were not signatories to the original agreement. See Druckers' vs. Pioneer Electronics, a District Court opinion by Judge Wolin on October 10, 1993. It's number 93-1931.

Pa174-175. The trial court, however, misapplied the concept of "transaction participants," which is based on the foreseeability of non-parties being involved in a transaction or eventual litigation. This error, as discussed below, was compounded by the court's erroneous failure to grant Entre's discovery motion. In fact, there is no basis to dismiss the case against the individual defendants -- who, in any event, are not subject to the jurisdiction of any California court. Thus if this ruling were allowed to stand, the individual defendants would be virtually "litigation-proof," insulated from suit in New Jersey and California.

The first case cited by the trial court, Manetti-Farrow, held that where "the alleged conduct of the non-parties is so closely related to the contractual relationship," the forum-selection clause will apply to those non-parties. 858 F.2d at 514, n.5. The Manetti-Farrow court relied ultimately on the Third Circuit's opinion in Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190 (3d Cir. 1983). There the plaintiff, Coastal, was suing the English defendant, Tilghman, as a third-party beneficiary of a contract between Tilghman and the English firm Farmer Norton. The non-signatories at issue were, as in Manetti-Farrow, closely related to the contracting parties, and their involvement in the transactions was foreseeable: "Coastal chose to do business with Farmer Norton, an English firm, knowing that Farmer Norton would be acquiring components from other manufacturers. Thus it would be perfectly foreseeable that Coastal would be a third-party beneficiary of an English contract, and that such a contract would provide for litigation in an English court." Coastal Steel, 709 F.2d at 203.

Under Coastal Steel, then, non-parties may take refuge behind a forum-selection clause only when their intimate involvement in the transaction is foreseeable. See Stephens v. Entre Computer Centers, Inc., 696 F. Supp. 636, 639 n. 2 (N.D. Ga. 1988); Clinton v. Janger, 583 F. Supp. 284, 290 (N.D. Ill. 1984). But here, the intimate involvement of the third parties -- the individual defendants -- in the transaction was not at all foreseeable. Their interference with Entre's business was neither expected nor, of course, contemplated. Indeed, they were named as defendants because their actions were not within the scope of their duties at Sun. Thus they could not have been foreseen by Entre as possible parties to litigation, or as "transaction participants,"[6] and Judge Coleman's reasoning does not apply.

---

6 The second case cited by Judge Coleman, Druckers', 1993 WL 431162, involved a non-signatory third party, in that case a plaintiff, who was the sole shareholder and personal guarantor of another plaintiff. The plaintiffs sought to avoid the contract's forum-selection clause by arguing that the non-signatory plaintiff -- effectively the alter ego of the other plaintiff -- was not a party to the agreement. The situation there is completely inapposite to the one at bar.

Given the absence of discovery, or even of submissions by defendants controverting the allegations about the individual defendants in the Verified Complaint, the trial court had no basis to conclude that the individual defendants were "transaction participants." In fact, based on the pleadings and the record that does exist, they could not be so regarded. Thus the dismissal of them from the case was error. And since California has no jurisdiction over them, and this Court does have jurisdiction over all of the parties, under this State's entire controversy doctrine the only possible forum to litigate this dispute is New Jersey.

POINT III

THE COURT BELOW ERRED BY REFUSING TO GRANT ENTRE'S MOTION TO COMPEL DISCOVERY.

Though styled a motion to dismiss, defendants were effectively granted a motion for summary judgment, since the submissions of the parties included substantial materials beyond the pleadings. R.6-2(e). It is fundamental that summary motion is "a stringent remedy" which should not be granted when there is "the slightest doubt as to the existence of a material issue of fact." Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954). See Shanley & Fisher, P.C v. Sisselman, 215 N.J. Super. 200, 211 (App. Div. 1987) (summary judgment reversed where party opposing same was deprived of opportunity for discovery). Here, however, the trial court refused to grant a discovery motion by Entre which would have shed substantial factual light on factors which the court must have considered in dismissing the case. In so doing, the trial court erred.

One fundamental issue in Judge Coleman's decision was the parties' relative conveniences in litigating this matter in New Jersey or in California. Pa172-173. Another was whether there was an overweening imbalance of bargaining power when entering into the franchise agreement, which would invalidate the forum-selection clause. Pa172. As the New Jersey Supreme Court observed in an analogous procedural context, "[i]t is apparent that a trial court's disposition of a forum non conveniens motion would be enhanced in such cases if decision were reserved until discovery has proceeded sufficiently to enable the court to make a

better-informed assessment of the private- and public-interest factors" [involved in evaluating the relative convenience of the selected forum]. D'Agostino v. Johnson & Johnson, Inc., 165 N.J. 491, 494 n.1 (1989).

Complementary to the policy restricting summary judgment to cases where there are not genuine factual issues is the policy permitting liberal use of discovery. See Shanley & Fisher. at 215-216. Here that policy was ignored, and legitimate requests for discovery by Sun regarding critical factual issues bearing on the only issue decided by the trial court were shunted aside. The court below should have granted Entre's motion for discovery, and its failure to do so was error.

POINT IV

ENTRE'S MOTION FOR A PRELIMINARY INJUNCTION SHOULD BE GRANTED.

In the trial court, defendants chose not to address Entre's motion for a preliminary injunction, relying instead on their cross motion for enforcement of the forum selection clause. The well-pleaded allegations in Entre's verified complaint [Pa8], and the additional evidence submitted by its vice president [Pa36], are uncontradicted by competent evidence in the record.

The undisputed facts of record establish that Entre is a franchisee deserving of protection under the Franchise Practices Act, and that Sun's termination of Entre's franchise agreement was without good cause. Similarly, the record shows that Entre will be irreparably injured if it is required to litigate this case in California. By contrast, defendants will suffer no injury whatsoever if the status quo is maintained while Entre's claims are litigated in the courts of this State.

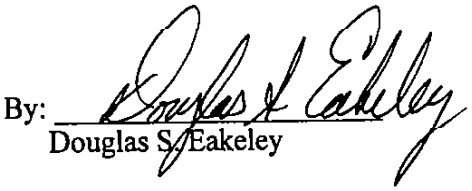
CONCLUSION

The Supreme Court has already determined that New Jersey has a "materially greater interest" than California in adjudicating a claim of wrongful termination of a New Jersey franchise. It has also determined that it would violate New Jersey's "strong policy" of protecting its franchisees to permit franchisors to extract a waiver of those protections by stipulating that the law of California should apply. Just as the choice of law provision in the parties' agreement should be set aside, so too should their selection of a California forum for resolution of their disputes.

The court below erred in its decision to enforce the forum selection clause and dismiss this action. That decision should be reversed, and the restraints imposed by this Court should be continued.

Respectfully submitted,

LOWENSTEIN, SANDLER, KOHL,
FISHER & BOYLAN
A Professional Corporation

By: 
Douglas S. Eakeley

DATED: June 24, 1994